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SUMMARY

OF THE

FREEDOM OF INFORMATION ACT

1976 PA 442,

MCL 15.231 *et seq*.

DATE: January 28, 2019

INDEX TO SUMMARY OF THE
FREEDOM OF INFORMATION ACT

I
Public Policy and Effective Date of Act

The Freedom of Information Act ("FOIA") states that it is the public policy of the State of Michigan that 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.

The Act became effective April 13, 1977.[1] Substantial amendments were made to this Act regarding FOIA procedures and fees that may be charged for a request for public records. These amendments were adopted effective July 1, 2015, under Public Act 563 of 2014.

II
Rights of the Public

Upon "written request" which describes the "public record" sufficiently to enable the "public body" to find the record, a "person" has a right to inspect, copy or receive copies of a public record of a public body, except as provided by Section 13 of FOIA. Further, a person has a right to subscribe to future issuances of public records which are created, issued or disseminated on a regular basis. A subscription is valid up to six (6) months, and is renewable. The definition of a "person" includes an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. A "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. The definition of "public body" is broad. It includes a county, city, township, village, intercounty or regional governing body, school district, municipal corporation, council, or a board, department, commission or agency thereof. Further, the definition of a public body includes any body which is created by State or local authority. The judiciary, including the office of county clerk and the employees thereof, when acting in the capacity of clerk to the circuit court, is ***not*** included in the definition of a public body. "Public record" is defined as a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. "Public record" does not include computer software.[2] Personal e-mails of public employees using publicly-owned computers are not "public records" subject to disclosure under FOIA. *Howell Ed Assn, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228; 789 NW2d 495 (2010), *lv den* 488 Mich 1010

[1] 1976 Public Act 442, as amended; MCL 15.231 *et seq.*

[2] "Software" means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.

(2010).[3] Handwritten notes of a public official are not considered public records if taken for personal use, and are not possessed or used by the public body in the performance of a public function. *Hopkins v Duncan Twp*, 294 Mich App 401; 812 NW2d 27 (2011). "Writing" means handwriting, typewriting, printing, photostating, 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, E-mail, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. The Act separates public records into two classes, the first being those which are exempt from disclosure under Section 13 of FOIA, and secondly, all others which are subject to disclosure under the Act. A "written request" means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means. The Act requires a request be made in writing for a written response, though the 2015 amendments also clarify that if an oral request is received and the public body's FOIA coordinator is aware that the records are available online, an obligation exists to advise the requestor as to that online availability.

A public body is required to furnish a requesting person a reasonable opportunity for inspection and examination of its public records. It is further required to furnish reasonable facilities for making memoranda or abstracts from its public records during normal business hours. A public body is permitted to make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference in the discharge of its function. The Act does not require a public body to make a compilation, summary or report of information except as provided in Section 11 of FOIA for a State agency. Further, the Act does not require a public body to create a new public record except as required in Section 11 of FOIA for a State agency. Upon request, the custodian of the public records shall furnish a certified copy of the public record. If a requested record exists in an electronic format, the requester is entitled to an electronic copy. *Ellison v Department of State*, 320 Mich App 169 (2017); *Farrell v Detroit*, 209 Mich App 7, 14 (1995). MCL 15.234(1)(c).

III
FOIA Procedures and Guidelines

With the 2015 amendments to the Act, all public bodies that are subject to FOIA must now establish procedures and guidelines to implement FOIA. The public body must also establish a written public summary of its FOIA procedures and guidelines. The summary should be written in a manner so it can be easily understood by the general public. These procedures and guidelines at a minimum must include how to make a FOIA request, how to understand the public body's written responses, what the fees are and how they are calculated, when deposits will be required, and the appeal and fee appeal process. The policies must also adopt a standardized fee calculation form to be utilized in providing detailed itemization of any fee amounts charged for

[3] Nevertheless, the public body may in its discretion disclose personal e-mails contained on a publicly-owned computer system, and may discipline employees for improper use of the computer system.

copies of the public body's records. The policies and procedures may also include the adoption of any other standardized forms to be used by the public body in responding to FOIAs, and any internal operational procedures of the public entity in handling FOIA requests.[4] Copies of these procedures and guidelines, public summary, and forms are to be available for free at the public body's offices and must be included with every FOIA response unless a link these documents is posted on the public body's website. If the public body administers or maintains an internet presence, then it is required to post the procedures and guidelines, written public summary and applicable forms on its website.

The procedures and guidelines must include a standard form to detail itemization of any fee the public body estimates or charges under FOIA. The itemization must clearly list and explain each of the six (6) fee components authorized under the 2015 legislation, which include several categories of labor associated with producing records; whether on paper or electronic form; costs of non-paper physical media used to produce public records (e.g., DVDs, flash drives); copying costs; and postage or shipping costs. If a public body fails to adopt the written procedures and guidelines, and written public summary, it may not charge a fee or deposit, though the obligation remains to respond to FOIA requests.

