



michigan municipal league

# Law Enforcement Action Forum Newsletter



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## The Michigan Court Of Appeals Brings The Freedom Of Information Act Into The 21<sup>ST</sup> Century. Now What?

By Gene King, LEAF Coordinator

At the end of January, Audrey Forbush, LEAF's Legal Advisor, called attention to a Michigan Court of Appeals opinion that had been published on January 26, 2010. The opinion deals with the Michigan Freedom of Information Act (FOIA), MCL 15.231, *et seq.*, as it relates to emails on publicly maintained computer systems. The case seemed straightforward in that the Court said the original FOIA laws did not contemplate the current technology. When the Court has to devise an opinion on a set of facts that the law does not specifically address, the rules require that the Court use the Legislative intent as a guide in interpreting the law. In this decision, the Court called for the Legislature to deal with this problem going forward. Audrey's concern is how far do the tentacles of the opinion actually reach?

The Court actually did a good job of looking at the facts in *Howell Educ. Ass'n v Howell Bd. of Educ.*, - - N.W.2d --, 2010 WL 290515 (Mich. App. 2010) and balancing them against what was the Legislators' intent when PA 442, 1976 was passed. The Court said, "We conclude that under the FOIA statute the individual plaintiffs' personal emails were not rendered public records solely because they were captured in the email system's digital memory." They also ruled that a mere violation of an



acceptable use policy barring personal use of the email system—at least one that does not expressly provide that emails are subject to FOIA—does not render personal emails public records subject to FOIA.

### To Provide or Not To Provide

The December, 2002 issue of the LEAF Newsletter, *The Freedom of Information Act – Privacy Rights vs. Disclosure* was the last time that LEAF discussed the topic of FOIA. At the time, several cases had been decided that spoke to the privacy of information and the exemptions found in FOIA. As was stated in 2002, FOIA provides citizens with broad rights to obtain public records limited only by the coverage of the statute and its exemptions (*Kent Co. Deputy Sheriff's Ass's v Kent Co Sheriff*, 463 Mich 353, 362; 616 NW2nd 677 (2000)). Nothing in FOIA itself prevents a government from providing any information it is willing to disclose. However, good judgment and several other acts such as the Crime Victim's Rights Act, the Family Educational Rights and Privacy Act of 1974, Employee Right to Know Act, the Health Insurance Portability and Accountability Act (HIPAA) and the Social Security Protection Act restrict what information a governmental entity can or should disclose.

LEAF has found that municipal entities still have questions and issues with trying to comply with FOIA and to protect the privacy of those who may be unfortunate enough to be involved in an incident or issue with the entity. FOIA provides several exemptions from releasing department policies, procedures, rules, codes or tactics. MCL15.243, Section (13)(n),(v) and (vi) specifically addresses law enforcement and allows departments to exclude from disclosure any departmental codes, plans of deployment, operational instructions and the contents of staff manuals provided to law enforcement officers or agents that might impair a department's ability to protect public safety. In most circumstances, departments should not release this information. Once again, the public interest in disclosure must outweigh the public interest in nondisclosure *in the particular instance*. This is another situation in which the department, if embroiled in controversy or suffering from the erosion of community confidence, may need to negotiate with the person requesting the information.

Many attorneys try to use FOIA to get around discovery rules. Therefore, departments should not release policies, procedures, rules, regulations or department regulatory or employee advisory documents or information without first conferring with legal counsel. Many municipal attorneys have a tendency to release these documents and police personnel records thinking that releasing them will have no significant consequences. This information is specifically exempted under MCL15.243, (13) (n), (v), (vi) and (ix). Its non-release is further supported in *Bradley v Saranac Community Schools Bd of Education*, 455 Mich 285, 565 NW2d 650 (Supreme Court 1997).

One of the most important issues is to meet all the notices and deadlines that FOIA established. Municipal entities bear a significant risk and expense if they fail to meet the requirements. For more information on FOIA, go to [mml.org](http://mml.org). For the LEAF Newsletter at [mml.org](http://mml.org) look under Insurance, then Pool or Fund where the Risk Management Resources are found on the left side of the page

choose Law Enforcement Newsletters and drop down to 2002.

