



# **Summary of PA 563'14 FOIA Reform Statute Changes**

The following changes go into effect July 1, 2015.

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## **FEES**

The public body may charge for the public record if it has established, makes publicly available, and follows procedures and guidelines as required in the statute. MCL 15.234(1).

The total fee shall not exceed the sum of the following (all of which must be itemized for the requestor):

- Labor directly associated with necessary searching, locating and examining. May only charge the hourly wage of the lowest-paid employee capable of searching, locating, and examining regardless of whether that person is available or actually performs the labor. Labor costs must be estimated and charged in increments of 15 minutes (rounded down). MCL 15.234(1)(A).
- Labor directly associated with separating exempt from non-exempt. May only charge the hourly wage of the lowest-paid employee capable of searching, locating, and examining regardless of whether that person is available or actually performs the labor. Labor costs must be estimated and charged in increments of 15 minutes (rounded down). If the public body doesn't employ a person capable of separating exempt from non-exempt in the particular instance, may contract with someone to do so, but must: (a) clearly note the person/firm in the fee itemization; and (b) rate charged may not exceed 6 times the state minimum hourly wage. May not charge for redaction if knows it previously redacted and still has the redacted document. MCL 15.234(1)(B).
- For non-paper copies, the actual and most reasonably economical cost of the media used. Public body need not provide non-paper if it lacks the technical ability to do so. MCL 15.234(1)(C).
- For paper copies, no more than 10 cents per page for 8 ½ by 11 or 8 ½ by 14 inch paper. Must use most economical means, including double sided printing. MCL 15.234(1)(D).
- Labor directly associated with duplication/publication. May only charge the hourly wage of the lowest-paid employee capable of searching, locating, and examining regardless of whether that person is available or actually performs the labor. Labor **need not** be estimated and charged in increments of 15 minutes – the

public body can choose the increments, but must round down. MCL 15.234(1)(E).

- The cost of mailing (if any). Must use most economical form unless specifically stipulated by the requestor. MCL 15.234(1)(F).

As to labor costs, the public body may also add up to 50% to the applicable labor amount to cover fringe benefits if it clearly notes the percentage multiplier. Subject to the 50% limitation, may not charge more than the actual cost of fringe benefits. MCL 15.234(2).

Cannot charge overtime unless specifically stipulated by the requestor and must be noted on itemization. MCL 15.234(2).

A public body may still waive or reduce charges if in public interest because it primarily benefits the general public. MCL 15.234(2).

Public body must provide a public record without charge for the first \$20 of the fee if: (a) indigent or (b) a non-profit. There are also additional revisions relating to this part of FOIA. MCL 15.234(2)(A) and (B).

FOIA **retains** the requirement that labor costs may not be charged unless failure to do so would result in unreasonably high costs because of the nature of the request in the particular instance, and the public body specifically identifies these unreasonably high costs. MCL 15.234(3).

Public body must provide records, but cannot charge until it is in compliance with the requirements for procedures and guidelines. MCL 14.234(4).

### *Fee Reduction where Public Body Untimely (MCL 15.234(9).)*

If the public body's response is untimely, and either: (a) the request contains words referencing FOIA (or similar language) or (b) the lateness was willful and intentional, then the labor costs must be reduced by 5% for each day late, up to a maximum 50% reduction.

The reduction must be noted on the itemization.

**NOTE:** It is critical because of this (and some other new provisions) that any written request prominently state within the first 250 words

of the request, that it is a request for information under Michigan's Freedom of Information Act. (We recommend that this be placed in the Subject or Re: lines.

## ***Challenging Fees (MCL 15.250A)***

### **Appeal to the Head of the Public Body**

A requestor may appeal the fees to the head of the public body if the public body provides for fee appeals in its procedures. The person appealing must identify how the fee exceeds the amount permitted.

The public body has 10 business days to:

- Waive the fee
- Reduce the fee with a written determination and certification
- Uphold the fee with a written determination and certification
- Extend the time to respond for 10 days with an explanation

### **Lawsuit to Challenge Fees**

A requestor may sue for excessive fees if:

- The public body doesn't provide for appeals
- The public body failed to respond
- The public body issued its determination

The suit must be brought within 45 days after receiving notice of the fee or a determination of an appeal.

The public body is not required to fulfill the request until the court resolves the fee dispute.

The burden is on the public body to establish that the required fee complies with its procedures and guidelines.

If the requestor prevails by receiving a reduction of 50% or more, the court may award all or a portion of attorney fees and costs.

If the public body acts arbitrarily and capriciously with respect to the fee, the court shall fine the public body \$500 to be paid to the state treasury and may fine \$500 to be paid to the requestor.

## **PUBLIC BODY PROCEDURES AND GUIDELINES (MCL 14.234(4).)**

- Public body must establish procedures and guidelines
- Public body shall create a written public summary of the specific procedures
- If the public body directly or indirectly has an official internet presence, it must post the procedures and guidelines to the website.
- Public body must provide copies of the procedures and guidelines (or the website link) in response to a FOIA request.
- Public body must have a standard fee itemization form.

## **PUBLIC RECORDS AVAILABLE ON THE PUBLIC BODY'S WEBSITE (MCL 15.234(5).)**

- Any public records available on the website are exempt from charges for separating exempt from non-exempt.
- Public body must notify requestor of availability on website, and, in written response, include website address.
- Public body must separate documents available on website from those that are not.
- Public body must notify requestor of additional charge to receive copies of records available on website.
- If the public body provides requestor the website address, and requestor requires another form, the public body shall provide, but may charge a fringe benefit multiplier exceeding 50% but may not exceed the actual costs.

## **DEPOSITS** (MCL 15.234(8) and (11), (12).)

- May require if half of estimated charges if charges exceed \$50
- Must include detailed itemization
- Must also give a good faith estimate regarding time it will provide records
- Under certain circumstances, the public body can require a deposit of 100% of the estimated charges where the requestor previously failed to pay in full the charges for a prior FOIA request

**NOTE:** This new 100% deposit requirement means, as a practical matter, that it is critical that FOIA requests contain language requesting that the seeker of the information be notified if the fee will exceed a certain amount so that appropriate steps can be taken.

## **MISCELLANEOUS**

Public body may provide information without a written request. If the request is verbal, and the information is available on the website, public body shall inform the requestor. (MCL 15.234(6) and (7).)

Public body's time to respond may be affected if the request goes into its Spam or Junk folder. MCL 15.235(1).

All lawsuits are either brought in the Court of Claims (if against the State) or in the Circuit Court where the public body is located. MCL 15.240.

If the public body arbitrarily or capriciously refused or delayed in disclosing information, the Court shall order the public body to pay \$1,000 to the State Treasury, and \$1,000 to the requestor.

Another new provision states that if the public body willfully and intentionally fails to comply with FOIA, the court shall order to pay an additional of fine of at least \$2,500 and not more than \$7,500 to be paid to the state treasury.



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## **The MPA Legal Hotline:**

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