FIXING FOIA

A GUIDE TO REWRITING MICHIGAN'S FOUNDATIONAL TRANSPARENCY LAW

STEVE DELIE

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Mackinac Center for Public Policy 140 West Main Street P.O. Box 568 Midland, Michigan 48640
989-631-0900 Fax: 989-631-0964 Mackinac.org mcpp@mackinac.org

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The Mackinac Center for Public Policy

Fixing FOIA: A guide to rewriting Michigan's foundational transparency law

By Steve Delie

Midland, Michigan

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Executive Summary

Michigan's Freedom of Information Act helps citizens hold their government accountable. The law grants the public access to records, documents, correspondence and other information created or used by any public entity. It is a fundamental element of a democratic system of government, enabling voters to inform themselves about how their government is run and how their tax dollars are used. There are countless examples of Michigan citizens using FOIA to unearth corruption, save taxpayers from boondoggles and expose illegal behavior by government officials or employees.

Despite this, Michigan's FOIA law needs to be reformed so that citizens can more effectively hold their governments accountable. The current state of the law suffers from three major problems that unjustifiably limit the public's access to government records.

One problem is excessive fees. Public officials may charge fees for the cost of processing a request under FOIA. This provision of the law is meant to ensure that complying with FOIA does not become an undue financial burden on government entities. But public officials frequently charge citizens inordinate amounts of money to respond to FOIA requests.

They regularly overestimate the time and minimum costs needed to process a request, which leads to charges of thousands of dollars.[*] Ordinary citizens are often unable to afford these costs. Challenging the estimated costs in court often requires spending thousands in legal fees. The result is that many otherwise valid requests are withdrawn due to excessively high costs.

Inappropriate and lengthy delays are another common problem with FOIA. The law, in theory, requires public officials to produce records in a timely manner. In practice, however, government bodies can take months to process routine and simple FOIA requests.

FOIA enables these long delays because it requires only that public bodies respond to a request within a set period. There is no deadline, however, for when governments must produce and deliver the requested records. Instead, public bodies set their own nonbinding estimates for how long they will take to fulfill a request. This affords officials the opportunity to delay releasing time-sensitive material. If officials believed, for instance, that disclosing some records would negatively impact their agency, they could delay releasing those records until they are less relevant or useful.

The timelines self-imposed by public bodies can only be challenged when they are considered unreasonable.[†] But there are few good options: either appeal to the same public body that issued the estimate or pursue costly and lengthy litigation. Even if these appeals are successful, the records involved would still have been effectively delayed from disclosure for months or even years.

A third problem is excessive use of redactions. FOIA permits certain information contained within public records to be redacted or withheld from disclosure. Many of these redactions are well-intentioned and

* The Michigan State Police once charged the Mackinac Center almost $7 million to respond to a FOIA request. Kathy Hoekstra, "FOIA: One Word Makes a $7 Million Difference" (Mackinac Center for Public Policy, March 31, 2010), https://perma.cc/8E26-BKSE.

† For example, see "Opinion No. 7300" (Michigan Attorney General, Dec. 12, 2017), https://perma.cc/YT7U-QC2K. It should be noted, however, that whether the estimated date of production is "reasonable" is a matter of interpretation. It is only limited by a time estimate for production that "contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor."

would not be objectionable if applied properly. Unfortunately, public bodies throughout Michigan are overly broad in their use of redactions.

The result is that documents are regularly redacted or withheld to the point of rendering them useless. Excessive use of redactions makes it easier for public bodies to hide what could be very important information — such as evidence of their own malfeasance or corruption — from public view. Once again, the remedy for inappropriate redactions is either to appeal to the public body that made those redactions or to spend thousands in court.

Excessive fees, inappropriate delays and broad redactions are not the only problems preventing FOIA from providing meaningful transparency. Over the years, numerous amendments and legal interpretations have created several loopholes in the law.* Lawyers and FOIA experts can navigate these loopholes, but they make it more difficult for ordinary citizens to obtain the information they seek. This undermines the core purpose of FOIA.

The Mackinac Center comprehensively reviewed Michigan's entire FOIA statute.† Identified here are the precise amendments to FOIA that would fix the aforementioned issues and more, ensuring that Michigan citizens have better access to information about their governments. Lawmakers seeking to reform FOIA can use this review as a guide to improve the law and make the government of Michigan more accountable to its citizens.

This policy brief presents each section of Michigan's FOIA law. It offers suggested edits to the law, including the exact statutory language that would fix its current problems. Language that should be removed is stricken, and language that should be added is underlined. Explanations of the proposed changes are provided in comments at the end of each section.

* That's not counting carve outs that were intentionally part of the law, such as exempting the Legislature and the governor from FOIA.

† This study is an outgrowth of work performed by the Mackinac Center, the Michigan Coalition for Open Government, the Michigan Press Association and the American Civil Liberties Union of Michigan. The Mackinac Center thanks these groups for their significant contributions to the work that inspired this study.

Overview of proposed rewrites and reforms

The proposed changes to Michigan's FOIA law detailed in this report are numerous and significant. This report analyzes each section of the law and provides word-for-word changes that would fix shortcomings and improve FOIA's use as a tool for government transparency. A short summary of each section's changes is provided, but a full description of every change would be unwieldy.

This section categorizes and summarizes the most important proposed changes presented in this report. The amendments are grouped into eight categories and the most significant reforms for each type are explained. Amendments are categorized as relating to: 1) definitions, 2) functions, 3) fees, 4) procedures, 5) appeals, 6) fines and penalties, 7) creation of the Open Government Commission, and 8) exemptions.

Definitional amendments

The amendments to FOIA's definitions are relatively few. New definitions are provided to create and identify the proposed Open Government Commission. There are also some to facilitate greater transparency relating to police personnel files.

A noteworthy amendment is an expansion of the definitions of "public record" and "public body." If adopted, these amendments would broaden the definition of a public body to make clear that documents created and used by public employees are subject to FOIA, an issue recently addressed in Litkouhi vs. Rochester Public Schools.* The proposed amendments also alter the definition of public record to include the records of a public body's agents. Finally, a change to the definition of public body would subject both the governor and Legislature to FOIA.