### The Howell Case Is Pretty Clear, Or Is It?

The *Howell* decision answers the question of what electronic records are public records and what are not when captured on a publicly owned system. The Court said:

Having determined that personal emails are not "public records" subject to FOIA, the next question is whether emails involving "internal union communications" are personal emails. We conclude that they are. Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership.

Thus, any emails sent in that capacity are personal. This holding is consistent with the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees." MCL 15.231(2). The release of emails involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.

The Court distinguished between when a personal email could remain private and when it could become public. Their example was a teacher being subject to discipline for abusing the acceptable use policy and personal emails were used to support that discipline. The use of those emails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the emails would become public records subject to FOIA. The Court said this is consistent with *Detroit Free Press, Inc v Detroit*, 480 Mich 1079; 744 NW2d 667 (2008). It is common knowledge that underlying the case was a wrongful termination lawsuit that resulted in a multi-million dollar verdict against the city of Detroit. During the course of the lawsuit and subsequent settlement negotiations, certain text messages became public that had been sent

between the Detroit mayor and a staff member through the staff member's city-issued mobile device. The text messages indicated that the mayor and the staff member had committed perjury.

A "public record" as defined in MCL 15.232(e) is "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." To be a public record the Court ruled in *Detroit News, Inc v Detroit*, 204 Mich App 720, 724-725; 516 NW2d 151 (1994) that the use or retention of the document must be "in the performance of an official function" and that the "mere possession of a record by a public body" does not render the record a "public document".

This pretty much takes care of the electronically stored data that is generated and retained by governmental entities that is not related to an "official function" of the operation. Audrey is concerned! With the use of social networking sites to promote the city and provide an avenue of open communication, is any posting, blog participation or friend responses considered public record? With today's retention requirements, has the Howell decision made another whole analysis necessary before records can be deleted for cleanup?

Audrey said in Michigan there is no specific statute, court ruling or opinion expressly addressing current technology in Michigan. The following is an updated summary of the basic provisions of the Freedom of Information Act (FOIA) as amended by 1996 PA 553 found on the Michigan Attorney General's website. The actual text of the statute follows in Section II. "It does not matter what form the record is in. The act applies to any handwriting, typewriting, printing, photostating, photographing, photocopying and every other means of recording. It includes letters, words, pictures, sounds or symbols, or combinations thereof, as well as papers, maps, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. It does not include computer software."

Audrey said since the Legislature was very specific in outlining the current technology available when they last amended FOIA, it is reasonable for public officials to conclude that location or format of the record is not relevant as long as it meets the definition of a public document.

### **No Protection For Settlements**

Audrey pointed to other cases influencing the handling of FOIA requests. Though somewhat aged, not many people realize that at the beginning of the intense battle of the Detroit mayoral scandal, the Detroit Free Press made a FOIA request to get their hands on the court settlements that were made in the Whistle Blowers cases brought by two fired Detroit police officers. When the city refused to provide the Settlement Agreements and related Notice of Rejection forms, a court battle ensued, culminating in the Michigan Supreme Court ruling. In *Detroit Free Press Inc v City of Detroit*, 480 Mich 1079; 744 NW2d 667 (2008) the Court said:

The court held the trial court did not err in concluding the Settlement Agreement and the Notice of Rejection were "public records" and subject to disclosure pursuant to the FOIA. The court also concluded the plaintiff-*Detroit Free Press's* Freedom of Information Act (FOIA) requests were sufficiently specific, and there is no FOIA exemption for settlement agreements.

This case affirmed the documents are public documents and are subject to production. Audrey said the ruling is not a landmark by any means, but it takes away the ability to shield the reputation of public defendants when settlements are made in cases that allege unproven bad behavior. Even though other documents are agreed upon addressing the facts, the allegations are available for posterity.

## Principles Can Be Costly When FOIA Requests Are Ignored

Another area of significant concern to Audrey is the cost of mishandling a FOIA request. One of the most common areas of default is failure to meet the timetables established in the act. The public has the right to "inspect, copy, or receive copies of the requested public record, under MCL 15.233(1), or under MCL 15.233(3); they can choose to examine public records. The government has five business days to respond to FOIA requests, MCL 15.235(2), and may only ask for one 10-business-day extension under MCL 15.235(2)(d).