The FOIA Act also provides that a public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, shall designate an individual as the public body's FOIA coordinator. The FOIA coordinator shall be responsible for accepting and processing requests for the public body's public records and shall be responsible for approving a denial. In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county.[5] For all other

[4] Cohl, Stoker & Toskey, P.C. can assist in adoption of the applicable procedures and guidelines, public summary, cost calculation form, and other forms individualized to any specific public body. Model forms have also been developed and are available for review at the following websites:

- Michigan Association of Counties – https://www.micounties.org
- Michigan Township Association – https://www.michigantownships.org/foia2015.asp
- Michigan Municipal League -- http://www.mml.org/resources/information/foia.html

[5] The 1996 amendments FOIA requiring the appointment of a FOIA coordinator may not be conclusive as to who the FOIA coordinator is for the county Constitutional offices of sheriff, register of deeds, treasurer, clerk and prosecuting attorney. A court could hold that the county is not the FOIA coordinator for those Constitutional offices. However, a centralized FOIA coordinator in the context of a public body where records are mandated and potentially FOIA requests responded to by various departments may be enhanced with a central FOIA coordinator. In such a case, the FOIA coordinator could assure that the county FOIA policies and fee calculation are consistently implemented, could appropriately direct requests in cases where records may be maintained in more than one office, could avoid the duplication of effort and inconsistencies in responses when records are found in more than one department, could assure that FOIA is not utilized by requestor in an effort to seek records from other departments in a manner to avoid statutorily established fees, and may enhance coordination between departments in handling FOIA requests.

public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator. A FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial. The Act also requires the designated FOIA coordinator to keep copies of all written requests for public records on file for at least one (1) year.

If the FOIA coordinator knows or has reason to know that all or a portion of a request for information is available on the public body's website, the public body must notify the requestor in its written response that all or a portion of the requested information is available online. When a FOIA coordinator knows of the presence of the requested document on the website, it must direct even oral requests for records to that website location. When the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on the internet at the time the request is made are exempt from any charges under FOIA. A written response must be provided that includes the specific website address where the requested information is available if the requested documents include items that are on the website, as well as those that are not, the response must separate the requested public records that are available on its website from those that are not available on the website and must inform the requestor of the additional charge to receive copies of records that are already available on its website.

IV
Fees for Public Records

A public body is permitted to charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. The requirements for charging fees for public records were substantial changed with amendments to the FOIA that took effect July 1, 2015 under Public Act 563 of 2014. These statutory amendments affect the fees that may be charged for a request for public records, the documentation that must accompany a FOIA response, and penalties that may be imposed for noncompliance.

A. Procedures and Guidelines

One of the major changes to FOIA was the requirement that, in order to charge a fee for a public record search, a public body must first establish and make publicly available free copies of its procedures and guidelines to implement the FOIA process, including the use of a standard form for detailed itemization of any fee amount in its responses to written requests for public records.

A public body must also create and post on its website a written public summary of its procedures and guidelines relevant to the general public regarding how to submit written requests, and explaining how to understand the public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. This written public summary (or a website link to it) must be included in the public body's response to a FOIA record request.

B. Detailed Itemization of Fee Components

The costs charged must have a detailed itemization and this must be provided to the requester in a uniformly used standard form. The detailed itemization of all fees charged must now clearly list and explain the allowable charges for each of the six fee components that comprise the total fee used for estimating or charging purposes in response to a FOIA request. The six fee components include:

(1) The labor costs for searching, locating and examining public records;

(2) The labor costs for separating exempt from non-exempt information;

(3) The actual and most reasonably economical cost of providing records on non-paper physical media, e.g., computer discs or electronic records, if requested in that form and the public body has the technological capability of providing it in that form;

(4) The actual total incremental cost of necessary duplication or publication of paper copies, not to exceed 10 cents per page for letter and legal size paper;

(5) The labor costs directly associated with duplication or publication of paper or electronic records; and

(6) The actual cost of mailing at the least expensive form of postal delivery. There is apparently no allowance for labor costs incurred in calculating the fees.

C. Itemization of Fee Components

A public body is required to utilize the most economical means available in making copies of public records. The Act states that a fee is not to be charged for the cost of search, examination, review and deletion and separation of exempt from non-exempt information, unless 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. The public body is then required to specifically identify the nature of these unreasonably high costs

For the three categories of labor costs (i.e., searching, separating, and copying), the public body shall not charge more than the hourly wage of its lowest-paid employee capable of performing that task in the particular instance, regardless of whether that person is available or who actually performs the labor. This "*lowest-paid employee capable of performing the task*" may vary for each of these categories. However, a public body may also use "contract labor," such as an attorney or other consultant, for the "separation and redaction of exempt materials"; and charge its actual contract labor costs, but not to exceed six (6) times the minimum wage.

Labor costs must be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, if it clearly notes the percentage multiplier used to account for benefits in the detailed itemization. However, the fringe benefit cost may not to exceed actual fringe benefits costs.

