



FOIA Policies and Procedures

rev. 12/16/09

This document supersedes any and all prior Office of the City Attorney (OCA) FOIA Policies and Procedures. It outlines the substantive and procedural safeguards to be used in responding to Freedom of Information Act (“FOIA”) requests. *See* MCL 15.231 *et seq.* The first part, Policies, outlines important substantive issues in answering FOIA’s. The second part, Procedures, outlines important procedural issues.

Policies

I. Statement of Policy: The requirements of the FOIA statute (the “Act”) apply to the OCA and provide the procedural and substantive standards to be followed by the OCA.

II. Elaboration of Policy.

A. Key Definitions.

1. Public Body: “Public body” means a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof. It also includes:

- a.** an agency, board, commission, or council in the legislative branch of the state government; or
- b.** a county, city, township, village, inter county, inter city, or regional governing body, council, school district, special district,

or municipal corporation, or a board, department, commission, council or agency thereof; or

- c. any other body which is created by state or local authority or which is primarily funded by or through state or local authority. It does not include private non-profit corporations.

- 2. **Public Record:** “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.

B. Coverage: FOIA sets requirements for the disclosure of public records by all “public bodies” in the state. All state agencies, county and other local governments, including the City of Lansing, as well as school boards, other boards, departments, commissions, councils, and public colleges and universities are covered.

C. Public Records Open to Disclosure: In general, all records except those specifically cited as exceptions are covered by the Freedom of Information Act. The records covered include minutes of open meetings, officials’ voting records, staff manuals, final orders or decisions in contested cases and the records on which they were made, and promulgated rules. Other written statements which implement or interpret laws, rules or policies, including, but not limited to, guidelines, manuals and forms with instructions, adopted or used by the agency in the discharge of its functions, are also covered.

D. Public Records Exempt From Disclosure: A public body may withhold from public disclosure certain categories of public records under FOIA consistent with limitations and requirements established by Michigan appellate courts. The following items track the numbering in the Act. *See* MCL 15.243(1)(a)-(y)

- 1. The following public records are exempt from disclosure under the Act:

- a. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- b. Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

- (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- c. A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
 - d. Records or information specifically described and exempted from disclosure by statute.
 - e. A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
 - f. Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.
 - g. Information or records subject to the attorney-client privilege.
 - h. Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
 - i. A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a

public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.

- j.** Appraisals of real property to be acquired by the public body until either of the following occurs:

 - (i)** An agreement is entered into.
 - (ii)** Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- k.** Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- l.** Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103.
- m.** Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.
- n.** Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.
- o.** Information that would reveal the exact location of archaeological sites. The department of history, arts, and libraries may promulgate rules in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

- p.** Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.
- q.** Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.
- r.** Records of a campaign committee including a committee that receives money from a state campaign fund.
- s.** Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

 - (i)** Identify or provide a means of identifying an informant.
 - (ii)** Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii)** Disclose the personal address or telephone number of active or retired law enforcement officers or agents or a special skill that they may have.
 - (iv)** Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents.
 - (v)** Disclose operational instructions for law enforcement officers or agents.
 - (vi)** Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii)** Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.
 - (viii)** Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.
 - (ix)** Disclose personnel records of law enforcement agencies.
 - (x)** Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- t.** Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department under article 15 of the

public health code, 1978 PA 368, MCL 333.16101 to 333.18838, before a complaint is issued. This subdivision does not apply to records or information pertaining to 1 or more of the following:

- (i) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.
 - (ii) The fact that an allegation was received by the department; the fact that the department did not issue a complaint for the allegation; and the fact that the allegation was dismissed.
- u. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- v. Records or information relating to a civil action in which the requesting party and the public body are parties.
- w. Information or records that would disclose the social security number of an individual.
- x. Except as otherwise provided in this subdivision, an application for the position of president of an institution of higher education established under section 4, 5, or 6 of article VIII of the state constitution of 1963, materials submitted with such an application, letters of recommendation or references concerning an applicant, and records or information relating to the process of searching for and selecting an individual for a position described in this subdivision, if the records or information could be used to identify a candidate for the position. However, after 1 or more individuals have been identified as finalists for a position described in this subdivision, this subdivision does not apply to a public record described in this subdivision, except a letter of recommendation or reference, to the extent that the public record relates to an individual identified as a finalist for the position.
- y. Records or information of measures designed to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, unless disclosure would not impair a public body's ability to protect the security or safety of persons or

property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

2. In addition, other exemptions apply for records protected by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, *see* MCL 15.243(2), and limitations on exemptions apply to information otherwise required by law to be made available to the public or to a party in a contested case under the administrative procedures act of 1969, *see* MCL 15.243(3), or otherwise in the possession of the executive office of the governor, *see* MCL 15.243(4).