Functional amendments

The second category of amendments is designed to address the basic way FOIA functions. This includes requiring public bodies to maintain a log of all FOIA requests sent to them within the last year, to post online a FOIA coordinator's contact information and to automatically publish online a year's worth of the most recent requests and responses.

These amendments also eliminate language that too many public bodies abuse to avoid responding to a FOIA request. The original purpose of this language was to prevent public bodies from being forced to compile information from multiple sources and create a new record to fulfill a request. But this provision has been used to argue that governments need not gather multiple records at all. The amended language clarifies this requirement and closes that loophole.

Apart from these changes, the remaining amendments are primarily ministerial. The changes establish electronic production of records as the default method of production, while still giving requestors the option to choose alternative production. Another noteworthy amendment makes clear that the Senate and House FOIA coordinators are appointed by the leadership of each body.

* For more information about this case, see: "Mackinac Center Sues Rochester Community Schools for Failing to Follow FOIA law" (Mackinac Center for Public Policy, 2023), https://www.mackinac.org/RochesterFOIA.

Fee amendments

Significant changes have been made to the process for charging FOIA fees. A key one says that a public body may only charge a requestor for the time spent redacting items that are required to be exempted, such as social security numbers, legal privileges, etc. However, other changes make most exemptions merely permissive, which means public bodies could not charge requestors for the time they take to redact them. This should incentivize fewer redactions because public bodies will bear the costs of redacting information that is not required to be exempt.

Other changes are designed to limit the fees governments can charge, even for mandatory exemptions. They ban charging fees for reviewing records for any purpose other than determining whether they are responsive to the request. Some public bodies have read FOIA as allowing them to charge for reviewing a record to determine whether it is "sensitive." This is often a euphemism for information that public officials fear might embarrass them, make them appear incompetent, or worse. Amendments also restrict the use of contract labor, prohibit charging requestors for the fringe benefits of employees processing the FOIA request, eliminate the requirement for a good faith deposit and require public bodies to accept payment for FOIA electronically if they accept electronic payments for other services.

There are two other fee-related amendments that are particularly noteworthy. The first is a cap on the maximum fee that can be charged for a request, which is set at $1 per page of information. This is inclusive of all chargeable expenses — in other words, a FOIA request resulting in the production of 100 pages cannot exceed $100, regardless of the time needed to locate, review and redact information.

Another amendment attempts to eliminate the common practice of charging fees for every request. The current standard allows a public body simply to assert that a request would result in unreasonably high costs, which grants that agency the authority to charge a fee. As amended, public bodies would have to explain in detail why a request would create unreasonable costs, including, at minimum, a comparison of the anticipated cost of the request against the public body's average cost for producing records over the past year.

Procedural amendments

Procedural changes include requiring a public body to acknowledge receipt of a FOIA request within 24 hours. The time afforded to produce records is sped up, with governments mandated to deliver records in five calendar days. Public bodies can opt for a 10-day extension but must now provide a detailed explanation for why the extension is necessary. Failure to respond to a request is a per-se denial of FOIA for appellate purposes.

The most important procedural amendment, however, is changing the deadlines in FOIA to refer to the production of records, rather than just a request for deposit. This eliminates the significant gap between the filing of a request and the production of records. This amendment makes clear that routine FOIA requests should be fulfilled in a timely fashion.

To avoid an undue burden on public bodies that do occasionally receive large requests, the amendment allows a public body to take even more time to fulfill a request. This option is tightly regulated, however,

because of the opportunity it presents for abuse. To take the extension, a public body must apply to the Open Government Commission and demonstrate that producing records within 15 days (five days plus the 10-day extension) would "materially disrupt the public body's ordinary business." The burden for demonstrating this rests with the public body, which must satisfy the standard through clear and convincing evidence. If that appeal is successful, the Commission will grant an extension that it concludes is the minimum amount of time needed for a response. If unsuccessful in applying for the extension, the public body is responsible for a requestor's attorneys' fees (if any) and is treated as though it failed to respond in a timely fashion.

This combination of amendments should result in the vast majority of requests being fulfilled within 15 calendar days, which would be a significant improvement to current practice.

Appeal amendments

Citizens may appeal a public body's FOIA decision. But an appeal is not considered "received" until a public body's next official meeting, which needlessly delays the appeals process. Amendments shorten the timeline for a government to respond to an administrative appeal to seven calendar days. They also eliminate a public body's ability to take an extension for responding to an appeal, which creates unnecessary delay.

In addition, lawyers who represent either themselves or their own firms are entitled to attorneys' fees, to encourage more appeals. Importantly, the amendments also clarify that even a partially victorious appeal (i.e. one which results in the disclosure of only some additional records) is sufficient to award a requestor's attorneys' fees and costs.

Fines and penalties amendments

The amendments completely overhaul the penalties for violating FOIA. Fines are now significantly increased and are tied to the financial condition of the public body. They will range from $2,500 to $25,000 per violation for a first offense. These fines increase based on the number of violations successfully appealed within the past two years. For a second violation, the fine is a minimum of $7,500. For a third violation, the minimum penalty is $10,000, and the fine increases another $5,000 for a fourth or subsequent violation. If a violation is willful or arbitrary, fines range from $5,000 to $50,000. A public body that loses a request for an extension will be fined $100 per day beyond the 15-day production window.

These fines are designed to be significant enough that a public body cannot simply chose to risk paying fines to avoid disclosing records. Fines should also encourage public bodies to staff and train FOIA departments. Admittedly, the effectiveness of these amendments will depend, at least in part, on the courts applying the law in the spirit intended. Small townships for instance, should not face a $25,000 fine for a first-time violation. Large actors like universities or the state, however, should consistently be fined at the top end of the scale. To assist courts, the amendments specify that a public body's budget, endowment and overall financial condition are relevant factors when calculating an appropriate fine.

Amendments creating the Open Government Commission

The largest overarching change proposed by the amendments is the creation of the Open Government Commission. The Commission would be an independent body made up of FOIA experts that could largely replace the courts as the decisionmaker on most FOIA issues.

