Elected Officials Webinar Series


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1. Policy
2. What is covered
3. How to respond
4. Exceptions
5. Cases and court decisions
6. Policy
7. Your questions

*A cautionary note: this presentation is intended to cover the concept of the FOIA and its basic provisions. There is no substitute for consulting with your city or village attorney, who can interpret the law in the context of your community’s particular circumstances and the most recent case law.
Policy of the Act

It is the public policy of this state that all persons, except those incarcerated in state or local correctional facilities, 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, consistent with this act.

The people shall be informed so that they may fully participate in the democratic process.
What must you provide?

A “public record,”

which is: a “writing” which is 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.
A Writing Is...

What is a “writing”?  
• paper documents  
• e-mail  
• voice mail?  
• notes?

• virtually any or all means of recording meaningful content, including writing by any method, photographing, printing, every means of recording, films, microfilm, magnetic or punch cards, discs, drums, etc.
Basic Requirements

• Appoint FOIA Coordinator – including for any public body under the control of the municipality

• Right to Inspect—the original

• Reasonable Access / Reasonable Protection

• Do not have to create a new public record, summary or compilation (computer formats)

• May charge a fee—uniform / actual cost / lowest paid employee (including fringes)

• May not charge for search, unless not to do so would be unreasonable

• If the anticipated fee exceeds $50, you may ask for a 50% deposit
Basic Requirements (continued)

- Requests must be in writing (fax or e-mail ok)
- It is ok for the request to just identify the information sought, w/o specifically describing the record that contains the information
- Requests can’t be “absurdly overbroad”
- You must reply—even if only to say the record does not exist because no action = denial, which has more requirements
Basic Requirements (continued)

• The public body must respond within 5 business days to a request by

  a) Granting

  b) written notice of denial

  c) granting in part, written notice denying in part

  d) notice of extending for 10 business days; maximum of one extension per request; must state the reason for the extension
Basic Requirements (concluded)

Failure to respond = a denial

Denial of records that do not exist must include a certificate that the records don’t exist

Violation of the FOIA can be expensive – it requires courts to award reasonable attorney fees and costs to plaintiffs who prevail
Some Public Records Are Exempt from Disclosure Under FOIA

What about the exemptions...

• Examples of exemptions:
  bids (until a bid is selected);
  test questions / answers;
  tentative bargaining agreements

• The decision to withhold a public record from disclosure is discretionary with the public agency. The act authorizes, but does not require, withholding of public records that are exempt.
Some Public Records Are Exempt from Disclosure Under FOIA

- The document may be provided even if it is one that is exempt under FOIA—unless it is one that cannot be provided because of another statute, right, or privilege—e.g. attorney-client, Social Welfare Act

- Re attorney-client privilege, the record sought in the FOIA request must be one between an attorney and client, containing privileged advice of a legal nature or client confidences. For municipalities this extends to agents and employees of the municipality who are authorized to act or speak for the municipality in relation to the subject matter.
Exemption: Invasion of Privacy

Is invasion of privacy an exception? Maybe.

- Most frequently used exemption to withhold records from disclosure is invasion of privacy. (See *Mager v Dept. of State Police*, 1999)

For this exemption the information must meet a two-part test.

- **First**, the information must be of a “personal” nature... if it is, then the next prong of the test must also be met

- **Second**, the release of the information must constitute a clearly unwarranted invasion of an individual’s privacy.
“Personal” = “reveals intimate or embarrassing details of an individual’s private life”

In the *Mager* case, a list of persons who had registered handguns was sought from the State Police. Ownership of a gun was held to be “personal” so as to meet the test’s first prong.

More recently the first prong was broadened to include also private or confidential information (here U of M employees’ home addresses and phone numbers)
Re the second prong of the test, the key is the extent to which the disclosure would serve the core purpose of the FOIA – thus, would contribute significantly to public understanding of the operations or activities of the government. This is the so-called “core purpose test”. In *Mager*, it was held that the second prong was also met because the FOIA request was entirely unrelated to the inner working of gov’t or how well the State Police were fulfilling their statutory functions.