Labor costs for searching and separating must be estimated and charged in increments of fifteen (15) minutes or more, with all partial time increments rounded down. Labor costs for copying may be in any increments of the public body's choosing, but partial increments must be rounded down. A public body may not charge for redaction of documents that were already redacted in response to a previous FOIA request, if redacted copies remain in the public body's possession.

D. Waiver or Reduction of Fees

The requirement that a public record shall be furnished without charge for the first $20.00 of the fee for each request by an indigent person has been extended to a non-profit organization designated by the state for the protection and advocacy of persons with mental illness.

If the requestor is eligible for a requested discount, the public body must note the discount on the detailed itemization form. If a requestor is ineligible for the discount, the public body must inform the requestor of the specific reason for ineligibility in the written response.

An individual is ineligible for this fee reduction if: (1) the individual has previously received discounted copies of public records from the same public body twice during that calendar year; or (2) the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

E. Fee Reduction for Failure to Timely Respond

If a public body does not respond to a written request in a timely manner, the public body must reduce the charges for labor costs by 5% for each day the public body exceeds the time permitted for a response to the request, with a maximum 50% reduction, and fully note the charge reduction on the detailed itemization form.

F. Public Records Available Online

If the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any charges under FOIA. If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on its website, the public body must notify the requestor in its

written response that all or a portion of the requested information is available on its website.

The written response, to the degree practicable in the specific instance, must include a specific webpage address where the requested information is available. On the detailed itemization, the public body must separate the requested public records that are available on its website from those that are not available on the website, and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

G. Verbal Requests

A public body may (but is not required to) provide requested information available in public records without receipt of a written request. However, if a verbal request for information is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

H. Good Faith Deposits

The public body may, at the time a request is made, demand a good faith deposit from the person requesting the public record or series of public records, if the fee would exceed $50.00. The fee deposit cannot exceed one-half of the total fees. A public body's demand for a good faith deposit (50% of the estimated fee) must now also contain a best efforts estimate by the public body regarding the time frame it will take to provide the public records to the requestor. The time frame estimate is nonbinding, but should be reasonably accurate. The public body is not required to start processing the response until the 50% deposit is made. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370; 872 NW2d 223 (2015)

If a public body has not been paid in full for copies of public records previously requested by an individual, the public body may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent FOIA request from that individual, but only upon meeting several narrow conditions.

I. Appeal of Fee Calculation

The FOIA amendments now allow for challenges to fees charged by a public body. If a public body requires a fee that exceeds the amount permitted by statute or under its publicly available procedures and guidelines, the requesting person may (1) appeal to the head of the public body, if such an appeal is provided for in the procedures and guidelines; or (2) commence a civil action in the circuit court for a fee reduction.

On an appeal, the head of the public body may waive the fee, reduce the fee, or uphold the fee. If the fee is not waived, the head of the public body must certify that the fee amounts comply with the statute and the public body's procedures and guidelines.

A court may uphold or reduce the fee. If the court reduces the fee by 50% or more, it may award the requester all or an appropriate portion of reasonable attorneys' fees, costs and disbursements. If the court determines that the public body arbitrarily and capriciously charged an excessive fee, the court shall order a civil fine of $500 against the public body.

J. Statutory Fees

The fee provisions of the Act do ***not*** apply to public records prepared under a statute specifically authorizing the sale of certain public records to the public or where the fee for providing a copy of the public record is otherwise specified by State law. In *Title Office, Inc v Van Buren County Treasurer*, 469 Mich 516; 676 NW2d 207 (2004), our law firm was successful in persuading the Michigan Supreme Court that fees for property tax records were to be computed according to the fee schedule provided in Transcripts and Abstracts of Records Act ("TARA"), rather than the FOIA, and that electronic copies of property tax records were "transcripts" under TARA, overruling *Oakland Co Treasurer v Title Office, Inc*, 245 Mich App 196; 627 NW2d 317 (2001). This decision is extremely beneficial to counties because the fees counties may charge under TARA are significantly greater than fees allowed under FOIA. This was recently confirmed in *Ellison v Dept of State*, 320 Mich App 169 (2017), as to statutory fees established under the Michigan Vehicle Code.[6]

V
Procedure after Written Requests Are Made

A FOIA request must be in writing, though the public body may respond to verbal requests, and if a verbal request is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address. A letter, facsimile, electronic mail, or electronic mail attachment is considered a "FOIA Request" if within its first 250 words it includes the words, characters, or abbreviations for *"freedom of information,"* "*information,"* "*FOIA,"* "*copy,"* or a recognizable misspelling of such, or appropriate legal code reference to the FOIA act, on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page.