The Commission would be made up of nine members. Four members would be appointed by the Legislature, with majority and minority party leadership each afforded two appointees. The governor appoints five members, with three of those resulting from recommendations by the Michigan Commission on Open Government, the Michigan Press Association and the Michigan Broadcasters Association. These organizations are on the front lines of issues with the application of FOIA. Appointments would be four-year, staggered terms.

To preserve the Open Government Commission's political independence, its members are politically insulated. They can only be removed for incompetence, dereliction of duty, malfeasance, misfeasance or nonfeasance in office. Legislative majority and minority leadership must agree to remove a member.

The Commission would be subject to both the Open Meetings Act and FOIA, with a minor carve-out allowing for closed sessions to discuss information that is purported to be subject to an exemption. In performing its duties, the Commission may receive unredacted records in order to evaluate whether an exemption was properly applied, and the unredacted records under its care are not subject to FOIA.

Commissioners would serve without compensation but would receive a per diem. Members would have all of the powers of a court for FOIA appeals but would also play an additional role of recommending improvements to FOIA and offering annual training to FOIA coordinators to promote best practices. As written, the Commission would have discretion as to which cases it accepts, to avoid being overwhelmed.

Exemption amendments

The amendments also significantly change what information can be exempted under FOIA. As previously mentioned, exemptions will now be classified as either mandatory or permissive. Mandatory exemptions are limited to social security numbers, FERPA and legally recognized privileges. All other communications are treated as permissive.

Public bodies applying an exemption would be required to state both why an exemption applies and why the public interest in nondisclosure outweighs the public interest in disclosure for each exemption. This is a change from the current practice, where most exemptions are applied categorically without consideration of the public interest. Requiring a detailed explanation gives requestors more information that will assist them in determining whether an exemption was properly applied. It also makes the exemption process less attractive to public bodies by increasing the burden of taking an exemption.

Amendments to specific exemptions solve common issues with FOIA. Specific examples include:

- Clarifying that an email address, working group contact information, and similar records are not exempt.
- Making a law enforcement officer's disciplinary records and departmental manuals explicitly nonexempt.
- Eliminating the frequently misapplied "frank communications" exemption.
- Changing the balancing test for law enforcement exemptions to favor disclosure by default.
- Requiring a public body to associate an exemption with each individual redaction and provide a specific description of why the redaction applies.
- Establishing that a public body must show an exemption applies by clear and convincing evidence.
- Clarifying that all records are presumed to be subject to disclosure until a public body can meet its burden of showing an exemption is proper.

Word-for-word rewrite of statute and commentary

Section 1: MCL § 15.231 – Short title; public policy.

Sec. 1.

(1) This act shall be known and may be cited as the "freedom of information act".

(2) It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Comment

Neither the title nor the policy behind FOIA requires amendment. The issues with FOIA do not stem from its purpose, which is both admirable and self-explanatory. The changes that are made to later sections are designed to ensure that FOIA is an effective way to obtain "full and complete" information, which is not currently the case.

Section 2: MCL § 15.232 – Definitions.

Sec. 2.

As used in this act:

(a) "Commission" means the Open Government Commission established by this act.

~~(a)~~(b) "Cybersecurity assessment" means an investigation undertaken by a person, governmental body, or other entity to identify vulnerabilities in cybersecurity plans.

~~(b)~~(c) "Cybersecurity incident" includes, but is not limited to, a computer network intrusion or attempted intrusion; a breach of primary computer network controls; unauthorized access to programs, data, or information contained in a computer system; or actions by a third party that materially affect component performance or, because of impact to component systems, prevent normal computer system activities.

~~(c)~~(d) "Cybersecurity plan" includes, but is not limited to, information about a person's information systems, network security, encryption, network mapping, access control, passwords, authentication practices, computer hardware or software, or response to cybersecurity incidents.

~~(d)~~(e) "Cybersecurity vulnerability" means a deficiency within computer hardware or software, or within a computer network or information system, that could be exploited by unauthorized parties for use against an individual computer user or a computer network or information system.

(f) "Disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or other proceeding conducted by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent.

~~(e)~~(g) "Field name" means the label or identification of an element of a computer database that contains a specific item of information, and includes but is not limited to a subject heading such as a column header, data dictionary, or record layout.

~~(f)~~(h) "FOIA coordinator" means either of the following:

(i) An individual who is a public body.

(ii) An individual designated by a public body in accordance with section 6 to accept and process requests for public records under this act.

(i)"Law enforcement agency" means a public body that employs 1 or more law enforcement officers or agents.

(j) "Law enforcement disciplinary records" means all records created in furtherance of a disciplinary proceeding conducted by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent, other than a complaint, allegation, or charge of a technical infraction, including, but not limited to, all of the following records and information:

(i) Records of any complaint, allegation, or charge against a law enforcement officer or agent.

(ii) The name of any law enforcement officer or agent against whom a complaint, allegation, or charge has been made.

(iii) All records, documents, and files, in whatever form, related to the investigation, adjudication, or disposition of any complaint, allegation, or charge against a law enforcement officer or agent.

(iv) The transcript of any disciplinary proceeding, including any exhibits introduced at the proceeding, regarding any complaint, allegation, or charge against a law enforcement officer or agent.

(v) Any finding by the Michigan commission on law enforcement standards or any state or local law enforcement agency, department, independent review board, or other entity tasked with evaluating any complaint, allegation, or charge against a law enforcement officer or agent during a disciplinary proceeding.

(vi) Any final written opinion or memorandum supporting the disposition and disciplinary action imposed, or the decision not to impose disciplinary action, on a law enforcement officer or agent against whom a complaint, allegation, or charge has been made, including all of the following:

(A) All factual findings.

(B) Any analysis of alleged misconduct.

(C) A description of the disciplinary action imposed on the law enforcement officer or agent, if any, and the data supporting the disciplinary action taken or the decision not to take disciplinary action.