NOTE: Personnel records, including salary and performance reviews, are generally *not exempt*.

Police may be different, as well as information regarding medical, counseling, and psychological records and social security numbers.
Exemption: Police Records

Aren’t police records exempt!?

- 3 categories:
  1) Investigation records
  2) Operational plans
  3) Personnel records

- In regard to **investigation records** -- very high standard to meet to be exempt from FOIA:
  1) Burden of proof on local government,
  2) Interpret exemption narrowly;
  3) Must separate exempt from non-exempt (and make latter available – redacting)
Exemption: Police Records

• The Michigan Supreme Court held: you must show exactly how disclosure would harm law enforcement proceeding—merely “pending case” or “on-going investigation” is not sufficient.

• More specifically, the disclosure of a record must do one of the following to qualify for the exemption:
  a) interfere with law enforcement proceedings;
  b) deprive a person of the right to a fair trial;
  c) be an unwarranted invasion of personal privacy (e.g. police repts containing names of suspects);
  d) disclose a confidential source;
  e) disclose investigative techniques; or
  f) endanger the life/safety of police personnel
Exemption: Police Records

• Most often the “interfere with law enforcement proceedings” is the basis of denial of a FOIA request. The Supreme Court in *Evening News Ass’n v Troy* (1983) set forth what is required.

• Examples of grounds for exempting public records include: evidence; witnesses; prospective testimony; gov’t strategy; confidential informants; etc.

• In *Evening News Ass’n*, the newspaper requested the identities of two officers and copies of incident reports regarding a fatal shooting by the police.
Exemption: Police Records

• As outlined above, a) the burden of proof is on the municipality; b) exemptions are interpreted narrowly; c) must redact materials and release the non-exempt portion; d) the portion withheld must nonetheless be described; and the justification must be more than conclusory, that is, simply based on the language of the FOIA.

• In regard to records that are operational, such things as communications codes or deployment plans, strategy, training manuals, means to identify informants, undercover officers, and addresses/phone numbers of active or retired officers – are exempt from FOIA.
Exemption: Police Records

• Police Personnel Records

  – Exempt if they deal with internal workings of the police department (e.g. who is an undercover officer).

  – Still subject to balancing test: that is, unless the public interest in non-disclosure outweighs public interest in disclosure . . . They would be subject to FOIA.

  – Must separate exempt material from non-exempt—and release non-exempt.

  – Records of police internal investigations have been held exempt by some courts.

  – (Note that FOIA does not contain a general exemption for personnel records – only for law enforcement.)
Exception for Frank Communication

• What is a “frank communication” as defined by the Supreme Court? The concept is that freedom of expression among gov’tal employees involved in decision making and policy formation should be encouraged.

  – (1) is a communication or note of an advisory nature made within a public body or between public bodies,

  – (2) that covers other than purely factual material, and

  – (3) is preliminary to a final agency determination of policy or action.

Note: there is still a balancing test, and disclosure is favored.
Today’s and Tomorrow’s Technology

• E-mail clearly falls within the definition of “writing” . . . which brings it within the definition of a “public record”. So . . .

• Any e-mail which “is prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function” would be subject to FOIA.

• Voice mail?

• Computer e-mail from home?
  1) Your personal computer
  2) Computer provided by city or village
Today’s and Tomorrow’s Technology, cont.

• What if.....two council members exchange emails about city business from their personal home computers? Assume no other city officials are a part of this exchange; assume their home computers don’t have a city account along with their personal account. Are the emails subject to FOIA?

• Note that the emails are never “in the possession of” the city or its computer system.
Probably no clear answer, but in the opinion of one city attorney:

“The risk is that a council member could ignore the city’s requirement (or recommendation) that all correspondence be sent to and from their city email address... as a deliberate means of trying to avoid the FOIA. At that point, have they perhaps converted their private email address into a city email address because of how they are using it? I think a court could find it was a deliberate attempt to evade the requirements of FOIA.”
Question 1

What if a school system had a policy regarding teachers that stated:

“all data contained on any school computer system is owned by [the school], and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. . . .

