

The Freedom of Information Act: Tips, Tricks and Recent Developments

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Our Goals Today

- Create a baseline understanding of the Michigan & Federal FOIA statutes
- Highlight areas of difference between them
- Leave you with insights you can use to accomplish better outcomes

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Introduction to FOIA

- Federal: 5 USC § 552 (1966)
- MI: MCL 15.231-15.246 (1977)
- "If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects."
 - Justice Louis Brandeis, 1893
- State government "must be open, transparent and accountable to taxpayers."
 - Gov. Gretchen Whitmer, Feb. 1, 2019
- MI courts find federal FOIA cases "persuasive" authority (except when they're not).

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To whom do FOIA statutes apply?

Federal FOIA:

- "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"

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To whom do FOIA statutes apply?

Michigan FOIA: "Public body" includes:

- Executive branch employees, officers, agencies, departments, or other bodies (but not the governor's office).
- Legislative branch agencies, boards, commissions, or councils.
- Local governments (e.g. county, city, town, school district, regional governing body, special district, etc.)
- Any other body created by state or local authority or which is primarily funded by or through state or local authority.

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To whom do FOIA statutes apply?

Michigan FOIA: "Public body" **does not** include:

- The governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
- The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court.
- Foreign public bodies are not within the plain language of the definition.

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Legislative Development



Proposed amendments to Michigan's FOIA statute would repeal the gubernatorial exemption to the definition of "public body" and make the governor's office subject to FOIA.

House Bills 4007-4016

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What about entities receiving public money?

- MCL 15.232(d)(iv): "Any other body which is created by state or local authority *or which is primarily funded by or through state or local authority.*"
 - Grants/subsidies, not purchase of goods/services
 - >50%
 - Present tense
 - Not federal
- But ... Constitutional?

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What about entities receiving public money?

- Must be "chartered or controlled"
 - Corp. for Public Broadcasting, Red Cross are not
- USSC (1980): "Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision."

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How Do I Make A Request?

- Writing
- Reasonable Detail
- Existing Records
- Tips
 - Targeted description
 - Informal approach
 - Disclose journalistic intent

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What is subject to disclosure?

Federal FOIA:

- "Record" undefined
- Can include private emails

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What is subject to disclosure?

Michigan FOIA

"Public record" 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."

M.C.L. § 15.232(e).

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What is subject to disclosure?

Michigan FOIA

Not every writing within a public body is a "public record."

- Mere possession is not enough.
- Must be "in the performance of an official function."
- E.g. personal email captured by back-up system might not be a "public record."

Howell Ed. Ass'n, MEA/NEA v. Howell Bd. of Ed., 287 Mich. App. 228, 243, 789 N.W.2d 495, 504 (2010).

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What is subject to disclosure?

Michigan FOIA



- No duty to create records.
- FOIA does not contain a requirement that a public body keep a particular document for any length of time, but other statutes require document retention protocols.
- Duty to preserve and maintain a record after receiving a FOIA request until request is resolved.
- FOIA allows a subscription to future instances of public records created on a regular basis.

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FOIA Exemptions

- General Information
- NEW: Roads, Body Cameras
- Trade Secrets and Bidding Information
- Attorney/Client Privilege
- Advisory Communications and Inter/Intra Agency Memorandums
- Personal Privacy
- Law Enforcement
- National Security

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What is exempt from disclosure?

Exemptions are generally discretionary.

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

Exemptions are interpreted narrowly.

Michigan FOIA has 25 exemptions.

Federal FOIA has 8 exemptions.



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New in MI: Roads, Body Cameras, Cybersecurity

- "cybersecurity plans, assessments, or vulnerabilities" – March 2018
- "Research data on road and attendant infrastructure" – March 2018
- Law enforcement body-worn camera privacy act (MCL 780.313(2)) – Jan. 2018
- Exempts "a recording recorded by a law enforcement officer with a body-worn camera that is recorded in a private place"

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Federal: Trade Secrets

- Records supplied by private entities that include profits, losses, market share, loan/financial info
- Food Marketing Inst. v. Argus Leader Media* (SCOTUS argument: April 22, 2019) – financial info related to SNAP



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Michigan Trade Secret Exemption

- Trade secrets, commercial or financial information
- Voluntarily provided for use in developing governmental policy
- If submitted upon an authorized promise of confidentiality
- A description of the information is recorded by the public body within a reasonable time
- "This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit."