(k) "Law enforcement officer or agent" includes a police officer employed by a municipality, county, or this state, an employee of a sheriff's office who performs law enforcement duties, a correctional officer, or any employee who provides public safety or investigative services for the department of corrections, a state correctional facility, a county jail, or a juvenile detention facility.

~~(g)~~(l) "Person" means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. Person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

~~(h)~~(m) "Public body" means any of the following:

(i) 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~~ including the governor and lieutenant governor, the executive office of the governor or lieutenant governor, and the employees thereof.

(ii) A senator, representative, employee, agency, board, commission, or council in the legislative branch of the state government. ~~An agency, board, commission, or council in the legislative branch of the state government.~~

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or any elected or appointed official, employee, board, department, commission, council, or agency thereof.

(iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, including any elected or appointed official and employee thereof, or any entity which directly or indirectly receives monies raised as the result of a millage either directly or indirectly, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

~~(i)~~(n) "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, and which remains in the possession, custody or control of the public body or any of its elected or appointed officials, employees, or other agents without regard to its location. ~~in the performance of an official function from the time it is created~~. Public record does not include computer software, but includes any records sent or retained by a public body's electronic

information technology system or device which is owned by a public body or funded in whole or in part by the public body. This act separates public records into the following 2 classes:

(i) Those that are exempt from disclosure under section 13.

(ii) All public records that are not exempt from disclosure under section 13 and that are subject to disclosure under this act.

(o) "Request" means a request by a requestor to inspect a public record or to obtain a copy of a public record.

(p) "Produce" means to provide requested records.

~~(j)~~(q) "Software" means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.

(r) "Technical infraction" means a minor rule violation by a law enforcement officer or agent, related solely to the enforcement of administrative departmental rules, that meets all of the following:

(i) Did not involve interaction with members of the public.

(ii) Was unrelated to the investigative, enforcement, training, supervision, or reporting responsibilities of the law enforcement officer or agent.

(iii) Did not involve deception, misrepresentation, dishonesty, or intemperate behavior by the law enforcement officer or agent.

~~(k)~~(s) "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

~~(l)~~(t) "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content.

~~(m)~~(u) "Written request" means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means.

Comment

A number of the defined terms in FOIA have been interpreted in court decisions in such a way as to hamper the transparency goals of FOIA. The changes presented to this section are designed to eliminate those loopholes and provide greater clarity on how FOIA is to be applied. Additional definitions relating to law enforcement are added to enhance accountability efforts relating to disciplinary issues. Specific justifications for these changes include:

- MCL § 15.232(a): This additional language is necessary to define the newly created Open Government Commission specified in MCL § 15.240c. The Commission would simplify the FOIA appeal process. Further discussion of the Commission can be found in the comment to that section.

- MCL § 15.232(f): This language is necessary in light of changes relating to the release or redaction of police records. The intent is to shield some police records, while still allowing the public to be informed about officers who have been disciplined for misconduct. These changes were drawn from House Bill 4291 of 2021, a bill primarily sponsored by Democratic lawmakers.*

- MCL § 15.232(i),(j): These definitions are also necessary due to later changes regarding the release and redaction of police disciplinary records.

- MCL § 15.232(m)(i): Michigan is one of only two states that exempts the governor, and one of only eight states that exempts the Legislature, from open records laws.† The amendments to this section remove the executive branch exemption.

- MCL § 15.232(m)(ii): This amendment likewise removes the legislative exemption to FOIA.

- MCL § 15.232(m)(iii): This additional language is necessary in light of an Oakland County Circuit Court opinion which found that records created and used by public schoolteachers for teaching students were not subject to FOIA.‡ Specifically, that opinion reasoned that FOIA is silent as to whether records created by employees outside the state's executive branch are subject to FOIA.§ The amended language makes clear that records created, used, prepared, possessed, or retained by employees are accessible under FOIA. Similar reasoning was at issue but not resolved by the Michigan Supreme Court in Bisio v. City of the Village of Clarkson.**

* "House Bill No. 4291" (State of Michigan, Feb. 23, 2021), https://perma.cc/T9T6-78CM.

† Stephen Delie, "Transparency Laws Are Designed To Keep the Government Accountable. But Do They?" (Mackinac Center for Public Policy, March 18, 2021), https://perma.cc/XJG2-RJ4U.

‡ Litkouhi v. Rochester Community School District, Oakland County Circuit Court, Dec. 15, 2022, https://perma.cc/R4VW-UCRU.

§ For more information, see: Jaime Hope, "Court rules against transparency in Rochester schools FOIA case" (Michigan Capitol Confidential, Mackinac Center for Public Policy, Dec. 22, 2022), https://perma.cc/6SBJ-XLNR.

** Bisio v. City of the Village of Clarkson, 506 Mich 37 (2020).

- MCL § 15.232(m)(iv): This change is necessary for the same reason as the amendment to the previous subsection but expands its application to include local government.

- MCL § 15.232(m)(iv): This change is a specific response to two entities (the Detroit Zoo and Detroit Institute of the Arts) receiving millage funding, but due to a unique legal structure, have been able to avoid being subject to FOIA. This amendment ensures that any entity that is either directly or indirectly supported by a millage is subject to FOIA.

- MCL § 15.232(n): This change is necessary due to an increasing number of public officials who conduct public business with their own private devices and email accounts. Those records are typically not disclosed in response to a FOIA request, creating an easy way for officials to hide information from the public. This issue was the core of Progress Michigan v. Attorney General, but this case did not resolve the issue.* This amendment would eliminate any ambiguity about whether these records are subject to disclosure.

- MCL § 15.232(o),(p): These additions create terms that will be used to ensure greater clarity about a public body's responsibilities under FOIA as herein amended.

- MCL § 15.232(r): This addition is necessary in light of the increased availability of police records created through later amendments.

Section 3: MCL § 15.233 – Public records; request requirements; right to inspect, copy, or receive; subscriptions; forwarding requests; file; inspection and examination; memoranda or abstracts; rules; compilation, summary, or report of information; creation of new public record; certified copies.

Sec. 3.

(1) Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.

