



FOIA 101: A PRIMER

Getting the most out of your
FOIA requests

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participate in the democratic process.”

Public Bodies

- Created or primarily funded by state or local unit of government
- State legislative branch agency, board, commission, or council*
- State executive branch officers* and employees
- State executive branch entities
- Local units of government and their constituent entities
 - New “office” rule – “Office of” counts
 - *Bisio v. City of the Village of Clarkston*, 506 Mich. 37 (2020)
 - Old “agent” rule – agents don’t count
 - *Hoffman v. Bay City Sch. Dist.*, 137 Mich. App. 333 (1984)

Public Records

- Writing*
 - Letters
 - Words
 - Pictures
 - Sounds
 - Symbols
- Prepared, owned, used, possessed by, or retained by a public body
- In the performance of an official function
- From the time it was created*



What about Personal Devices?



- In *Progress Michigan v. Palmer*, a FOIA request was sent to the Wayne County Board of Canvassers and two specific individuals on the Board, Monica Palmer and William Hartmann dealing with the 2020 election seeking communications between the Board and “anyone associated with the Michigan Republican Party and its local parties, the Republican National Committee, or Trump for President...”
- The response: none of the Board members received a Wayne County email account or County cell phone therefore there were no records existed
- The Board noted that it passed along the FOIA request to individual members
- The Court concluded that the defendants ***must have used personal devices***, services, and accounts while performing official business of the Board and that any ***such communications would be responsive*** to a FOIA request.

Can I FOIA Private Social Media Accounts?

- On December 16, 2021, the Court of Appeals in *Blackwell v. City of Livonia* addressed the right to access communications sent to the **private social media account** of a mayor
- The Court ruled that communications on the mayor's private Facebook account **were not prepared, owned, used, in the possession of, or retained by the public body** and therefore were not public records
- Even though the mayor, in a personal account, may have posted information of interest, including articles about the city's efforts to abate COVID-19, the mayor is not the "office of the mayor" and not within the definition requiring disclosure



Public Record – Trouble in Oakland County

Courts have ruled that the people of Michigan are entitled to information regarding the affairs of government and the official acts of **public officials and employees**. But how far does the term “employees” really go?

- In *Litkouhi v. Rochester Community School District*, a parent sought copies of various materials used to teach a class and only received a syllabus in a FOIA request.
- The District’s position: teachers are not members of a “public body” for the purposes of FOIA.
- The Circuit Court noted that the definition of public body includes employees only in the first part of the definition: “a state officer, employee, agency . . . or other body in the executive branch.”
- In contrast, employees were not present in the reference to schools (“a county, city, township, village, intercounty, intercity, or regional governing body, council, school district special district ...”).



FOIA RESPONSES AND EXEMPTIONS

No Blanket Exemptions

Evening News Ass'n v. City of Troy, 417 Mich. 481 (1983)

Takeaway: The Supreme Court imposed a “**give details**” rule for the law enforcement exemption.

- The burden is on the public body to prove the exemption applies
- Exemptions are interpreted narrowly
- Details describing the matters withheld must be provided



