

1-8-09

To City FOIA Coordinator, M Looman

From John W. Breen

CC Mayor, City Council

Subject response to City letter of 12-23-08 RE 12-11-08 FOIA's: 12-11-08 A, 12-11-08 B, 12-11-08 C, 12-11-08 D, 12-11-08 E, 12-11-08 F and Appeal of the Denials to each of the aforementioned 6 FOIA requests.

Executive Summary

The city's 6-page 12-23-08 response to 12-11-08 FOIA requests is a litany of unfounded assertions and ill-founded excuses. City Manager Harrier again illuminates the city's apparent inability, unwillingness, or both to provide basic public information. Harrier's arguments not to provide the requested information in a timely manner and at a rational cost are specious.

The city asserts the inadequacy of the city's staff. If city staff is actually inadequate to perform public services, including providing public information in accordance with the law, this is City Manager Harrier's and Council's fault and problem. The city cites records filing procedures that functionally preclude ready public access. If the city lacks proper and reasonable records keeping procedures such that State FOIA mandates can't be timely and reasonably followed, this is Harrier's problem to abate.

Whatever the laundry list of excuses the city wishes to provide, it's not that the city can't afford adequate staff and or staff training to implement legally and rationally compliant public access to public records. According to the City's self-described A+ audit, the city has over \$880,000 in the bank in unencumbered general fund cash and during the past fiscal year the general fund cash balance grew over \$116,000. The city's recent spending spree for trucks, buildings, and various cost overruns further testifies to unencumbered city funds abundance.

Saugatuck has no right to effectively deny public records access through inappropriate records keeping that produces ludicrous costs or unnecessary complexity for basic public records retrieval and or inspection. Saugatuck has no right to shift the consequences of its shortcomings to individual members of the public by making irrational monetary demands for access to public records.

If the city's filing system has commingled FOIA exempt information with what are public records and subject to public inspection, then it is a situation that the city must forthwith abate. Demanding \$50,000 for records stipulated by the city's code and or state and federal law to be maintained, kept as public records and available to the public is outrageous.

Both the public's and public officials' need and right to be able to readily ascertain the methods and results of the enforcement of the city's building and zoning codes are basic and essential. Building and zoning code violation identification and enforcement have a significant impact on the comparative desirability and market value of property within a community. The safety and durability of structures as well as the protection of property rights are fundamental reasons why building and zoning codes and their equitable, timely, and effective enforcement are mandated.

Discussion

The 12-11 FOIA requests mirror 11-30-08 FOIA requests that the city previously rejected. The city rejected the 11-30-08 requests by stating the requests failed to identify specific parcels. Nothing was mentioned about not treating the 11-30-08 requests separately as the city now wishes to do regarding the 12-11 FOIA's. The city responded to each 11-30 request regardless that they were identified in the same manner, sent in the same manner and relative time frame, as were the 12-11-08 requests.

The city's response to each of the 11-30 FOIA's indicated that the requested data was filed only by parcel number and that to provide the requested information it would be necessary to identify the parcel numbers. Accordingly, the 12-11-08 FOIA requests provided a list of the parcels for which the data was requested.

Now Saugatuck complains the 12-11 FOIA's identify the individual parcels. The city alleges fault because the 12-11-08 FOIA requests utilized a common parcel identification list. The city's preference would have involved submitting the same 20 page list many times thus causing the city to unnecessarily print and maintain hundreds of pages in its files.

What is it about these FOIA requests the city finds so onerous? Are the documents sought unusual, obscure, or not to be kept or found in the ordinary conduct of the public's business? Both the 11-30 and the 12-11 requests asked for what was required by the city's own code to be public records. Specifically,

"Section 154.171 (C) of the Zoning Ordinance states that, "the Zoning Administrator shall be empowered to make inspections of buildings or premises in order to properly carry out the enforcement of this Chapter." Furthermore, subsection (E) states that "the Zoning Administrator shall keep a record of every written and/or identifiable complaint of a violation of any of the provisions of this chapter, and the action taken consequent to each such complaint, which records shall be public records."

The FOIA requests asked for data required by city code to be public information to answer 4 basic questions that the public is entitled to know.

1. How many Stop Work orders has the city issued since 1992 and against what properties?
2. How many zoning complaints has the city received since 1992 and against what properties?
3. What actions/responses did the city take/receive regarding each zoning/stop work order complaint?
4. How many court cases has the city filed and against whom for zoning violations since 1992?

Answers to these 4 questions enables a determination of to what extent building and or zoning code violations/complaints are and have been a problem in the city of Saugatuck and how the city is and has responded to abate the violations such that the codes are effectively enforced. This knowledge affords the ability to determine to what extent property located in Saugatuck is and has been properly protected.