(2) Unless a requestor qualifies as indigent under section 4(2)(a) or unless a requestor asks only to inspect public records in person, ~~A~~a requestor ~~from a person, other than an individual who qualifies as indigent under section 4(2)(a),~~ must include the ~~requesting person's~~ requestor's complete name, address, and contact information, and, if the request is made by a person other than an individual, the complete name, address, and contact information of the person's agent who is an individual. ~~An address must be written in compliance with United States Postal Service addressing standards.~~ Contact information must include a valid telephone number or electronic mail address.

* Progress Michigan v. Attorney General, 506 Mich 74 (2020).

(3) An employee of a public body who receives a request for a public record ~~shall~~ must promptly forward that request to the freedom of information act coordinator.

~~(4) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.~~

(4) A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription is valid for up to 6 months, at the request of the subscriber, and is renewable.

~~(2)~~(5) A freedom of information act coordinator ~~shall~~ must keep a copy of all written requests for public records, the public body's response(s), the date on which the records were produced, and the fee charged to the requestor on file for no less than 1 year. During this period, if the public body directly or indirectly administers or maintains an official internet presence, all requests and responses, including any records produced in response, shall be published thereon, or, in the event that the public body does not maintain an internet presence, shall be made available for inspection at the public body's principle office. Requests, responses, and records required to be posted under this section shall be made available to the public no more than thirty (30) calendar days from the date records are produced.

~~(3)~~(6) A public body ~~shall~~ must furnish a ~~requesting person~~ requestor a reasonable opportunity for inspection and examination of its public records, and ~~shall~~ must furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body ~~shall~~ must protect public records from loss, unauthorized alteration, mutilation, or destruction.

(7) This act does not require a public body to create a new public record, except as required in section 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record.

(8) The custodian of a public record ~~shall~~ must, upon written request, furnish a ~~requesting person~~ requestor a certified copy of a public record.

(9) A public body must provide responsive records in electronic format except in those circumstances in which the production of electronic records would significantly increase the fee charged to the requestor. If the production of electronic records would increase the cost of a response by more than $20, or 10% of the overall fee, whichever is greater, the public body must notify that requestor of the difference in cost and permit the requestor to choose between the production of electronic records, or an alternative method of production. This subdivision does not apply if a public body lacks the technological capability necessary to provide records in an electronic format in the particular instance. This requirement notwithstanding, a requestor maintains the right to specify that records be produced in an alternate form, or otherwise be made available for inspection.

Comment

The changes to this section are primarily intended to decrease costs to requestors. Most notably, they make available to the public the results of all record requests of a public body for a one-year period.

- MCL § 15.232(2): This amendment clarifies that a requestor need not provide an address if they are indigent or intend to physically inspect records.

- MCL § 15.233(4) (former): This amendment eliminates a section that was frequently abused. The intent was to prevent public bodies from having to create a single, new record based on information contained in multiple documents that might come from multiple sources. That's a reasonable limitation, but some public bodies use this section to deny requests that would require them to locate and deliver multiple documents, arguing that they are not required to compile documents. Deleting this section removes the potential for this type of misuse.

  Further, this section already allows a public body to avoid creating a new record, which would include a summary of existing records. The proposed amendment maintains that limit on a public body's responsibility. It clarifies that governments must compile records containing responsive information to fulfill a request, but they are not required to synthesize that information into a new record.

- MCL § 15.233(5): FOIA coordinators are currently not strictly required to maintain a log of FOIA requests and responses. By requiring such a log be kept, citizens will have access to the all the records that are made public through FOIA requests. It also holds public bodies more accountable for how they manage FOIA compliance. In addition, requiring requests and responsive records be posted within 30 days allows requestors interested in similar or identical records to easily obtain that information without having to file a request. This could lighten the burden of FOIA on public bodies.

- MCL § 15.233(9): This addition clarifies that a requestor is presumed to intend electronic delivery of the requested records. While a requestor remains free to request paper copies, this approach should help to alleviate delays arising from a public body initially treating a request that does not specify electronic delivery as a request for paper records. Additionally, public bodies attempting to produce paper records would face additional burdens in explaining why that method would be most beneficial to the requestor rather than the public body.

Section 4: MCL § 15.234 – Fee; limitation on total fee; labor costs; establishment of procedures and guidelines; creation of written public summary; detailed itemization; availability of information on website; notification to requestor; deposit; failure to respond in timely manner; increased estimated fee deposit; deposit as fee; failure to pay or appeal deposit; request abandoned.

Sec. 4.

(1) A public body may charge a fee for a public record search, for the necessary copying of a public record for inspection, or for providing a copy of a public record if it has established, makes publicly available, and follows procedures and guidelines to implement this section as described in subsection (4). Subject to subsections (2), (3), (4), (5), and (9), the fee must be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. Except as otherwise provided in this act, if the public body estimates or charges a fee in accordance with this act, the total fee must not exceed the sum of the following components:

(a) That portion of labor costs directly associated with the necessary searching for, locating, and examining of public records in conjunction with receiving and fulfilling a granted written request. The public body ~~shall~~ must not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor. Labor costs under this subdivision ~~shall~~ must be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. For purposes of this subsection, a public body's review may only consist of the review necessary to determine whether a record is responsive, and no fee may be charged for reviewing records for any other purpose.

(b) That portion of labor costs, including necessary review, if any, directly associated with the separating and deleting of exempt information from nonexempt information as provided in section 14. For services performed by an employee of the public body, the public body ~~shall~~ must not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14 as determined by the public body's FOIA coordinator on a case-by-case basis, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs when calculating charges under this subdivision if it clearly notes the name of the contracted person or firm on the detailed itemization described under subsection (4), and provides a detailed explanation of why the use of contracted labor was necessary in the particular instance. Total labor costs calculated under this subdivision for contracted labor costs must not exceed an amount equal to 6 times the state minimum hourly wage rate determined under section 4 of the improved workforce opportunity wage act, 2018 PA 337, MCL 408.934, or the hourly wage of the public body's FOIA coordinator, whichever is less. Labor costs under this subdivision

~~shall~~ must be estimated and charged in increments of 15 minutes or, with all partial time increments rounded down. A public body ~~shall~~ must not charge for labor directly associated with redaction under section 14 if it knows or has reason to know that it previously redacted the public record in question and the redacted version is still in the public body's possession. If a public body charges a fee as described by this subsection, such a fee cannot exceed the fee charged to locate responsive records as described in subsection (a).

