

## **FOIA amendments affect members**

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Governor Engler recently signed into law amendments to Michigan's Freedom of Information Act. The amendments change the way that municipalities must respond to requests for information from the public, create new duties for local governments, and add important new provisions pertaining to software and computer data.

The revisions to the statute expand upon the information that must be provided, further delineate the procedures to be followed in requesting and supplying information, and impose stiff penalties, including reasonable attorney fees and costs of the requester, if litigation is necessary to obtain information, even where the public body has not refused to produce a record but has merely delayed past the time deadlines established under the Act.

The Michigan Freedom of Information Act (the Act or FOIA) embodies the state policy that all persons, except those incarcerated in state or local facilities, are entitled to full information regarding governmental decision-making. Incarcerated persons are no longer entitled to benefit under the Act. We have seen a history of expansive interpretation of the Act on the part of Michigan's courts. The presumption is that records are public and should be produced. This approach is continued under the amended statute.

The Act's definition of a "public body" includes:

- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.
- The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of the clerk to the circuit court, is not included within the definition of public body.

The definition of "person" under the Act includes individuals, corporations, limited liability companies, partnerships, firms, organizations, associations, governmental entities, or other legal entities. It does not include those serving a sentence of imprisonment in a state or county correctional facility in Michigan, any other state, or any federal facility. The omission of prisoners, frequent requesters prior to an amendment that was enacted in 1994, should provide some relief to public bodies, particularly those with prisons or local jails of any size.

Any requesting person is entitled to obtain public records as specified in the Act. The definition of “public record” has been updated to take into account computer data and software. It now provides:

“Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.

Public records are divided under the Act into two categories: those that are exempt from disclosure under section 13 of the Act, and all other public records (all of which are subject to disclosure). The definition of a “writing” that constitutes a public record has not changed.

The Act addresses the question of computer information by defining software, a category that is excluded by definition. “Software” means a set of statements of instruction that when incorporated into 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 does not violate a software license. These provisions are intended to clarify the application of the Act to computer-stored information but to ensure that FOIA is not used to obtain valuable software which was purchased or developed by a municipality for processing its information.

The list of exempt records remains substantially the same as under the earlier statute. There are several notable additions to the records that are exempt from disclosure. Those pertaining to municipalities include:

- 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 a public body.
- Records or information relating to a civil action in which the requesting party and the public body are parties.
- Information or records that would disclose the social security number of any individual.

For municipalities, the most significant change is the addition of records relating to a civil action. This section is somewhat unclear. The change apparently seeks to end the use of the Act as an additional mechanism of discovery during civil litigation. If the record is otherwise available to the public, a litigant will still be able to obtain the information by simply filing a request in someone else’s name. By exempting such records, the provision seems intended to require litigants against the government to wait the normal period for answers to discovery rather than employing the Act as a method to expedite access to public records.

The Act requires a public body that is a city, village, township, county, or state department, or under the control of one of those entities, to designate an individual as the body’s FOIA coordinator. The coordinator is made responsible for accepting and processing requests for public records, and is responsible for approving a denial. In a county without an executive form of government, the FOIA coordinator is the chairperson of the county board of commissioners. For all other public bodies, the coordinator is the chief administrative officer of the respective public body. A FOIA

coordinator may designate another individual to act on his or her behalf in accepting and processing requests for public records, and in approving a denial.

Although the title is new, the requirement of a FOIA coordinator is not substantially different from the requirements of the earlier Act. The chief administrative officer of a municipality was required to be responsible for approval or disapproval of FOIA requests under the earlier version of the Act. That individual could designate someone else in writing to be responsible. Although the amended statute no longer requires a written designation, the better practice is to formally appoint someone to handle this responsibility.

[Prepared by Plunkett & Cooney, P.C., and presented to the Pool Board of Directors by B.I. Stanczyk]

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The amendments change the way that municipalities must respond to requests for information from the public, create new duties for local governments, and add important new provisions pertaining to software and computer data.