Readily accessible and functionally organized baseline code compliance and enforcement data is also required for proper city management. This includes tracking the incidence of zoning complaints and / or building violations and the time line/ resolution / incidence of enforcement procedures such as lawsuits. This baseline data would be no less needed than the incidence of crime by type and the solve rate or the number of fires by date, type, and location. Is all this information as well only in the each of 1109 parcel files?

How would the city/public quantifiably know a builder's compliance record when building code violations and notices are buried and available only, as the city claims, by looking through 1109 parcel record files and then searching by date and builder name? What about owners who own many properties? How does the city find what owners comply vs. those who don't and involving how many properties?

Since his hiring, City Manager Harrier has been the Zoning Administrator (ZA). By City Code and Charter it's Harrier's job to assure oversight and proper records keeping practices for the ZA's duties and for all city functions and contracted services.

Harrier's duties include monitoring the work provided by the both the zoning and the building inspection service firms that together charge Saugatuck taxpayers \$50+K per year. To be at all meaningful, Harrier's oversight should include regular activity reports from contracted city service providers. If not, how could any effective monitoring or oversight even take place?

Both the 11-30 & the 12-11 FOIA requests asked for information, which in the course of standard good government practices, should be readily available. The records of the zoning services provider and the building code service providers should also identify the information sought. The city's code says the records are to be kept and are public records. Nevertheless, the city states that to obtain this information will require in excess of \$50,000 and an unknown timeframe because every parcel file will have to be examined in a complex manner and over an extended and unknown time period.

The city's excuses stretch credulity to the limit. Not long ago the city spent considerable public funds to organize public records. Even if the city still has, as it self-describes functionally defective filing procedures, inadequate staffing or both Saugatuck is not excused from its legal and management obligations. The city's filing and management practices operate to disenfranchise both the public and other city officials.

If every time each of the 1109 parcel files must be examined, how would a responsible ZA, a zoning service firm, or a building inspection service firm effectively do their respective job? For example, how could past complaints and code violations be practically located / tracked for follow-up and resolution or research be conducted to see how past similar situations have been handled? How would anyone know or determine what past situations had occurred and were handled?

How is the public to know that code enforcement is occurring and to what extent it is fairly and or effectively administrated? How is the public to know when or if complaints and or violations are overlooked or ignored?

Under the city's admitted records management practice, proper, consistent, and effective code enforcement is improbable, if not impossible. Public access to public records is rendered a practical impossibility.

No one would be able to ascertain the status of complaints without first knowing that a complaint or violation had occurred except by going through 1109 parcel files. But, proper, consistent and effective zoning and building code enforcement is exactly what every Saugatuck citizen and property owner is entitled to and should be able to determine that it is and has been delivered. The same holds true for those elected and appointed Saugatuck officials charged with various oversight responsibilities.

If all complaints, violations, and their direct associated records can't be readily found, how does anyone ascertain what type of enforcement is occurring, at what cost, and what effectiveness? A few examples illustrate the point.

A zoning complaint arrives 1-1-09. According to the city, it is filed in the parcel numbered file associated with the property that is the subject of the complaint. How does the ZA later find the complaint? How does the ZA even know a complaint was received and filed in the first place? What happens if several complaints are made within a short time frame and are filed? How are they later retrieved?

A complaint is received 1-1-09 involving several properties. The ZA investigates and sends a letter to some, but not every owner whose property has been the subject of multi property complaint and actions are taken in

some of the situations and not for others. Where and how are such complaints filed? Per the city, only the parcel files has this information.

In 2010 a need arises to examine and compile just the prior year's complaints to prepare a report or respond to a citizen, a ZBA, or Planning Commission request. How is this to be accomplished? Because the city says all this information is scattered in one or more of 1109 files, at what cost and time must be expended to locate just one or two year's records?

And must, as the city asserts, the city manager or say the city attorney first review all the 1109 parcel files to see what may or may not be seen by the building services or zoning services firm, or other elected or appointed city officials? What about a clerk that the ZA asks to retrieve something in a file? What about members of the ZBA, Planning Commission, or the firms providing zoning and building services? Must the city manager first examine all the file documents as the city asserts? And is even the city manager legally able to see certain information – social security numbers, copies of checks with account numbers?

The ZA is fired or resigns. The building services firm or the assistant zoning administrator firm is replaced. How do any of the successors find the status of existing complaints or even know what complaints have been filed and when? Must successors examine all 1109 parcel files, but only after the city manager/city attorney has done so first? And, do they wait some unspecified time while this occurs?