(c) For public records provided to the requestor on any form of nonpaper physical media, the actual and most reasonably economical cost of the nonpaper physical media. The requestor may stipulate that the public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided to him or her in lieu of paper copies. This subdivision does not apply if a public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.

(d) For paper copies of public records provided to the requestor, the actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies ~~shall~~ must be calculated as a total cost per sheet of paper and ~~shall~~ must be itemized and noted in a manner that expresses both the cost per sheet and the number of sheets provided. The fee must not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body ~~shall~~ must utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.

(e) The cost of labor directly associated with duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor. The public body ~~shall~~ must not charge more than the hourly wage of its lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor. Labor costs under this subdivision ~~may~~ must be estimated and charged in ~~time~~ increments of 15 minutes or more, ~~the public body's choosing; however,~~ with all partial time increments ~~shall~~ must ~~be~~ rounded down.

(f) The actual cost of mailing, if any, for sending the public records in a reasonably economical and justifiable manner. The public body ~~shall~~ must not charge more for expedited shipping or insurance unless specifically stipulated by the requestor, but may otherwise charge for the least expensive form of postal delivery confirmation when mailing public records.

(2) When calculating labor costs under subsection (1)(a), (b), or (e), fee components ~~shall~~ must be itemized in a manner that expresses both the hourly wage and the number of hours charged. ~~The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used to account for benefits in the detailed itemization described in subsection (4). Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits.~~ Overtime wages ~~shall~~ must not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted on the detailed itemization described in subsection (4). A search for a public record ~~may~~ must be conducted or copies of public records ~~may~~ must

be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. The question of whether the production of a public record can be considered as primarily benefitting the general public must initially be determined by the public body, but is subject to appeal to the Commission or to the circuit court as provided by this act. A public record search ~~shall~~ must be made and a copy of a public record ~~shall~~ must be furnished without charge for ~~the first $20.00 of the fee for each request by~~ ~~either~~ any of the following:

(a) An individual who is entitled to information under this act and who submits an affidavit stating that the individual is indigent and receiving specific public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency. ~~If the requestor is eligible for a requested discount, the public body shall fully note the discount on the detailed itemization described under subsection (4).~~ If a requestor is ineligible for indigent status ~~the discount~~, the public body ~~shall~~ must inform the requestor specifically of the reason for ineligibility in the public body's written response. An individual is ineligible for this fee reduction if ~~any of the following apply:~~

~~(i) The individual has previously received discounted copies of public records under this subsection from the same public body twice during that calendar year.~~

~~(ii)~~ ~~T~~the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

(b) A nonprofit organization formally designated by the state to carry out activities under subtitle C of the developmental disabilities assistance and bill of rights act of 2000, Public Law 106-402, and the protection and advocacy for individuals with mental illness act, Public Law 99-319, or their successors, if the request meets all of the following requirements:

(i) Is made directly on behalf of the organization or its clients.

(ii) Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the mental health code, 1974 PA 258, MCL 330.1931.

(iii) Is accompanied by documentation of its designation by the state, if requested by the public body.

(3) A fee as described in subsection (1) ~~shall~~ must not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless: (a) the claimed exemption is mandatory in that failure to redact the relevant information would violate state or federal law; and (b) failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. To charge such a fee, the public body must cite the mandatory exemption upon which it relies and provide evidence substantiating its claim of unreasonably high costs, including, at minimum, a statement of the public body's average costs for producing records in the prior calendar year. The public body has the burden of demonstrating that the failure to charge a fee would result in unreasonably high costs to the public body by clear and convincing evidence. A public

body's determination that the costs of fulfilling a request would be unreasonably high is appealable to the Commission or the circuit court as provided by this act.

(4) A public body ~~shall~~ must establish procedures and guidelines to implement this act and ~~shall~~ must create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary ~~shall~~ must be written in a manner so as to be easily understood by the general public. If the public body directly or indirectly administers or maintains an official internet presence, it ~~shall~~ must post and maintain the procedures and guidelines and its written public summary on its website. A public body ~~shall~~ must make the procedures and guidelines publicly available by providing free copies of the procedures and guidelines and its written public summary both in the public body's response to a written request and upon request by visitors at the public body's office. A public body that posts and maintains procedures and guidelines and its written public summary on its website may include the website link to the documents in lieu of providing paper copies in its response to a written request. A public body's procedures and guidelines must include the use of a standard form for detailed itemization of any fee amount in its responses to written requests under this act. The detailed itemization must clearly list and explain the allowable charges for each of the 6 fee components listed under subsection (1) that compose the total fee used for estimating or charging purposes. Other public bodies may use a form created by the department of technology, management, and budget or create a form of their own that complies with this subsection. A public body that has not established procedures and guidelines, has not created a written public summary, or has not made those items publicly available without charge as required in this subsection is not relieved of its duty to comply with any requirement of this act and ~~shall~~ must not require deposits or charge fees otherwise permitted under this act until it is in compliance with this subsection. Notwithstanding this subsection and despite any law to the contrary, a public body's procedures and guidelines under this act are not exempt public records under section 13.

(5) If the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any charges under subsection (1)(b). If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on its website, the public body ~~shall~~ must notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable in the specific instance, must include a specific webpage address where the requested information is available. On the detailed itemization described in subsection (4), the public body ~~shall~~ must separate the requested public records that are available on its website from those that are not available on the website and ~~shall~~ must inform the requestor of the additional charge to receive copies of the public records that are available on its website. If the public body has included the website address for a record in its written response to the requestor and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or other form as described under subsection (1)(c), the public body ~~shall~~ must provide the public records in the specified format. ~~but may use a fringe benefit multiplier greater than the 50% limitation in subsection (2), not to exceed the actual costs of providing the information in the specified format~~.