The public body, upon receipt of a written FOIA request for a public record, shall respond to the request not more than five (5) business days after the request is received.[7] An employee who receives a written FOIA request should immediately turn

[6] MCL 257.208a

[7] The five business days for responding to a FOIA request includes all non-holiday weekdays Monday through Friday, regardless of whether the public body is itself open for business on those days. OAG, No. 7172 (March 17, 2005). Thus, if a governmental entity is open for business only three days per week, the two days that it is closed count toward the five business days for responding to a FOIA request.

over the request to the FOIA coordinator. A written request made by facsimile, electronic mail or other electronic transmission is considered not received until one business day after the electronic transmission is sent. If an emailed request goes to a "spam" or "junk mail" folder, it is not considered as received until 1 day after the public body first becomes aware of the written request. The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

There is a provision in FOIA allowing for an extension of the above-stated time limitation.[8] This extension shall be for not more than ten (10) additional business days. The public body does not have to provide a reason for requiring the extension, but must issue the extension notice in writing. Therefore, the public body has a total of fifteen (15) business days to respond[9] after receipt of the request, regardless of when the notice of extension is issued. *Key v Twp of Paw Paw*, 254 Mich App 508; 657 NW2d 546 (2002).

The responses to FOIA requests shall be one of the following:

1. Grant the request.

2. Issue a written notice to the requesting party denying the request.

3. Grant the request in part and issue a written notice to the requesting party denying the request in part.

4. Issue a notice extending for not more than 10 business days the period during which the public body shall respond to the request. The public body is not permitted to issue more than one notice of extension for a particular request.

Failure to respond to a request constitutes a public body's final determination to deny the request. Failure to respond to the request as provided above could result in an appeal or circuit court action. The court could order the public body to disclose and provide copies of the public record and shall assess damages against the public body as provided in Section 10(8) of FOIA, if the public body did not comply with the FOIA response requirements. Failure to timely respond will also result in the reduction of the level of fees that may be charged for records, as noted in Paragraph III, E, above.

A written notice denying the request, in whole or in part, for a public record is required to contain the following:

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[8] MCL 15.235(2)(d)

[9] The Michigan Attorney General has opined that the FOIA statutory time limits do not impose a specific time by which a public body must fulfill a request for public records that it has granted, but rather must respond with a "best efforts estimate" as to the time it will take to fulfill a request based upon the public body working diligently to fulfill its obligation to produce the records. OAG, No. 7300 (December 12, 2017).

1. An explanation of the basis under the Act or other statute for the determination that the public record or portion of that public record is exempt from disclosure, if that is the reason for denying all or a portion of the request. Reasons for not disclosing information must be more than "conclusory." The mere repetition of statutory language is not sufficient. The justification must indicate factually how a particular document interferes with the interest protected by the exemption, i.e., how would it constitute a clearly unwarranted invasion of an individual's privacy, or how would it interfere with law enforcement proceedings, or how would it prejudice the physical security of a jail or prison, et cetera.[10]

2. A certificate that the public record does not exist under the name given by the requesting party or by another name reasonably known to the public body.[11]

3. A description of the public record or information on a public record that is separated or deleted as provided in Section 14 of FOIA, if a separation or deletion is made.

4. The public body is required to give a full explanation of the requesting person's right to either 1) submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial or 2) to seek judicial review under Section 10 of FOIA. Notification of the right to judicial review is also required to include notification of the right to receive attorney fees and damages as provided in Section 10.

If a public body makes a final determination to deny all or a portion of a request, the requesting person may do one of the following at his or her option:

1. Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

[10] *The Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983).

[11] If some or all of the requested records do not exist, the Public Body may not simply omit that portion of request, but must affirmatively "certify" the nonexistence of the requested record. [MCL 15.235(5)] Therefore a denial based upon the nonexistence of a record must include in any "denial form" a certification that the record does not exist, or a separate "Certificate of Non-Existence" must be provided. A Court of Appeals panel held in a recent unpublished per curiam opinion that failure to provide such a certification is a violation of FOIA. *Steinberg v City of Highland Park*; 2018 WL 472151 (COA Docket No. 334432; January 18, 2018).

2. Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days[12] after a public body's final determination to deny a request.

Within 10 days after receiving a written appeal, the head of a public body shall do one of the following:

1. Reverse the disclosure denial.

2. Issue a written notice to the requesting person upholding the disclosure denial.

3. Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

4. Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than one notice of extension for a particular written appeal.

The requesting person may also seek an appeal of the FOIA fees being charged by the public body, as reviewed in Paragraph III, I above.

If a court reviewing a FOIA Appeal determines a public record is not exempt from disclosure, it shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located, has venue over the action. The public body has the burden to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision.

If a circuit court finds in favor of the person asserting the right to inspect, copy or review a copy of all or a portion of a public record, the court shall award reasonable attorney fees, costs and disbursements.[13] If the person prevails in part, the court may,

[12] The 180-day limitation period begins to run when the public body places the denial letter in the mail (not the date the letter was written). *Prins v State Police*, 291 Mich App 586; 805 NW2d 619 (2011).