If the city's parcel filing system haphazardly or purposefully contains legally privileged information, such that not even council members, a city clerk, external city contracted service personnel or the public would have the right to examine the files, the situation must be abated. Information such as social security numbers are no more accessible to clerks, council members or external contracted personnel than to the general public.

If the public can't readily examine what are to be PUBLIC files and PUBLIC records, then it's the city's responsibility to make immediate corrections by removing non-public information from what are supposed to be public accessible files. In no event does the city have a right to outrageously charge the public for what are the city's filing process shortcomings.

By stipulating a \$50,000 cost, the city is effectively denying the public the right to examine and to secure copies of records required by the city's code to be kept as public records- even those specially identified by City Code Section 154.171 (C).

The city further asserts the requested documents would have to be vetted for FOIA exemptions. According to the city's Code, **Section 154.171 (C)**, that there could be no FOIA exemptions for:

1. Every written and/or identifiable complaint of a violation of any of the provisions of this chapter and
2. The action taken consequent to each such complaint, which records shall be public records.

The FOIA requests for the zoning complaints the city has received, and the actions (meaning of course notices sent concerning complaints, responses thereto and any filed legal actions) are for documents the city admits in its code are public records.

Regarding other information requested by the FOIA's, the city well knows that city filed court complaints are by definition public records. There is no FOIA exemption for building or zoning code violations sent by the city/city agents or for correspondence the city/city agents receives from those who receive such notices and respond.

Notwithstanding the law in this and other situations, Mr. Harrier, backed by the majority of Council, has adopted obscurantism as city policy – the practice of withholding information from the public. The city likes to “game” the FOIA system with delays, specious assertions or excessive monetary demands. There is at least a partial answer to this latest example of the city’s obscurantism policy. Michigan FOIA law, **15.233** Sec. 3 subsection 3 provides,

“(3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its Public records during the usual business hours.”

In accordance then with the city’s 12-23-08 letter modifications are offered to the 12-11-08 FOIA requests. These modifications are made in the spirit of addressing the city apparent nonfunctioning records keeping and self-inflicted inadequate staffing levels.

Modifications to The 12-11-08 FOIA Requests.

These modification are offered and based upon the following:

Alternative A. Within 30 days from January 12, 2009, the city will remove from the parcel files for Property Class 401 the information deemed by the city to be FOIA exempt. The city will identify the documents removed by general type, parcel number, and cite the claimed code exemption for each removed document. The city will “flag” parcel files with property Class 401 and only these files will be examined. Or,

Alternative B. Within 30 days from January 12, 2009, the city will remove from all parcel files the information deemed by the city to be FOIA exempt. The city will identify the documents removed by general type, parcel number, and cite the claimed code exemption for each removed document.

Modified FOIA requests:

1. In lieu of the requests submitted 12-11-08, the request is made to the city to make the parcel files available for inspection in accordance with Alternative A or B above for a period not to exceed a total of 80 hours and only during standard city work hours and days. The request excludes anything RE: 850 Park St.
2. Any copying and assembling of documents will be done using non-city equipment and personnel and will be limited to a total time equal to no more than 32 hours and only during standard city work hours and days.
3. The city will provide workspace to examine the parcel files and an electrical outlet.

These modifications are open for acceptance by the city until 1-20-09. In the event the city wishes to offer other ideas and concepts, this is acceptable, but as this process has already deviated from standard FOIA procedures, the city is requested to communicate its suggestions by the aforementioned date and time and by e-mail (pktasap@aol.com) or fax (614-416-0876). Regardless unless an affirmative response or specific rational suggested alternatives is received on or before 1-20-09, it will be concluded that the city’s proffer for alternatives to the original 12-11-08 requests was another delaying game.

Other issues

Each of the 12-11-08 FOIA requests was submitted as separate and distinct requests. Each was identified separately using a date/ alpha code. Each request must be separately addressed by the city and not combined as to cost to time frame. For example legal proceedings are required to be maintained by either the city clerk and or the law firm and would not require anywhere near the cost or time asserted by the city. In like fashion finding stop work orders is not a costly or time-consuming task.

The city's 12-23-08 letter is in fact a denial to each request for one or more or all of the following reasons.

1. The city did not timely respond to each request as required by law
2. The city did not treat each request separate as required by law
3. The city's response does not offer a reasonable opportunity to evaluate the cost for each of the FOIA requests because no estimated cost is provided for each of the FOIA requests.
4. The city's estimated cost is unsubstantiated and fails to offer even a breakdown of the cost
5. The city failed to honor the mandated time line to provide public information and in fact offers no time frame whatsoever for any of the information made in the separate FOIA requests to be available.

Accordingly the city is notified that this correspondence is an APPEAL of the city's denial of the lawfully submitted 12-11-08 FOIA requests.