(6) A public body may provide requested information available in public records without receipt of a written request.

(7) If a verbal request for information is for information that a public body believes is available on the public body's website, the public employee ~~shall~~ must, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

~~(8) In either the public body's initial response or subsequent response as described under section 5(2)(d), the public body may require a good faith deposit from the person requesting information before providing the public records to the requestor if the entire fee estimate or charge authorized under this section exceeds $50.00 $100.00, based on a good faith calculation of the total fee described in subsection (4). Subject to subsection (10), the deposit must not exceed 1/2 of the total estimated fee, and a public body's request for a deposit must include a detailed itemization as required under subsection (4). The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance. If a public body does not respond in a timely manner as described under section 5(2), it is not relieved from its requirements to provide proper fee calculations and time frame estimates in any tardy responses. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.~~

~~(9)~~(8) If a public body does not respond to a written request in a timely manner as required under section 5(2), the public body ~~shall~~ must do the following:

(a) Reduce the charges for labor costs otherwise permitted under this section by 5% for each day the public body exceeds the time permitted under section 5(2) for a response to the request~~., with a maximum 50% reduction, if either of the following applies:~~

~~(i) The late response was willful and intentional.~~

~~(ii) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "information", "FOIA", "copy", or a recognizable misspelling of such, or appropriate legal code reference for this act, on the front of an envelope, or in the subject line of an electronic mail, letter, or facsimile cover page.~~

(b) If a charge reduction is required under subdivision (a), fully note the charge reduction on the detailed itemization described under subsection (4).

(c) This section must not be construed as limiting any remedies available for noncompliance established elsewhere in this act.

(~~10~~)(9) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

~~(11)~~(10) Subject to subsection (12), after a public body has granted and fulfilled a written request from an individual under this act, if the public body has not been paid in full the total amount under subsection (1) for the copies of public records that the public body made available to the individual as a result of that written request, the public body may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent written request from that individual if all of the following apply:

(a) The final fee for the prior written request was not more than 105% of the estimated fee.

(b) The public records made available contained the information being sought in the prior written request and are still in the public body's possession.

~~(c) The public records were made available to the individual, subject to payment, within the time frame estimate described under subsection (8).~~

~~(d)~~(c) Ninety days have passed since the public body notified the individual in writing that the public records were available for pickup or mailing.

~~(e)~~(d) The individual is unable to show proof of prior payment to the public body.

~~(f)~~(e) The public body calculates a detailed itemization, as required under subsection (4), that is the basis for the current written request's increased estimated fee deposit.

~~(12)~~(11) A public body ~~shall~~ must ~~no longer~~ not require an increased estimated fee deposit from an individual as described under subsection (~~11~~10) if any of the following apply:

(a) The individual is able to show proof of prior payment in full to the public body.

(b) The public body is subsequently paid in full for the applicable prior written request.

(c) Three hundred sixty-five days have passed since the individual made the written request for which full payment was not remitted to the public body.

~~(13)~~(12) A deposit required by a public body under this act is a fee.

~~(14)~~(13) If a deposit that is required under ~~subsection (8) or~~ ~~(11)~~(10) is not received by the public body within 45 days from receipt by the ~~requesting person~~ requestor of the notice that a deposit is required, and if the ~~requesting person~~ requestor has not filed an appeal of the deposit amount pursuant to section 10a, the request shall be considered abandoned by the ~~requesting person~~ requestor and the public body is no longer required to fulfill the request. Notice of a deposit requirement under subsection ~~(8) or~~ ~~(11)~~(10) is considered received 3 days after it is sent, regardless of the means of transmission. Notice of a deposit requirement under subsection ~~(8) or (11)~~(10) must include notice of the date by which the deposit must be received, which date is 48 days after the date the notice is sent.

(14) Notwithstanding any other provision of this statute, a public body must not charge more than $1.00 per page for the production of records, inclusive of all costs permitted by this section.

(15) If a public body accepts electronic payments for any other services it provides, it must also accept electronic payments for fees permitted by this act. A public body may not charge any fee for accepting such an electronic payment that is not equal to or lesser than the fee charged in connection with other electronic payments.

Comment

The changes to this section are also primarily intended to decrease costs to requestors. They clarify and limit what public bodies can charge requestors for the costs of searching for, retrieving, reviewing, copying and releasing public records.

- MCL § 15.234(1)(a): This amendment eliminates a loophole that allows public bodies to charge requestors to review material to determine whether it negatively impacts the public body's interests. Not only does this process increase expenses to a requestor by requiring an additional "sensitivity" review prior to one for redactions, but it also encourages public bodies to apply excessive redactions to documents they deem sensitive. A proper FOIA review should only consider whether the record is responsive, and whether exemptions properly apply, without regard for the effect disclosure of the record would have on the public body.

- MCL § 15.234(1)(b): Currently, public bodies can use outside counsel to review records with relatively little proof required to demonstrate in-house staff cannot perform that review. This disincentivizes training their employees to conduct such reviews, as public bodies are relatively free to charge a high rate for the cost of outside counsel at will. To avoid this issue, this amendment caps fees to be no higher than the compensation that could be charged if the FOIA coordinator (who should be capable of handling the FOIA review process) performed the work. Those fees are further limited by being tied to the fee required to locate responsive records, to prevent the costs associated with redacting documents from significantly increasing the costs of a requests.

- MCL § 15.234(2): For some larger public entities, and particularly for larger universities, adding fringe benefits to the fees charged under FOIA significantly magnifies the expense to requestors. This amendment eliminates the ability to charge fringe benefits to make FOIA more affordable.

- The amendment also changes a public body's role when responding to requests that are primarily made for the public interest. These requests must be fulfilled without cost under the proposed change. This is consistent with federal FOIA law and can have significant impacts. For example, the Mackinac Center in 2009 filed parallel state and federal FOIA requests, and the optional nature of Michigan's fee waiver enabled the Michigan State Police to charge almost $7 million.* The federal FOIA, which has a mandatory public-interest fee waiver, was fulfilled for free.