“By logging into this system, you acknowledge your consent to these terms and conditions of use”. . . . “Users agree to use this technology only for appropriate educational purposes.”
Question 1 (continued)

The policy further stated, “[e] mail is not considered private communication. . . . It may be accessed by others and is subject to subpoena. . . . Users should not expect that their communications on the system are private. . . .”

This “reverse FOIA” case was where unions sought to block release of personal e-mail sent to and from 3 teachers (who were involved in a controversial union-school contract negotiation) who used the school computer system for the e-mails. The e-mails were stored in the school’s system.
The union argued that the emails of the teachers were related to union business and not “public records”.

The **trial court held the e-mails were public records, subject to FOIA**, because they were “in the possession of, or retained by” the school.

It was argued that “retention of electronic data is an official function where it is required for the operation of an educational institution.”

Should the teachers’ e-mails be subject to FOIA?
• **No.** The Court of Appeals held: the e-mails were not subject to FOIA.

• (The Michigan Supreme Court denied leave to appeal. A rehearing was requested but denied.)

• Why?
Answer 1 (continued)

The key to the Court of Appeals decision: is that use or retention of the document must be “in the performance of an official function.”

“We conclude that under the FOIA statute the . . . personal e-mails were not rendered public records solely because they were captured in the e-mail system’s digital memory.”

“Additionally, we conclude that mere violation of an acceptable use policy barring personal use of the e-mail system – at least one that does not expressly provide that e-mails are subject to FOIA – does not render personal e-mails public records subject to FOIA.”
In a city council chamber the video camera recorder was left on, by mistake, and it recorded some conversations among city staff after the council meeting had adjourned. A copy was sought under FOIA.

Is the video tape subject to FOIA?
Answer 2

• **No.** An unpublished COA opinion held:

  the unedited tape was not a public record “as no official city business was conducted during that time despite the fact that the city retained the unedited tape.”
Question 3

• a) What if a personal letter is read aloud at a township board meeting and incorporated into the minutes. Subject to FOIA?

• b) What if a township board member makes hand written notes for his personal use and does not circulate them among the other board members; they are not used in the creation of the minutes; and they are retained or destroyed at his sole discretion. Are these notes subject to FOIA?
Answer 3

a) **Yes** – the “private letter became public because it was read into the record of the township meeting and used by the township board to resolve a specific issue.” (Walloon Lake Water System Inc v Melrose Twp, 163 Mich App 726, 1987).

b) **No** – Under these circumstances the Court of Appeals held the notes were not used in the performance of an official function.

– they were a “writing” . . . but not in furtherance of an official function (Hopkins v Township of Duncan, 294 Mich App 401, October 20, 2011).

– Note however in an unpublished opinion (WDG Investment Co., LLC v Michigan Dept. of Mgt & Budget, 2002) the notes taken by a member of a bid review board were held to be subject to FOIA because they were held to be in furtherance of an official function.
Going back to the case involving the personal e-mails between the 3 teachers...

What if... the case were about a teacher who is subject to discipline for abusing the policy on the acceptable use of school computers -- and the personal e-mails were used as evidence to support that discipline?

Under these circumstances, would the teachers’ e-mails be subject to FOIA?
• Probably yes. The COA decision stated

• “... The use of those e-mails would be related to one of the school’s official functions – the discipline of a teacher – and, thus the e-mails would become public records subject to FOIA.”
So... It is less about *where* something is stored...... than *what* it is and *how* it is used.

How about city and village officials’ e-mail on their home computers? On a city or village-provided computer?

Should you have separate accounts .....one for city/village business and one for personal business?
Conclusion

• When in doubt, consider the policy of the Act

  – Analysis should begin with the presumption that any records requested are subject to disclosure. No records are exempt unless they fit within one of the specific exemptions, which will be narrowly construed.

  – The best policy for a public body is to accept the pro-disclosure intent and language of the act and to respond accordingly.