[13] Attorney fees are awarded only upon a determination that the public body wrongfully failed to disclose non-exempt public documents. Attorney fees are not awardable in a dispute over the fees charged for a FOIA response. *Detroit Free Press, Inc v Dept of Attorney General*, 271 Mich App 418; 722 NW2d 277 (2006). A prevailing party's entitlement to an award of attorney fees includes all such fees related to achieving production of the public records. *Prins v Michigan State Police*, 299 Mich App 634; 831 NW2d 867 (2013).

in its discretion, award all or an appropriate portion of the above. The award is assessed against the public body. If the circuit court determines the public body acted arbitrarily and capriciously by refusal or delay in disclosing, the court shall award in addition to actual or compensatory damages, punitive damages in the amount of $1,000 against the public body, as well as punitive damages in the amount of $500 against the public body that is found to have arbitrarily and capriciously violated the Act by charging an excessive fee**.** Further, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court may order the public body to pay a civil fine of not less than $2,500 nor more than $7,500 for each occurrence, taking into account the public body's budget and whether it was previously assessed penalties for FOIA violations.

VI
State Agencies

Section 11 of FOIA pertains to State agencies and is applicable to a county department of social services.

A State agency shall publish and make available to the public all of the following:

1. Final orders or decisions in contested cases and the records on which they are made.

2. Promulgated rules.

3. Other written statements which implement or interpret laws, rules or policy adopted or used by the agency in the discharge of its functions.

Except to the extent that a person has actual and timely notice of a matter required to be published and made available, and that matter has not been so published, such person shall not be required to resort to or be adversely affected by such matter.

This section does not apply to records which are exempt under Section 13 of FOIA.

Definitions of "state agency," "contested case," and "rules" in this section shall be the same as those used in the Michigan Administrative Procedures Act, 1969 PA 306; MCL 24.201 to 24.315.

VII
Public Records Exempt from Disclosure Under Section 13 of the Act

A public body may exempt from disclosure the following if the conditions stated in Paragraph IV of this outline are adhered to:

1. Information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of an individual's privacy.[14]

2. Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would:

   a) Interfere with law enforcement proceedings;[15]

   b) Deprive a person of the right to a fair trial or impartial administrative adjudication;

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[14] The Michigan Supreme Court has held that disclosure of records pursuant to a FOIA request must "serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Mager v Dept of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999) (citations omitted). In *Mager*, the Court held that disclosure of gun ownership constituted a clearly unwarranted invasion of an individual's privacy. *Id*, at 146. *Mager* discussed a two part test to determine if disclosure would constitute a clearly unwarranted invasion of privacy.

The home addresses and telephone numbers of public employees constitute private information exempt from FOIA. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657; 753 NW2d 28 (2008). *See also,* the discussion regarding personnel files in Paragraph XI, below. Further, Michigan courts have held that the disclosure of traffic accident reports constitute an unwarranted invasion of personal privacy, and government entities are not required to make these reports available. *Baker v City of Westland*, 245 Mich App 90; 627 NW2d 27 (2001). However, public bodies must be consistent in their responses to such requests. If a public body releases accident reports, or UD-10s, to one individual or entity, it must release the reports to all individuals and entities requesting them.

Voted election ballots, including information as to the political party selected by each elector in the presidential primary election, are not exempt from disclosure under the privacy exemption. *Practical Political Consulting v Sec of State*, 287 Mich App 434; 789 NW2d 178 (2010); OAG, No. 7247 (May 13, 2010).

[15] If a public body decides to exempt records from disclosure on the basis of this exemption, it must determine that disclosure of the information would in fact interfere with law enforcement proceedings. Denial of the FOIA request is not justified solely by the fact that an open investigation exists, but may be justified where the investigation is active and ongoing, the information sought on a suspect is intertwined with other sensitive information, and other suspects existed. *King v Oakland Co Prosecutor*, 303 Mich App 222; 842 NW2d 403 (2013). A public body has a continuing duty to disclose investigatory materials after the investigation is closed. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475; 691 NW2d 50 (2004). A law enforcement purpose must be justified by more than a conclusory recitation of the statutory exemption language. *State News v Mich State Univ*, 481 Mich 692; 753 NW2d 20 (2008). The exemption is viewed in the context of events occurring at the time of the denial. Events that occur after a public body's denial under this exemption are irrelevant. *Id*. There is no duty to monitor the situation, and subsequently disclose the information if circumstances have changed, e.g., release of the information would no longer interfere with law enforcement proceedings. Rather, the requester may make another FOIA request. *Id.*

c) Constitute an unwarranted invasion of personal privacy;

d) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source;

e) Disclose law enforcement investigative techniques or procedures;

f) Endanger the life or physical safety of law enforcement personnel.

3. A public record which, if disclosed, would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure outweighs the public interest in nondisclosure.

4. Records or information specifically described and exempted from disclosure by statute.[16]

5. A public record or information described in FOIA which is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that officer or body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

6. Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

a) The information is submitted upon a promise of confidentiality by the public body;

b) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made;

[16] Minutes of a closed session of a public body are exempt from FOIA. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136; 683 NW2d 745 (2004); MCL 15.267(2). Results of a polygraph examination are exempt from FOIA. *King v Michigan State Police Dept*, 303 Mich App 162; 841 NW2d 914 (2013); MCL 338.1728(3).Certain audio and/or video recordings from law enforcement body-worn cameras are covered by a specific statute enacted in 2017, which is reviewed in Paragraph XII, below.

c) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request.[17] This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

7. Information or records subject to the attorney-client privilege.

8. Information or records subject to the physician-patient, psychologist-patient, minister, priest or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.