E. Availability of Public Records.

1. A request must be made in writing and provided to the FOIA coordinator of the public body. A FOIA coordinator may designate another individual to act on his or her behalf to accept requests for processing.
2. A person may ask to inspect, copy or receive a copy of a public record. There are no qualifications such as residency or age that must be met in order to make a request. However, prisoners in state, county or federal correctional facilities are not entitled to make requests.
3. A person also has the right to subscribe to future issuances of public records which are created, issued or disseminated on a regular basis. A subscription is valid for up to six months, at the request of the subscriber, and is renewable.
4. The public body or agency has a responsibility to provide reasonable facilities so that persons making a request may examine and take notes from public records. The facilities must be available during the normal business hours of the public body. Finally, the public body is obligated to take appropriate steps to safeguard original public records while being reviewed.

- F. Fees for Public Records:** A public body may charge a fee for the necessary copying of a public record for inspection or providing a copy of a public record to a requestor. A public body may also charge for search, examination and review and the separation of exempt information in those instances where failure to charge a fee would result in unreasonably high costs to the public body. The fee must be limited to actual duplication, mailing and labor costs. The first \$20 of a fee must be waived for a person who is on welfare or presents facts showing inability to pay because of indigency.

G. Deadlines.

1. Requests

- a. 5 Business Days:** Not more than five business days after receiving a request, the public body must respond to a request for a public record.
- b. 10 Business Days (Extension):** The public body can notify the requester in writing and extend the time for an additional ten business days.

2. Appeals

- a. 10 Days:** Within 10 days of receiving an appeal, the City Council President must: (a) reverse the denial, (b) uphold the denial in writing, (c) reverse the denial in part and uphold the denial, in writing, in part, or (d) extend the time.
- b. 10 Business Days (Extension):** Under unusual circumstances, extend, in writing, for up to 10 business days, the period for responding, after which time the City Council President must do (a), (b), or (c). *See* MCL 15.240(2).

H. Denial of a Record: If a request for a record is denied, written notice of the denial must be provided to the requester within five business days, or within 15 business days if an extension is taken. A failure to respond at all, constitutes a denial. When a request is denied, the public body must provide the requester with a full explanation of the reasons for the denial and the requester's right to submit an appeal to the head of the public body or to seek judicial review. Notification of the right to judicial review must include notification of the right to receive attorney fees and collect damages.

I. Enforcement: A person may appeal a final decision to deny a request to the head of the public body. A person also has the right to commence an action in circuit court to compel disclosure of public records. The suit must be filed within 180 days after the public body's final decision to deny a request. The action may be brought in the county where the requester lives, the county where the requester has a principal place of business, the county where the public record is located, or a county where the public body has an office.

J. Penalties for Violation of the Act: If the circuit court finds that the public body has arbitrarily and capriciously violated the Act by refusal or delay in disclosing or providing copies of a public record, it may, in addition to any actual or compensatory damages, award punitive damages of \$500 to the person seeking the right to inspect or receive a copy of a public record.

Procedures

I. TRAINING.

- A.** Consistent with longstanding OCA practice, all FOIA Personnel shall receive continuous and comprehensive FOIA training, including written certification thereof.
- B.** The training shall include, at a minimum:
 - 1.** Preliminary training before being designated as a FOIA Coordinator or Officer, including support staff, which shall include knowledge of and proficiency with:
 - a.** The Act;
 - b.** Leading cases and AG opinions under the ACT;
 - c.** FOIA Policies and Procedures.
 - 2.** All FOIA Personnel shall receive continuing legal education and training, including:
 - a.** Annual participation in seminars focusing on FOIA, including the Institute for Continuing Legal Education (ICLE), the Michigan Municipal League (MML)/Michigan Association of Municipal Attorneys (MAMA), and other providers of such training;
 - b.** Subscription to the MML's listserv, including especially threads and updates on FOIA decisions and issues, which are then circulated to the group;
 - c.** Review and discussion of FOIA in OCA staff meetings, led by Chief Deputy City Attorney/FOIA Coordinator, including:
 - (i)** All significant incoming advance sheets, court decisions, and AG opinions on FOIA issues;
 - (ii)** Circulation such materials to all FOIA Personnel, along with analysis and application of those materials;
 - d.** Interoffice memoranda to FOIA Personnel regarding updates on FOIA issues, cases, polices, and procedures.

II. FOIA REQUEST RECEIVED.

- A.** Date stamp request when received (faxed requests do not need to be stamped, date is at top of fax copy).
- B.** As soon as possible, but not later than the day after receipt, transmit the request to coordinating assistant.
- C.** Coordinating assistant logs FOIA request on computerized log sheet:
 - 1.** “Due out” date computed (5 working days after receipt; faxed requests are logged in on the next day’s date.).
 - 2.** Print copy of updated log sheet for file.
 - 3.** Determine departments to forward request to.

III. REQUEST RECORDS FROM APPLICABLE DEPARTMENT(S).

- A.** Prepare request cover memo* to department(s).
- B.** Make copies and deliver hard/electronic copy to department where applicable records are retained.
- C.** Keep the original request and a copy of the cover memo for OCA records.

IV. TRACKING AND EXTENSION NOTICE.

- A.** Track request so that it is responded to according to the time frames established in the Act.
- B.** If the request requires a voluminous amount of records to be copied or records are being requested of several departments, it may be necessary to send a notice of extension.
- C.** The extension notice is sent out on the first “due date” and extends the period for response an additional 10 business days.

