

Big Changes Coming Soon to Michigan's Freedom of Information Act

June 26, 2015

Municipal Matters Newsletter - Spring/Summer 2015 Edition

At the close of its 2014 session, the Michigan Legislature passed significant amendments to the Freedom of Information Act (FOIA). These amendments are scheduled to take effect on July 1.

The principle goal of the amendments was to put in place regulations requiring public bodies to make the FOIA process more transparent and to control the fees public bodies charge in responding to FOIA requests. In particular, public bodies must establish specific written procedures and guidelines for FOIA requests, including a separate written summary informing the public on how to submit FOIA requests, deposit requirements, fee calculations, and avenues for challenging and appealing the public body's denial of a request.

The following is a summary of the changes every public body must be aware of and prepare for prior to July 1.

Procedures and Guidelines

Every public body must establish procedures and guidelines to implement the act, including a written public summary that addresses how to submit written requests to the public body and explains how to understand a public body's written responses, deposit requirements, fee calculations and avenues for challenge and appeal. The written public summary must be in plain English so that it is easily understood by the general public.

If the public body administers or maintains an Internet presence, then it is also required to post the procedures, guidelines and written summary on its website and to provide free copies of the procedures, guidelines and written summary upon request. In addition, the procedures, guidelines and written summary must be included with all FOIA responses, or a website link to the documents.

The procedures and guidelines must include a standard form to detail the itemization of any fee the public body estimates or charges under FOIA. The itemization must clearly list and explain each of the six fee components authorized under the new legislation, which will be discussed in more detail below, which include several categories of labor costs associated with producing public records, in paper or electronic form; costs of non-paper physical media used to produce public records (i.e., DVDs, flash drives); copying costs and postage costs.

BIG CHANGES COMING SOON TO MICHIGAN'S FREEDOM OF INFORMATION ACT Cont.

If a public body neglects to establish procedures and guidelines or a standard form detailing fees or fails to follow the procedures and guidelines, it CANNOT charge a fee or deposit for responding to a FOIA request.

FOIA Responses

While the timelines to respond to a written request have stayed the same, under the new amendments, if a public body fails to respond on a timely basis, it must reduce the allowable fee by five percent per day for each day the public body is late in responding if: 1) the late response was willful and intentional or 2) the request was a clearly designated FOIA request. Any charge reduction required must be fully noted on the detailed itemization of fees.

Electronic Records

The timelines for receipt of a written request by facsimile, electronic mail or other electronic transmission remain the same, that being one business day after the electronic transmission is made. However, under the amendments, if a written request is sent by electronic mail and delivered to the public body's spam or junk-mail folder, the request is not received until one day after the public body first becomes aware of the written request. A public body is required to note in its records both the time the request is delivered to its spam or junk mail folder and the time it first becomes aware of the request.

A FOIA requestor may require the public body to provide records on non-paper physical media, by email or otherwise electronically provided, as long as the public body has the technological capability necessary to provide records on the particular media stipulated by the requestor.

If the public records are available on the public body's website, the public body shall inform the requestor in its written response that all or a portion of the requested information is available on its website and to the extent practicable, include a specific web page address where the requested information is available.

If the requestor seeks public records in another format, paper or otherwise, the public body must provide the records in the format specified and can then charge accordingly. A public body may not charge for records provided in response to a FOIA request if the records were otherwise available on the public body's website.

If the public body receives a verbal request for information, it shall inform the requestor the information is available on the public body's website.

Fees

Under the new amendments, a public body may still charge for labor costs when (1) searching for, locating and examining the records requested (2) the labor costs associated with duplication and publication of the requested records, and (3) labor costs associated with separating and deleting exempt information from nonexempt. However, the amendments provide more specificity and detail regarding what labor costs may be charged.

Labor costs for (1) and (3) listed above must be charged in increments of 15 minutes, with all partial time rounded down. Labor costs for (2) may be estimated and charged in time increments of the public body's choosing, but again, all partial time increments must be rounded down.

Labor fees must be itemized on the fee itemization form and demonstrate the hourly wage charged, the number of hours and the percent added (not to exceed 50 percent of the labor charge) to cover the cost of fringe benefits. No overtime may be charged unless the requester specifically agrees to pay for overtime charges, and it is clearly noted on the detailed itemization.

Public bodies under the new amendments may now charge for contractual labor services required to perform separation and deletion of exempt information from nonexempt information, if the public body does not employ a person capable of such activity. The name of the contracted person or firm must be clearly noted on the detailed itemization. Also, the total labor costs may not exceed six times the state minimum hourly wage rate for such contractual services.

In addition, if the public body has previously redacted the public record in question and the redacted record is still in the public body's possession, the public body may not charge for labor associated with redaction.