9. 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 to be conducted, until the deadline for submission of bids or proposals has expired.

10. Appraisals for real property to be acquired by the public body until: (1) an agreement is entered into; or (2) three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

11. Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this Act outweighs the public interest in nondisclosure.

12. Medical counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information as defined in 45 CFR 160.103.

13. Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the

[17] In order to claim an exemption of commercial or financial material voluntarily submitted to a public body, the public body must record a description of those materials within a reasonable time. *Coblentz v City of Novi*, 475 Mich 558; 719 NW2d 73 (2006).

public interest in disclosure.[18] This exemption does not constitute an exemption under State law for purposes of closed sessions under the "Open Meetings Act." As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under Act No. 336 of the Public Acts of 1947.[19]

14. Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, which, if disclosed, would prejudice a public body's ability to protect the public safety, unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

15. Information which would reveal the exact location of archeological sites. The Secretary of State may promulgate rules in accordance with the Administrative Procedures Act, to provide for the disclosure of the location of archeological sites for the purposes relating to the preservation or scientific examination of sites.

16. Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase, if disclosure of the data would reveal that only one bidder has met the specifications. This subdivision shall not apply after one year has elapsed from the completion of testing.

17. Academic transcripts of an institution of higher education, where the record pertains to a student who is delinquent in the payment of financial obligations to the institution.

18. Records of any campaign committee, including any committee that receives monies from a State campaign fund.

[18] A document is a “frank communication” if the court finds that it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). “Frank communications” that were preliminary to an agency determination when created continue to be exempt after the final agency determination is made. *Bukowski v City of Detroit*, 478 Mich 268; 732 NW2d 75 (2007).

[19] MCL 423.201 to 423.217: An Act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of this Act.

19. Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would:

a) Identify or provide a means of identifying an informer.

b) Identify or provide a means of identifying a law enforcement undercover officer or agent or plainclothes officer as a law enforcement officer or agent.

c) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills that they may have.

d) Disclose the name, address or telephone number of family members, relatives, children, or parents of law enforcement officers or agents.

e) Disclose operational instructions for law enforcement officers or agents.

f) Reveal the contents of staff manuals provided for law enforcement officers or agents.

g) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

h) Identify or provide a means of identifying a person as a law enforcement officer, agent or informer.

i) Disclose personnel records of law enforcement agencies.[20]

[20] Pursuant to *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353; 616 NW2d 677 (2000), internal investigation records of a law enforcement agency may be exempt from disclosure if the public interest in nondisclosure outweighs the public interest in disclosure. However, in *Herald Co, Inc v Kent Co Sheriff's Dept*, 261 Mich App 32; 680 NW2d 529 (2004), the Court of Appeals held the Kent County Sheriff's Department failed to meet its burden of proof in demonstrating why it was entitled to protect an internal investigation report from disclosure, and ordered that the documents be released. The Court held that the public interest in disclosure of the records outweighed the public interest in nondisclosure, and that disclosure would not constitute a clearly unwarranted invasion of privacy. The internal investigation report involved a sheriff's deputy arrested in a prostitution sting operation along with 14-15 other men. The newspaper published a story about the arrests and alleged preferential treatment the sheriff's deputy received. The Court held that the requested documents shed light on the official acts and workings of the government, and contained information from which the public could make a determination with respect to whether the deputy was given preferential treatment. Thus, the Court held, the public interest in disclosure outweighed the interests in nondisclosure. (Continued)

j) Identify or provide a means of identifying residences which law enforcement agencies are required to check in the absence of their owners or tenants.

20. Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department before a complaint is issued. This does not apply to records and information pertaining to one or more of the following:

a) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

b) The fact that an allegation was received by the department; the fact that the department did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

21. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

22. Records or information relating to a civil action in which the requesting party and the public body are parties.[21]

23. Information or records that would disclose the social security number of any individual.

24. Except as otherwise provided in this subdivision, an application for the position of president of an institution of higher education established under Mich Const, 1963, materials submitted with such an application, letters of recommendation or references concerning an applicant, and records or information relating to the process of searching for and selecting an individual for a position described in this subdivision, if the records or information could be used to

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A Court of Appeals panel held in a recent unpublished per curiam opinion that disciplinary reports are a personnel records within the meaning of this exemption. *Mansour Law PC v Oakland County*, 2017 WL 4158027 (COA No 332797; September 19, 2017), lv den ___ Mich ___ (2018) (Docket No. 156680).

[21] A FOIA requester must be the actual party in litigation with the public body for the "civil action" exemption to apply. *Taylor v Lansing Board of Water & Light*, 272 Mich App 200; 725 NW2d 84 (2006)(exemption inapplicable where requester was a friend of the litigant).

identify a candidate for the position. However, after one or more individuals are identified as finalists, the above does not apply.