V. RECEIPT AND REVIEW OF RECORDS REQUESTED AND RESPONSE.

A. RECEIPT AND REVIEW.

- 1.** Once all documents/records are received, the assigned FOIA coordinator will review records for compliance with request and for any information which may need to be redacted due to applicable exemptions.
- 2.** When review is complete, the coordinating assistant (using the cost/copying record) will determine costs (add benefit factor, as determined by Finance Department, add postage cost, and round total to

nearest \$.50) and the assigned FOIA coordinator will prepare cover letter* to requestor.

3. Submit letter of response and copies to assigned attorney for review and signature.

B. RESPONSE: Granted or Granted in Part.

1. Confirm accuracy of copies, including redactions.
2. Once response packet is returned by attorney:
 - a. Make 2 copies of cover letter (1 to attach to request packet and 1 for billing file).
 - b. If appropriate, make copy set of material being released.
 - c. Prepare envelope for mailing.
 - d. Put response in mail no later than due date, or extended due date.

C. RESPONSE: Denied.

1. If no records are found applicable to the request, or if records applicable are exempt, prepare letter of denial.*
2. Submit letter of denial to assigned attorney.
3. Once denial letter and attached records are returned by attorney:
 - a. Make 1 copy of cover letter to attach to the packet to be retained.
 - b. Prepare envelope for mailing.
 - c. Put response in mail no later than due date, or extended due date.

VI. PROCEDURAL AND SUBSTANTIVE SAFEGUARDS PRIOR TO RESPONSE.

A. PROCEDURAL SAFEGUARDS.

1. Are all Social Security Numbers redacted?
2. Are all redactions illegible in production copy, including production of a copy of the redacted document instead of the original?

3. For law enforcement matters:
 - a. Is information properly redacted to prevent disclosure of confidential source or information? *See* Policies II.D.1.(b).
 - b. Is information properly redacted to prevent disclosure of other exempted information? *See* Policies II.D.1(s).
 - (i) Identity of informant?
 - (ii) Identity of undercover officer, agent, or plain clothes officer?
 - (iii) Personal address or telephone number of active or retired law enforcement officers or their special skills?
 - (iv) Name, address, or telephone numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents?
 - (v) Operational instructions for law enforcement officers or agents?
 - (vi) Contents of staff manuals provided for law enforcement officers or agents?
 - (vii) Danger to the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies?
 - (viii) Identity of person as a law enforcement officer, agent, or informant?
 - (ix) Personnel records of law enforcement agencies?
 - (x) Identity of residences that law enforcement agencies are requested to check in the absence of their owners or tenants?
4. For criminal prosecutions in which denial is based on pending investigation, has status of case been confirmed with ICPO?

B. SUBSTANTIVE SAFEGUARDS.

1. Have all exemptions been considered? *See* Policies II.D.1(a)-(y).
2. Where an exemption is claimed, has sufficient explanation been given?
3. For personnel matters, does response comply with Bullard-Plawicki?
4. Have privacy concerns been adequately addressed?
 - a. Has information covered by Health Insurance Portability Accountability Act of 1996 (HIPAA) been redacted?

- b.** Has information covered by the Public Health Code, 1978 PA 368, especially as codified at MCL 333.1531, been redacted?
- c.** Has information covered by the Mental Health Code, 1974 PA 258, especially as codified at MCL 330.1748, been redacted?
- d.** If not covered by HIPAA, the Public Health Code, or the Mental Health Code, has medical information been appropriately redacted, including especially a person's actual or alleged HIV status?
- e.** Have appropriate redactions been made for "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy," MCL 243(1)(a)?

VII. FINALIZATION PROCEDURES.

- A.** Mark FOIA log with date out, whether it was released or denied, and costs, if any.
- B.** File packet in monthly folder in FOIA file cabinet.
- C.** File billing sheet (copy of cover letter of released records) in FOIA receivables folder in FOIA file cabinet.

VIII. FOIA PAYMENT RECEIVED.

- A.** When a check for payment of a FOIA request is received, these are the steps that should be taken in recording and processing the payment:
 - 1.** Date stamp the cover letter and/or check.
 - 2.** Hold checks until there are 3-5 of them to process.
 - 3.** Pull the copy of the original cover letter (which serves as an invoice) from the "FOIA Receivables" file folder.
 - 4.** Mark the FOIA log with date received and ck #.
 - 5.** Copy "invoice" cover letters to attach to receipt.
 - 6.** Prepare receipts.
 - 7.** Attach copy of "invoice" letter to receipt book.
 - 8.** Prepare deposit slip.
 - 9.** Give deposit slip and checks to 2nd person to take down to Treasurer's for deposit.

10. Prepare envelopes for mailing receipts.
11. File “invoice” copies in “FOIA payments rec’d” file folder.
12. Get yellow copy of deposit slip back from 2nd person (after deposit with Treasurer) and file with other slips.

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* Forms for the FOIA log, department request sheets, release, deny or release/deny cover letters, etc. are contained in the FOIA directory of the Shared drive.