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Practice Tip

The Michigan trade secret exemption is significantly more narrow than the Federal exemption.

Additional MI requirements:

- Public body must record description,
- Must be for use in developing policy,
- Cannot be submitted as a condition of receiving a benefit.



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Attorney/Client Privilege

Federal: Implied within deliberative process exemption; subject to scrutiny

MI:

- Expressly protected
- Extends to Joint Defense communications

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Internal/Advisory Communications

MI:

- Protects "frank communications" between officials
- Something more than factual
- Preliminary to final decision
- Balanced against public interest

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Internal/Advisory Communications

Fed:

- Authored by agency
- Preliminary to final decision
- More than factual
- Broader than MI

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Personal Privacy

- Two sources:
 - "Information of a personal nature" (MI) or "personnel and medical files and similar files" (Fed) if disclosure is "a *clearly* unwarranted invasion of an individual's privacy."
 - Law enforcement records that are "unwarranted invasion of personal privacy."
- Measured at time of request. *State News v MSU* (2008)

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Personal Privacy

Influenced by "purpose of FOIA"?

- the purpose of FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Mager v. Dep't of State Police*, 460 Mich. 134 (1999)
- "Rap sheet" is unwarranted invasion. *DOJ v Reporter's Cmte* (USSC 1989)

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Law Enforcement

- Law enforcement records that would:
 - Interfere in investigation (revealing evidence, witnesses, prospective testimony, the transactions being investigated, the direction of the investigation, governmental strategy, prospective new defendants, and the scope and limits of the government's investigation)
 - Deprive person of fair trial
 - Disclose confidential source/info
 - Endanger officers
- Must show particularized justification

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Limiting the Burden of FOIA

Private Entities:

- Document sharing protocols
- Reverse FOIA Lawsuits

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Copying Fees: MI

- Hot-Button Issue – Long used to impose hidden barriers to access
- 2015 Amendment:
 - 10 cents/page
 - "most reasonably economical cost" of digital media
 - Labor at lowest-paid employee's wage, in 15-minute increments
 - Good-faith deposit of 50% if over \$50
- 2018 Amendment:
 - Requires identifying info for requestor
 - Reaction to massive request for voting records from unknown NY resident

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Copying Fees: Federal

- "Reasonable" fees for "direct" costs
 - \$11-28/hr. labor
 - computer time up to \$270/hr.
 - Copying 3-25 cents
- 2016 Act waives fees for late production
- Noncommercial requests: no fee for reviewing for exemptions
- Fee waivers for media
 - *Cause of Action v. Federal Trade Commission* (D.C. Cir. 2015).

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Proactive Disclosure: MI

- Whitmer Executive Order
 - Urges the use of livestreaming to broadcast public meetings anywhere in the state.
 - Orders the Department of Technology, Management and Budget to devise an online system where public notices and records can be uploaded.



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Proactive Disclosure: Federal

- 2016 FOIA Improvement Act:
 - Public disclosure of frequently requested documents
 - Requires electronic production
- FOIA.gov
- FBI Vault
- DHS: AI processing

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Deadlines

- MI: 5 business days with one 10-day extension
- Fed:
 - 20 days to respond (grant/deny)
 - Delay for "unusual circumstances"
 - Expedited processing
 - No fees if late
 - Reality is much slower

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Remedies for Inadequate Disclosure

- Appeal, Lawsuit
 - MI: Court has 3 options: complete justification from agency; in camera review; review by plaintiff's counsel. *Evening News Ass'n v. City of Troy*, 417 Mich. 481 (1983)
- Fee recovery is possible
 - MI: if lawsuit was "reasonably necessary" and had "substantial causative effect"
 - Fed: Release at any stage of litigation = victory
- Expedited Litigation
 - State, but not Federal

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Remedies for Inadequate Disclosure

- Negotiate for narrowed scope / redaction
- Motion for *Vaughn* Index
 - Federal procedure; possible in MI
- Whitmer Executive Order "encourages" agencies to answer before deadline and to not take extensions.
 - Not law, but leverage



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Thank you!

Please feel free to contact us for a free initial consultation on your questions.

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