25. Records or information of measures designed to protect the security or safety of persons or property, whether public or private, including but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan Anti-Terrorism Act, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

This "exemptions" section of FOIA does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the "Michigan Administrative Procedures Act."

The FOIA is a pro-disclosure statute, however, and its exemptions are narrowly construed.[22] When deciding whether to refuse a request for disclosure of information on the basis of any of the above exemptions, a public body must follow the rules adopted by the Michigan Supreme Court in *Evening News Ass'n v City of Troy* case which includes the following:

1. The burden of proof is on the public body claiming exemption from disclosure.

2. Exemptions are interpreted narrowly.

3. Detailed affidavits describing the material withheld must be provided to the party requesting it.

4. The party requesting the information must be provided with a written justification of the exemption. The justification must be more than "conclusory," i.e., simple repetition of statutory language. The justification must indicate factually how a particular document interferes with the interest protected by the exemption.

[22] *Herald Co v Bay City,* 463 Mich 111, 119; 614 NW2d 873 (2000).

VIII
Separating Exempt Material

Records which contain material exempt under Section 13, as well as materials not exempt from disclosure, are subject to disclosure after the separation of all exempt material.

The public body must, to the extent practicable, separate the exempt from the non-exempt information. The public body shall describe in an affidavit the exempted material when furnishing copies of the non-exempt portion of the record, unless that description would reveal the contents of the exempt information and, thus, defeat the purpose of the exemption.

IX
"Enhanced Access to Public Records Act"
1996 PA 462; MCL 15.441 *et seq.*

A public body may allow for a person's immediate access to specific public records for inspection, purchase or copying by digital means pursuant to the Enhanced Access to Public Records Act, MCL 15.441 *et seq*., which is not part of the FOIA statute. The terms "person," "public body" and "public record" have the same definitions as set forth in the FOIA. Upon adoption of an Enhanced Access Policy, a public body may charge a "reasonable fee" which enables the public body to recover only those operating expenses directly related to a public body's provision of enhanced access. MCL 15.442(g). This is a different fee than charged under the FOIA. Operating expenses for which a public body may charge under its Enhanced Access Policy include, but are not limited to, a public body's direct cost of creating, compiling, storing, maintaining, processing, upgrading or enhancing information or data in a form available for enhanced access, including the cost of computer hardware and software, system development, employee time and the actual cost of supplying the information or record in the form requested by the purchaser. MCL 15.442(c).

The public records which the public body may provide enhanced access and charge a reasonable fee include:

1. A geographical information system (GIS) producing customized maps based upon a digital representation of geographical data;

2. The output from a geographical information system (GIS).

The statute also provides that the public body may identify any public record as being available through enhanced access.

The public body may provide another public body with access to or output from its GIS for the official use of that other public body, without charging a fee to that other public body, if the access to or output from the system is provided in accordance with a written intergovernmental agreement that conforms with Section 3(1)(d) of the Enhanced Access to Public Records Act, MCL 15.433(1)(d), and the other body

complies with the other requirements of Section 3(1)(d) as it relates to collection and payment of fees to the public body.

An Enhanced Access Policy does not limit the inspection and copying of a public record pursuant to the FOIA. A public body is not required to provide enhanced access to any specific public record, but may provide enhanced access to any public record that is not confidential or otherwise exempt by law from disclosure. Before providing enhanced access to a member of the general public, a public body that elects to provide enhanced access shall adopt an enhanced access policy that complies with the Enhanced Access to Public Records Act.

X
The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the HIPAA Privacy Rule

The U.S. Department of Health and Human Services issued the Privacy Rule to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Privacy Rule standards address the use and disclosure of individuals' health information, called "protected health information," by organizations subject to the Privacy Rule, called "covered entities." Each public body must make a determination whether it is a "covered entity" under HIPAA.

The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral.[23] Thus, HIPAA and the HIPAA Privacy Rule can affect what information a public body may disclose pursuant to a FOIA request. If a party is requesting protected health information of an individual from a covered entity, the information cannot be released without a valid authorization signed by the individual subject of the request. 45 CFR 164.508. The covered entity's stated denial would be pursuant to MCL 15.243(1)(d): "...records or information specifically described and exempted from disclosure by statute," and MCL 15.243(1)(*l*): "protected health information as defined in 45 CFR 160.103." It is important to note that the rights and protections granted under HIPAA continue to apply to the protected health information of deceased individuals. 45 CFR 164.502(f), entitled Standard: deceased individuals, states:

> A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual for a period of 50 years following the death of the individual.

[23] The "Health Information Technology for Economic and Clinical Health Act (HITECH)" enacted in 2009 now applies certain HIPAA privacy and security requirements directly to business associates, imposes data breach notification requirements for unauthorized uses and disclosures, and generally widened the scope of privacy and security protections available under HIPAA.

Thus, a request for such information must be accompanied by a signed authorization from the individual's personal representative. You should consult with your attorney when dealing with a possible HIPAA issue.