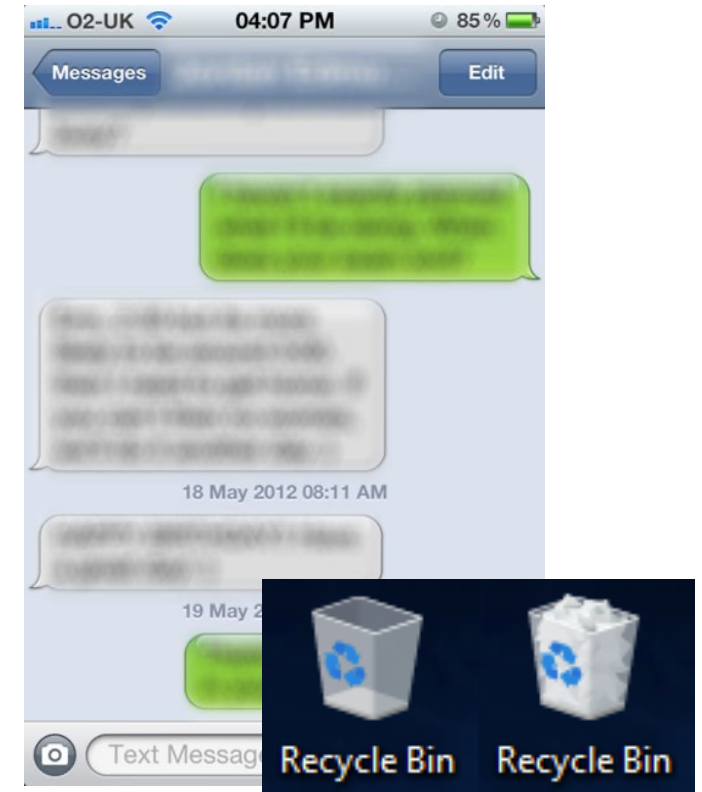
No Blanket Exemptions

Does *City of Troy* Apply to Other Exemptions?

- *Metcalf v. Grand Ledge Pub. Schs.* (unpublished)
- A public body must present sufficient evidence to invoke an exemption.
 - Cannot just simply invoke an exemption
 - Must explain the basis under the act or statute for the portion that is exempt from disclosure
- Courts are taking the duty to justify much more seriously
- This can breathe life into administrative appeals
- This can streamline FOIA litigation and reduce the cost to sue

More on FOIA Responses –Lessons from *Metcalf*

1. A public body must provide the records after the requesting party provides the good-faith deposit.
2. A request for “any texts/emails (saved and deleted)” is not too broad.
3. As a general matter union documents are not those relating to a public body.



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Exemption A Privacy Exemption

- Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.



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Blackwell v. University of Michigan

- In *Blackwell v. Univ. of Michigan Regents*, plaintiff sought a copy of an anonymous incident report alleging that then-President engaged in a sexual affair with a subordinate.
- The university's FOIA office granted plaintiff's request, ***in part***, and provided a copy of the anonymous complaint with the ***name of the subordinate employee removed*** due to FOIA's privacy exemption.
- Plaintiff sued, arguing that the employee's name was not information of a personal nature, and that disclosure of the employee's name would not constitute a clearly unwarranted invasion of the employee's privacy.



Blackwell cont'd

FOIA's privacy exemption has two prongs:

- The information must be of a ***personal nature***.
- The public disclosure of that information would constitute a ***clearly unwarranted invasion*** of an individual's privacy.

Here, the name would provide “intimate, embarrassing, private, or confidential” details about that individual and was information of a personal nature.

The Court found that the allegations in the anonymous complaint did not pertain to the conduct of the subordinate employee in her governmental role, but rather, to the ***conduct of the former President***.

The Court rejected that the public had an interest in the scandal because ***plaintiff did not explain*** what the ***subordinate employee*** is accountable for.

Privacy: Now What?

- When preparing a FOIA request that seeks the names of public individuals involved, you should be able to demonstrate how disclosure of a person's name relates to the individual's role as a public employee or representative.
- Merely seeking names of individuals involved generally may be met with redactions or pushback based upon the privacy exemption.



Exemption B

Law Enforcement Exemption

- “Law enforcement proceedings” are any ongoing investigation into illegal acts that could possibly result in civil or criminal action
- *Ruggiero v. Shiawasse Co. Sheriff’s Office*, 2022 MI App-U 359748-39
 - Affidavit supplied
 - Disclosure would chill cooperation from witnesses
 - The target deputy had previously destroyed evidence in a civil case, and the affiant supplied a spoliation sanctions order as proof
 - Concern that tipping off the target would cause her to hide or destroy evidence if she learned of the investigation before it could be completed.
 - Later supplied counter-affidavit from the target deputy that she was already aware of the investigation did not invalidate the earlier legitimate concern

Exemption D

Records Exempted by Another Statute

- Records or information specifically described and exempted from disclosure by **statute**.
- Regulations are not statutes
 - *ACLU v. Calhoun Co. Sheriff's Office*, 509 Mich. 1 (2002)
 - Records sought related to detention of U.S. citizen under intergovernmental service agreement between ICE and jail
 - Sheriff asserted Exemption D based on 8 CFR 236.6
- If it's not passed by the Legislature, it's not a statute