A public body may not charge more than 10 cents per sheet for paper copies of public records and must utilize the most economical means for making copies, including using double-sided printing, if such copying service is available and results in a savings. Mailing must be done in the most economic manner. Expedited shipping or insurance charges may only be charged if the requester agrees. The public body may charge for postal delivery confirmation if the method is the least expensive available.

Fee Waivers

The amendments expand the class of people entitled to fee waivers and provide further criteria for determining whether an individual is entitled to a fee waiver.

Consistent with the existing act, the first \$20 of any fee must be waived for indigent people. Under the amendments, an indigent is entitled to this waiver if the individual submits an affidavit specifying that the individual is indigent and receiving some type of public assistance, or otherwise demonstrates their

BIG CHANGES COMING SOON TO MICHIGAN'S FREEDOM OF INFORMATION ACT Cont.

inability to pay. Even if the indigent can demonstrate one of these two requirements, the requester is ineligible for a fee waiver if he/she have received a fee waiver twice in the same calendar year or the individual is requesting information on behalf of someone paying him/her to do so.

In addition, the first \$20 of any fee must also be waived for a very limited class of nonprofit organizations. These include only nonprofit corporations that are either designated by the state to carry out activities under Subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 or the Protection and Advocacy for Individuals with Mental Illness Act. Even if the nonprofit corporations are so designated, the request must meet certain additional requirements.

Deposits

Consistent with the existing act, a good faith deposit of one-half of the total estimated fee may be required if the entire fee estimate exceeds \$50. However, the request for a deposit must now include: (1) a detailed itemization form listing and explaining the allowable charges and (2) a "best efforts estimate" of how long it will take the public body to provide the records.

A public body may, under certain limited circumstances, require a 100 percent deposit before processing a request from individuals who have not paid the public body for public records acquired pursuant to a previous FOIA request.

Appeals

The amendments now allow 10 business days to respond to a written appeal, rather than 10 days.

Venue for an action against a public body is only proper in the circuit court in which the public record or an office where the public body is located, rather than in the requester's venue.

If the court determines the public body has arbitrarily and capriciously violated the act, a new \$1,000 civil fine must be imposed against the public body and deposited in the state general fund. In addition, the mandatory punitive damages are increased from \$500 to \$1,000.

Also added with the new amendments is a process for appealing the fee charged by a public body. The procedure allows an "excessive fee" to be appealed either to the head of the public body or in court. The appeal to the head of the public body must be in writing and identify how the fee charged exceeds the amount permitted under FOIA. There is no timeline in the amendments within which the appeal must be filed with the head of the public body and it is, therefore, recommended that an appeal deadline be included with the public body's procedures and guidelines.

The head of a public body must respond within 10 business days by waiving the fee, extending the time to respond for up to 10 more business days, or either reducing or upholding the fee. If the fee is reduced or upheld, the head of the public body must specifically detail how the fee complies with FOIA

BIG CHANGES COMING SOON TO MICHIGAN'S FREEDOM OF INFORMATION ACT Cont.

and certify that the statements are accurate and the fee complies with FOIA.

A person may also file a civil action in the circuit court for the county where the public record or an office of the public body is located, but only if one of the following applies: (1) the public body does not provide for fee appeals in its procedures and guidelines, (2) the head of the public body failed to respond to a written appeal, or (3) the head of the public body issued a determination to a written appeal. An action in circuit court must be filed with 45 days after receiving the notice of the required fee or within 45 days from the determination by the head of the public body.

The public body has the burden to show that the fee is not excessive and complies with its procedures and guidelines. If the court finds the fee was excessive, the following remedies are provided:

1. The fee shall be reduced to the amount permitted under FOIA.
2. If the fee is reduced by 50 percent or more, the court may award attorneys' fee and costs.
3. If the court finds that the public body arbitrarily and capriciously charged an excessive fee, assess a civil fine of \$500 to be paid to the state general fund and may also assess punitive damages of \$500.

In addition to all of the other sanctions, if a court determines that a public body willfully and intentionally failed to comply with the act or otherwise acted in bad faith, it must impose a civil fine of \$2,500 to \$7,500 per occurrence. In determining the fine, the court shall consider the budget of the public body and whether the public body has previously been assessed penalties for violations of the act. The civil fine shall be deposited in the general fund.

The Municipal Matters Newsletter is distributed by the firm of Plunkett Cooney. Any questions or comments concerning the matters reported may be addressed to Audrey J. Forbush or any other members of the practice group. The brevity of this newsletter prevents comprehensive treatment of all legal issues, and the information contained herein should not be taken as legal advice. Advice for specific matters should be sought directly from legal counsel. Copyright© 2015. All rights reserved PLUNKETT COONEY, P.C.