XI
"Employee Right To Know Act"
1978 PA 397; MCL 423.502, *et seq.*

The Bullard-Plawecki Employee Right to Know Act is applicable to all current and former employees of an employer and is not part of the FOIA statute. This Act provides various legal requirements pertaining to the personnel records of employees. This Act should be reviewed before disclosing information contained in personnel records of a former or current employee.[24]

Employers are not to release to third parties any information relating to a disciplinary report, letter of reprimand, or other disciplinary action without providing the employee, or former employee, notice of such divulgence, except when such information is provided to other persons in the employer's organization or union officials representing such employee. The required notice is to be by first class mail to the employee's last known address.[25] This notice is to be sent on or before the day the information is to be released. This required notice need not be provided to the employee, or former employee, when such employee has waived the same upon a signed employment application with another employer, when disclosure is ordered in a legal action or arbitration proceeding, or if the information is requested by a governmental agency pursuant to a claim or complaint by such employee.

XII
"Law Enforcement Body-Worn Camera Privacy Act"
2017 Public Act 85

On July 12, 2017, the Law Enforcement Body-Worn Camera Privacy Act was signed into law and becomes effective January 8, 2018. (2017 Public Act 85) This new law includes provisions that will control the disclosure of data obtained by a law enforcement officer "body-worn camera," being a device that is worn by a law enforcement officer that electronically records audio and video of the officer's activities. Disclosure of video or audio recordings are subject to the protections provided for crime

[24] In *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997), the Michigan Supreme Court held that personnel records of teachers are subject to disclosure under the FOIA and not protected by a privacy exemption. This would be applicable to public employees, excluding law enforcement personnel in some instances. Medical information and social security numbers should be omitted.

[25] In order to recover damages from a violation of the notice requirement, the employee must prove harm from the failure to receive notice of the divulgence of a disciplinary report, as distinct from harm resulting from the divulgence of the disciplinary report itself. *McManamon v Redford Twp*, 273 Mich App 131; 730 NW2d 757 (2006).

victims under the State's crime victim's rights laws,[26] including exempting from disclosure under FOIA certain personally identifiable victim information, such as names and addresses, and visual representations such as the digitally stored recordings of a body-worn camera. Also exempt from disclosure would be audio or video recordings from a body-worn camera recorded in a "private place," being a place where an individual may reasonably expect to be safe from casual or hostile intrusion or surveillance. However, except for an audio and video recording exempted from disclosure under the statutory exemptions in Section 13 of FOIA, these recordings recorded in a private place may be released to (1) an individual who is the subject of the audio and video recording; (2) an individual whose property has been seized or damaged in relation to a crime to which the recording is related; and (3) a parent of, a legal guardian of, or an attorney for any of these individuals.

This statute also provides that an audio or video recording from a body-worn camera that is retained by a law enforcement agency in connection with an ongoing criminal investigation or an ongoing internal investigation *is not a public record* and *would be exempt from disclosure under FOIA*, but *only* to the extent that disclosure as a public record would do *any* of the following:

- Interfere with law enforcement proceedings.
- Deprive a person of the right to a fair trial or impartial adjudication.
- Constitute an unwarranted invasion of personal privacy.
- Disclose the identity of a confidential source or, if the record were compiled by a law enforcement agency in the course of criminal investigation, disclose confidential information furnished only by a confidential source.
- Disclose law enforcement investigative techniques or procedures.
- Endanger the life or physical safety of law enforcement personnel.
- Disclose information regarding a crime victim in violation of provisions of the CVRA.

While these disclosure exemptions are nearly identical to some of the statutory FOIA exemptions, disclosure for these would technically be subject to the new law's evaluation instead of FOIA, which may then not mandate the additional FOIA "balancing test" analysis required under FOIA for some of the FOIA exemptions. The new law also provides that audio or video recordings from a body-cam retained by a law enforcement agency relating to a civil action in which the party requesting the recording and the public body are parties is *not* a public record and so is also exempt from disclosure under FOIA.

This new law also provides for body-cam audio or video recording retention requirements, an evidentiary audio and video recording being retained for at least 30 days from the date the recording was made, and recordings that are the subject of an ongoing criminal or internal investigation, or an ongoing criminal prosecution or civil action, being retained by a law enforcement agency until the completion of the ongoing investigation or legal proceeding. Additionally, if the recording is relevant to a formal

[26] William Van Regenmorter Crime Victim's Rights Act (CVRA) [MCL 780.751 *et seq*]

complaint against a law enforcement officer or agency, the recordings must be retained for at least three (3) years after the date the recording was made.

However, while the digital body-worn camera recordings have these specific new statutory disclosure procedures, when the noted criteria do not apply, the established law and procedures under FOIA would then remain applicable. Additionally, the new law provides that if a fee is charged for providing any "body-worn camera" recordings, then the fees are to be calculated using the same procedures as used under FOIA. Finally, this new law also provides that any law enforcement agency using body-worn cameras must adopt a written policy regarding the use of the devices by its law enforcement officers, and regarding the maintenance and disclosure of the recordings recorded by body-worn cameras that are consistent with the new law.

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