Exemption M Frank Communications

- Must be a communication within or between public bodies that is
 - Advisory in nature
 - About more than pure facts
 - Preliminary to a final agency determination of policy or action
- The public interest in encouraging frank communication must clearly outweigh the public interest in disclosure “in the particular instance”
 - *Herald Co., Inc. v. Ann Arbor Pub. Schs.*, 224 Mich. App. 266 (1997)
- Does not automatically cover settlement communications
 - *Michigan Rising Action v. Sec’y of State*, 2022 MI App-U 359355-42

Exemption N

Law Enforcement Codes and Deployment Plans

- Exempt if disclosure would prejudice a public body's ability to protect the public safety
- “Deployment of law enforcement personnel” means sending LEOs to address particularized threats or situations
 - *Hjerstedt v. City of Sault Ste. Marie*, – Mich. App. – (Feb. 21, 2023)
 - Responding to the scene of an active shooter
 - Responding to the scene of a vehicle crash
 - Responding to civil unrest in a community
- Public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.



PRACTICAL TIPS

Avoiding FOIA's Four-Letter “F” Word

- No publicly available policy, no fees. MCL 15.234(1).
- Remind them fees are optional. MCL 15.234(1) (“may charge”)
- Ask for a waiver: “primarily benefiting the general public.” MCL 15.234(2)
- Specify electronic production or inspect records
- Scrutinize labor and cost estimates
- Discount rights
- Scrutinize deposit requests
- Fee appeals

Fee Considerations

- Reduce, Reuse, Recycle: No charge for redaction if the public body knows it previously redacted & still has the redacted document
- Online Freebies: Cannot charge for records available for free on website unless you insist after being told
- Look Before Buying: Right to inspect different from the right to copy (inspection = no fees, less fees)
- Deposits: Fee deposits only if the fee is estimated to exceed \$50, and then only 50% of the estimated fee (unless you were a deadbeat within the last year)

Work the Bureaucracy

- First rule of government spending:
“Why have one, when you can have two at twice the price?”
 - County governments often implement state requirements and have reporting requirements.
 - Same for local governments, both as to counties and the state
- Check DTMB record retention schedules for all public bodies for which agency should have what records for how long

<https://www.michigan.gov/dtmb/services/recordsmanagement/schedules>

Access Outside of FOIA

- State Constitution
 - All financial records accountings, audit reports and other records of public moneys are open to inspection. Const (1963), art. 9, sec. 23
 - A statement of all revenues and expenditures of public moneys shall be published and distributed annually. *Id.*
- Statutes
 - Michigan Legal Defense Fund Act, 2008 PA 288
- Judiciary
 - MCR 8.119: Specifies which records in the case file are public.
 - AO 1997-10: How to obtain records about court administrative matters.

Walking Through Some Requests

FOIA Coordinator

_____ Police Department

Address

Re: Freedom of Information Act Request

Dear Sir/Madam:

This is a request under the Michigan Freedom of Information Act (MCLA § 15.231 et. seq.). I write to request all records, relating to any arrests, charges, prosecutions or complaints filed against [name], who has resided at: [fill in any addresses you know] from January 1, 2017 to the present.

I will pay reasonable costs for locating and reproducing the requested material. Please contact me at [phone number] if the costs for the requested material will exceed \$25.00.

You have 5 business days to respond to this request by either providing copies of the records or a detailed written explanation for any denial, including a reference to the specific statutory exemption(s) upon which you rely and the category of documents covered by the exemption. In addition, to the extent that you claim some portions of the responsive materials are exempt from disclosure, please provide all segregable non-exempt portions. Please call me at the above number if you should have any questions.