The Act now provides that a request to see or copy a public record must be made in writing. This is a change from the earlier version which permitted oral requests for public records. The Act defines "written request" as a writing that asks for information and includes a writing transmitted by facsimile, electronic mail, or other electronic means. A requesting person is also entitled to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. This language is new, although many public bodies had already provided for such a subscription because it allows for administrative ease in supplying information and avoids the necessity of processing numerous requests for information that will be available on a continuing basis. A subscription is valid for up to six months, at the request of the subscriber, and is renewable.

A requesting party is entitled to inspect, copy, or receive copies of the requested public record. The Act continues to require some specificity about the record sought. The requesting party must describe a public record sufficiently to enable the public body to find the record.

The Act obligates an employee of a public body who receives a request for a public record to promptly forward that request to the freedom of information act coordinator. Unless the requesting person agrees in writing, the public body must respond to the request for a public record within five business days after the public body receives the request. The public body may respond by doing one of the following:

Granting the request;

Issuing a written notice to the requesting person denying the request;

Granting the request in part and issuing a written notice to the requesting person denying the request in part; or

Issuing a notice extending for no more than 10 business days the period during which the public body shall respond to the request. A public body is not entitled to issue more than one notice of extension for a particular request. The request for an extension must specify the reasons for the extension and the date by which the public body will grant or deny the request.

If the public body fails to respond timely to the request, as required, its inaction constitutes the public body's final determination to deny the request. If the public record should have been disclosed, the public body is subject to the penalties under the Act for this failure. This is an extremely significant change. If municipalities are not alert to the deadlines, the consequences could be severe because they will become subject to attorneys fees and costs although they have simply delayed past the short deadlines established under the Act. These provisions seem intended to spur governments to respond in a more timely way than has been the case in many areas under the former Act.

If the public body denies a request for a public record, it must issue a written notice that contains:

An explanation of the basis for denial, under the Act or other statute, regarding its determination that the public record, or portion of the public record, is exempt from disclosure- if that is the reason for denying all or a portion of the request;

A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body- if that is the reason for denying the request or a portion of the request;

A description of a public record or information on a public record that is separated or deleted pursuant to section 14 (the exception which allows redaction [editing] of exempt material where it is in a record that also contains non-exempt material), if a separation or deletion is made;

A full explanation of the requesting person's right to appeal to the head of the public body (in writing and specifically stating that it is an "appeal") or to seek judicial review by filing an action in circuit court;

Notice of the right to receive attorneys' fees and damages as provided in the Act, if after judicial review, the circuit court determines that the public body has not complied with the Act and orders disclosure of all or a portion of a public record.

The notice of denial must be signed by the individual designated as the FOIA coordinator under the provisions of the Act. The Act provides for an appeal to circuit court or to the head of the public body. This internal appeal process to the head of the public body is new.

Under the Act, the requesting person has the option of pursuing an appeal to the head of the public body or proceeding to circuit court. If the requesting person wants to appeal to the head of the public body, the requester must submit a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial. A board or commission that is the head of a public body is not considered to have received

a written appeal until the first regularly scheduled meeting of that board or commission following submission of the appeal.

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

Reverse the disclosure denial;

Issue a written notice to the requesting person upholding the disclosure denial;

Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part; or

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

If the head of the public body fails to respond to the appeal or upholds all or a portion of the disclosure denial, the requesting person may seek judicial review of the nondisclosure by commencing an action in circuit court. The Act provides that the burden is on the public body to sustain its denial. If the requesting party prevails, the court must award reasonable attorneys' fees, costs, and disbursements. If the requesting party prevails in part, the court has discretion to award all or a portion of attorneys' fees, costs, and disbursements. The circuit court is empowered to award punitive damages of \$500 in addition to compensatory or actual damages, if the public body has arbitrarily or capriciously violated the Act by refusal or delay in disclosing or providing copies of a public record. The damages are not assessed against the individual but against the public body that kept or maintained the public record.

[Prepared by Plunkett & Cooney, P.C., and presented to the Pool Board of Directors by B.I. Stanczyk.]