

April 25, 2012

Why the Freedom of Information Act Needs Refinement

The Freedom of Information Act helps us understand the actions of public officials and employees. The Michigan Press Association (which represents over 300 newspapers and websites that reach an audience of 6.9 million Michigan residents) believes this Act is crucial to good governance.

- *FOIA ensures that parents can review the qualifications of teachers in their school system so they know that qualified teachers are being hired.*
- *FOIA ensures that the police blotter is always available so that residents can be warned that car thefts are occurring in their neighborhood.*
- *FOIA ensures access to applications for government programs so that citizens can see that qualified entities are obtaining taxpayer dollars.*

In March, 2012 the Center for Public Integrity released a study of ethics and integrity in state governments across the United States. Michigan is one of eight states getting a failing grade (an F) and was ranked 43 out of 50 states in terms of corruption risk. Refining FOIA can reduce that risk and improve effective government.

FOIA is about accountability. It helps spot wrongdoing and weaknesses and gives us information to improve our neighborhoods, schools and society. It's essential to government of the people, by the people and for the people.

Look at the legislative intent of Michigan's FOIA (Public Act 442 of 1976):

"It is the public policy of this state that all persons, except those persons 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."

Government officials have thrown up barriers that fly in the face of that policy. These include time delays and fees for producing information that are inconsistent and excessive. The net effect is a "constructive denial" of access to public records.

What do those problems look like in the real world?

- The Michigan State Police told a reporter that making copies of documents to respond to her FOIA request would run 36 cents a page. The reporter figured costs would amount to no more than \$400. The MSP said it would cost \$2,192.74, citing expenses of searching for retrieving, reviewing, examining and separating exempt material.
- The Wayne County Airport Authority required a newspaper to file a Freedom of Information Act request to review its meeting minutes (which are required to be available in a public area in their offices). The authority insisted that a county employee monitor the reporter as she

reviewed the records and sought to charge the paper for the county employee. They backed down on the charge, but insisted on someone sitting in the room (who ended up reading a magazine) with the reporter. After the reporter pointed out that that was a poor use of taxpayer dollars, the next person who came in to watch brought a calculator and work papers.

- The Macomb County Corporation Counsel's Office handles FOIA requests for all county departments. It is notorious for late responses and excessive charges. One example: a FOIA request was made on December 11, 2009 prompted a response several days later that the Christmas holiday would make it difficult to do the "research and investigation" needed to comply with the request. On Jan. 8, the requestor was told that the research would be completed if they supplied a check for \$35. The information was finally released on January 19. On another occasion a requestor was charged \$15 for two pages – no documents – that summarized a response to their questions.
- A study by Michigan State University's School of Journalism had students file FOIA requests with Ingham County schools and municipalities asking how many FOIA requests these entities had received in each of the five preceding years. Responses varied: Some communities answered immediately, others denied the request and invited the students to file a lawsuit. Three required per-page copying fees ranging from \$5 to \$40. One student was told "this is just a crummy time of year to follow the Freedom of Information Act."

Bottom line: there is a lack of consistency in government compliance with FOIA. Residents have a right to find out what's going on with their government. And it's RESIDENTS – not just reporters – who have trouble finding out how their taxes are spent and how public employees conduct themselves.

"The largest single group of people who use the law to get information are senior citizens," according to National Security Archive Director Tom Blanton in an interview with National Public Radio. Veterans are next.

There are some simple and sensible solutions to ensure access to government information. They are:

WHAT: Have a consistent fee structure across the state.

HOW: Amend MCL 15.234

Establish a per page fee for providing a public record that includes the cost for duplication, examination and separation of exempt from non-exempt information. Set a low statewide fee and then index it to CPI. This section should specify that NO FEE will be charged for a citizen to inspect documents on site.

WHAT: Require government to adhere to the timelines spelled out in the statute

HOW: Amend MCL 15.235

Failing to respond to FOIA requests within current timelines should be enforced so that taxpayers aren't burdened with more costs when government litigates or pays fines. Requiring slow responders to reduce the cost of answering the FOIA by 20% for each day of delay and if the delay goes over the 5 days allowed in statute the public body cannot charge anything for filling the request is a sensible step.

WHAT: Have uniform litigation standards to reduce costs for citizens.

HOW: Amend MCL 15.235

Mandate the award of all fees and costs incurred in a lawsuit if a FOIA plaintiff prevails on any portion of their claim. The FOIA mandates attorney fees only when plaintiffs completely prevail. Otherwise,

attorney fees are left to the discretion of court. Where there are multiple violations by a public body (e.g., separate but related FOIA requests were denied), a plaintiff is in the catch-22 of either filing multiple suits for each separate FOIA request (which may have adverse legal consequences) or file 1 lawsuit and risk only partially recouping costs – i.e., only recovering that portion related to a FOIA request on which they prevailed. This could be a costly proposition for everyday residents.

WHAT: Limit assertion of new exemptions *after* a lawsuit is filed that were never asserted before.

HOW: Amend MCL 15.243*

Amend FOIA to provide that any exemptions not asserted in the initial FOIA response or in response to a FOIA appeal are deemed waived and cannot be asserted in a subsequent lawsuit. Because the law allows defendants to add purported exemptions throughout litigation, FOIA requestors can't assess their chance of prevailing in a lawsuit. Worse, they also run the risk that they will incur fees and costs in instigating a lawsuit only to have an entirely new "exemption" asserted that may be upheld at least in part by the court. The result is incurring fees and costs that cannot be recovered. This should not be allowed.

A CONCEPT WORTH EXPLORING: Establishing a board / commission whose #1 objective is to provide Michiganians with information about the workings of their government to which, by law, they are entitled. A secondary objective would be to reduce litigation costs for citizens and units of government in contesting open government claims. Board members could be appointed by the Governor and confirmed by the Senate. An equal number of members could come from the media and from local government. The remainder would be public members. An executive director (who would be an attorney) would administer the board.

There are other issues that could go on a wish list of FOIA refinements... but addressing the concern of cost and arbitrarily long response times would make a world of difference in shining the sun on Michigan government at all levels.

*(* for the amendment to be consistent and effective, it should probably be cross referenced in a few other sections such as MCL 15.240(2), which governs responses to appeals, and 15.240(4), which discusses actions commenced under FOIA, and 15.235(4), which requires an explanation for denials (i.e., should be amended to state that every applicable exemption must be asserted or lost).*