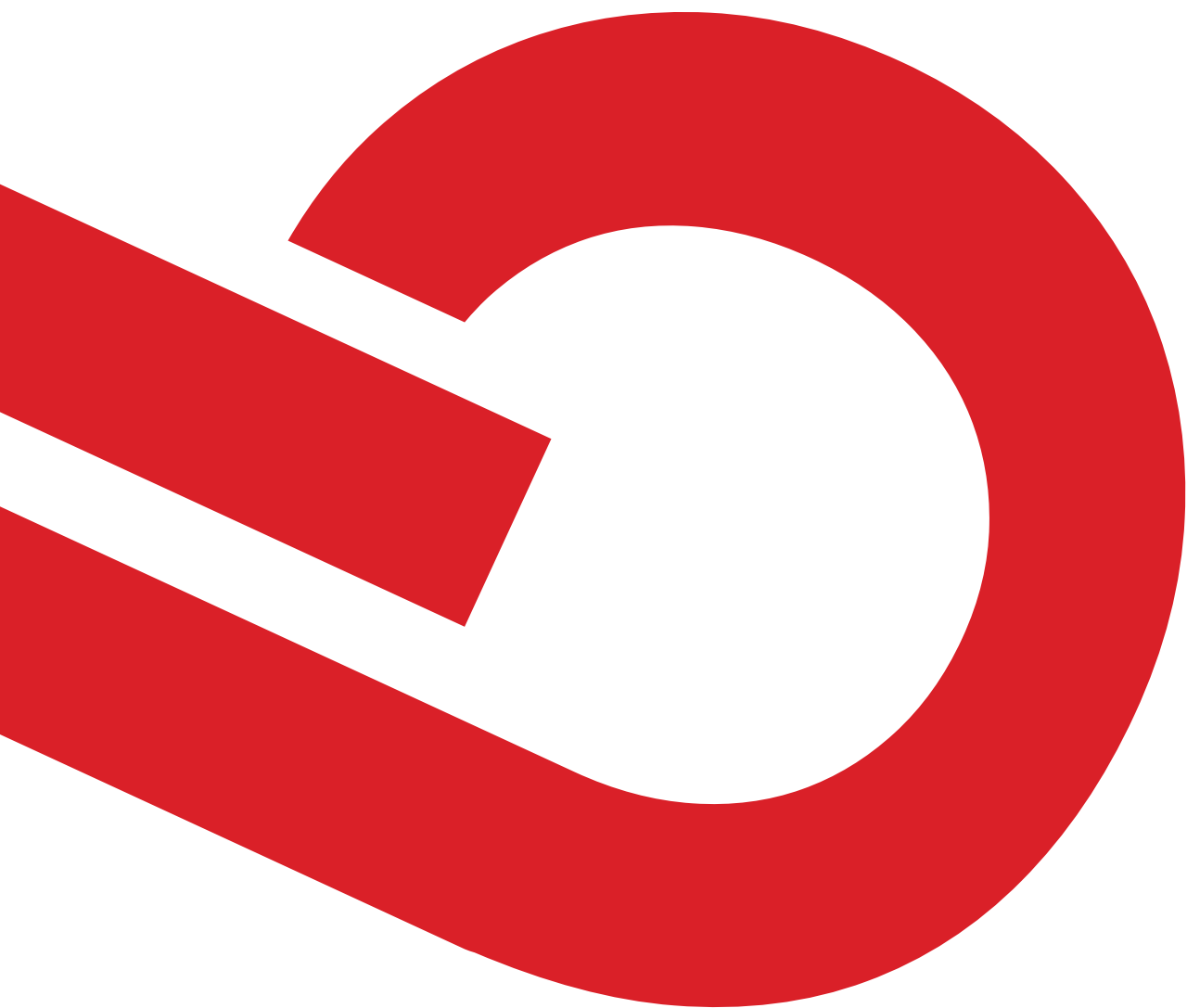
Some other examples

This is a request under the Michigan Freedom of Information Act (MCLA § 15.231 et. seq.). I write to request all communications between Suzy Clerk and Johnny Commissioner beginning January 1, 2018 through January 5, 2018, relating to the January 8, 2018 board meeting.

This is a request under the Michigan Freedom of Information Act (MCLA § 15.231 et. seq.). I write to request the monthly progress reports made by the Municipal Lighting Authority of Robin City to the Robin City body known as the City Council for the last 3 months.



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