If the entity does not meet the timetable for providing a response, it forces the requester to go to the courts to seek a remedy. Once this happens, MCL 15.240(6) allows the attachment of attorney fees. The law says if the prevailing party is the person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record, the court shall award reasonable attorneys fees, costs, and disbursements. If the person or public body prevails in part, the court may award all or an appropriate portion of reasonable attorney fees, costs, and disbursements. MCL 15.240(7) allows the court to decide if the public body arbitrarily and capriciously denied a FOIA request, which allows for a required \$500 fine.

Audrey points to a recent Michigan Supreme Court case that supports MCL 15.240(6), which requires a court to award reasonable attorney fees, costs and disbursements to prevailing FOIA plaintiffs. In *Coblentz v City of Novi*, 774 NW2d 526 (November 13, 2009) the Court reaffirmed their position of reasonable attorney fees;

The trial court erred in considering whether the city's conduct was "corrupt enough" to justify a sanction that "amounts to a severe criminal penalty," and whether the requested attorney fees would bankrupt the city or whether a sanction would "burden...the public welfare." "Nothing in MCL

15.240(6), or decisions of this Court, authorizes consideration of such factors in determining a reasonable attorney fee award." Reasonable attorney fees shall be determined pursuant to the factors set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

In *Smith*, the Court ruled that in determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the Court shall make this determination using reliable surveys or other credible evidence. Then, the Court should multiply that amount by the reasonable number of hours expended in the case.

Audrey opined that this decision will help to curb some of the costs in these cases, but in most circumstances FOIA cases should not have to go to court to be resolved. Audrey said to make sure to get the FOIA resources by going to [mml.org](http://mml.org) and in the search box at the right top of the screen put in FOIA, then follow rules explicitly.

## Social Networking, FOIA, Retention

A presentation entitled *Social Media: Legal Considerations for Communities*, made by Attorney Laura Katers Reilly of Kendricks, Bordeau, Adamini, Chilman & Greenlee, P.C., at the MML Region Seven Education Seminar in Ishpeming Michigan on May 13<sup>th</sup>, spoke to the issue of social networking sites established and maintained by a "public body" being subject to FOIA. As of the date of her presentation, Reilly said there were no Michigan cases considered specifically on point to FOIA and social networking. She came to her conclusions looking at trends from the latest FOIA litigations, rulings and opinions from other states, and some educated predictions.

Reilly suggested that using the language of what a public record is under Michigan FOIA, and the *Howell Education Association* decision as guidance, a municipality's official page on social

networking sites such as Facebook (Twitter 'tweets', etc.) would likely be a "public record" because the content is posted by the municipality in "performance of an official function." Whether or not postings by others on the site constitute "public records" will depend on the purpose of the comments. Examples are posting questions or proposals on the site and inviting comments to gauge public sentiment on issues. She went on to say that, the "Friends" info or sign in, or identification of blogger info, which could include unsolicited comments not pertaining to a subject addressed on the site, are, like the emails in *Howell Education Association*, more "personal" and incidental to public purpose, and therefore would probably not be a "public record".

One of the most important issues in using a social networking site is for the municipal entity to establish rules of use before creating a social networking page. The rules should be placed on the social networking page setting forth the purpose of the forum and guidelines for posting comments. Reilly said the idea is to allow the municipal employee monitoring the site to edit public posting so people are not promoting their own business or hijacking the intended discussion of point. This also allows the control of inappropriate language, comments or subjects. She also recommended that the entity establish that once posted the entity reserves the right to restrict or remove any content that is deemed in violation of the entity's Social Media Policy, third party regulations or any applicable law.

The next issue is that the entity's retention policy outlines how, when and where the information from the site will be stored and who is responsible to retrieve it. Remember, under *Howell* and *Detroit Free Press*, private records can become public records when it becomes relevant to an official function. It becomes very important to be able to find, analyze and reproduce the information if presented with a FOIA request or subpoena otherwise there may be sanctions.

To find information on the Freedom of Information Act and Records Management go to [mml.org](http://mml.org) or contact one of the Research Specialists at the MML.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund  
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