- This amendment also is one of the first to utilize the newly created Open Government Commission (see proposed MCL § 15.240c). Challenging a public body's determination that a request is not primarily in the public interest is difficult, if not impossible. The amendment explicitly authorizes an appeal of this decision and provides the option to file that appeal with the Commission. This will make

* The Michigan State Police once charged the Mackinac Center almost $7 million to respond to a FOIA request. Kathy Hoekstra, "FOIA: One Word Makes a $7 Million Difference" (Mackinac Center for Public Policy, March 31, 2010), https://perma.cc/8E26-BKSE.

the appeal process more cost efficient. It also prevents overwhelming the court system with FOIA-related matters.

- MCL § 15.234(2)(a): This proposed amendment clarifies that an indigent requestor is not limited to a set number of FOIA requests per year. This ensures that all Michiganders, regardless of wealth, have equal access to the FOIA process.

- MCL § 15.234(3): This amendment eliminates a major loophole. Nearly every public body determines that every FOIA request would result in unreasonably high costs, and as a result, requires a fee to be charged. To prevent this, the amended language would require public bodies to demonstrate that a particular request would result in unreasonably high costs when compared to the average costs of other requests. Furthermore, because the burden is "clear and convincing" evidence, public bodies must meet a fairly high evidentiary standard to charge a fee.

  This amendment also clarifies that only the mandatory exemptions contained in section 13 (such as the social security number exemption) can result in fees. This disincentivizes public bodies from heavily redacting records based on permissive exemptions (such as the privacy exemption) that are often used to shield information from disclosure that the public body finds to be disadvantageous to its interests. The default position for a public body reviewing a FOIA request should be complete disclosure, with the public body only redacting information that, if released, would violate state or federal law. This amendment promotes this approach, as public bodies wishing to apply permissive exemptions would do so at their own expense.

- MCL § 15.234(8): In light of a future change requiring records to be produced within a fixed period of time, and charges only being applicable to mandatory exemptions, a good-faith deposit is no longer necessary.

- MCL § 15.234(9)(a): This amendment eliminates the cap on reducing the price of a FOIA response when a public body fails to process it in a timely fashion. For FOIA to be an effective tool, it must result in the timely production of documents. By leaving the cost-reduction uncapped, public bodies are incentivized to process requests quickly. Furthermore, a requestor who prevails after a significant delay could receive their records for free as a form of additional relief.

- MCL § 15.234(9)(c): This amendment clarifies that the previous changes to this section are not intended to limit any other remedies available within FOIA for a public body's failure to comply with the requirement of the act.

- MCL § 15.234(14): This amendment creates a hard cap on the total amount that can be charged to produce records. Although FOIA already prohibits public bodies from charging more than $0.10 per copied page, there is currently no upper limit on the maximum amount that may be charged for all the labor costs on a per-page basis. In doing so, the amendment disincentivizes public bodies from classifying highly paid employees as being "the lowest paid employee capable of performing the work," which increases costs to requestors. By setting an overall hard cap of $1 per produced page, labor costs cannot be inflated by classifying highly paid employees as the "lowest paid employee capable of performing the work," which is generally left to a public body's discretion.

- MCL § 15.234(15): This amendment addresses an issue in which some public bodies insist on payment by check, even when accepting electronic payments for other services. It also includes a carve out for those public bodies that do not accept electronic payments for any purpose, to avoid requiring an unfunded mandate.

Section 5: MCL § 15.235 – Request to inspect or receive copy of public record; response to request; failure to respond; damages; contents of notice denying request; signing notice of denial; notice extending period of response; action by requesting person requestor; law enforcement records management system; alternate responses.

(1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body. A written request made by facsimile, electronic mail, or other electronic transmission is ~~not~~ received by a public body's FOIA coordinator the day it is transmitted, unless the request is not submitted on a business day, in which case it is not received until ~~1~~ the following business day ~~after the electronic transmission is made~~. However, 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 1 business day after the public body first becomes aware of the written request. The public body ~~shall~~ must note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request. A public body must acknowledge, in writing, receipt of a request no later than 24 hours after receiving it.

(2) Unless otherwise agreed to in writing by the person making the request, a public body ~~shall~~ must~~, subject to subsection (10) section 4(16),~~respond to a request for a public record within 5 ~~business~~ calendar days after the public body receives the request ~~by doing 1 of the following~~ by producing the requested records. In unusual circumstances where the public body is unable to produce records within 5 calendar days, the public body may take an additional 10 calendar day extension, but only after issuing a written notice to the requestor specifically identifying the unique unusual circumstances justifying the extension. A public body shall not issue more than 1 notice of extension for a particular request. Said notice shall comply with MCL 15.235(7).

~~(a) Granting the request.~~

~~(b) Issuing a written notice to the requesting person denying the request.~~

~~(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.~~

~~(d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.~~

(3) Failure to produce records in response ~~respond~~ to a request within the time periods specified under subsection (2) constitutes a public body's final determination to deny the request unless a petition for additional time has been filed as provided in section 5(11) of this act.~~either of the following applies:~~

~~(a) The failure was willful and intentional.~~

~~(b) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "information", "FOIA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to this act, on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page.~~

(4) In a civil action to compel a public body's disclosure of a public record under section 10, the court ~~shall~~ must assess damages against the public body under section 10(7) if the court has done both of the following:

(a) Determined that the public body has not complied with subsection (2).

(b) Ordered the public body to disclose or provide copies of all or a portion of the public record.

(5) A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice must contain:

(a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.

(c) A description of a public record or information on a public record that is separated or deleted under section 14, if a separation or deletion is made.

(d) A full explanation of the ~~requesting person~~ requestor's right to do ~~either~~ any of the following:

(i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.

(ii) Seek judicial review of the denial under section 10.

(iii) Appeal the determination to the Commission as provided in section 10c.

(e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

(6) The individual designated in section 6 as responsible for the denial of the request ~~shall~~ must sign the written notice of denial.

(7) If a public body issues a notice extending the period for ~~a response to the request~~ producing records, the notice must specify the reasons for the extension and the date by which the public body will do 1 of the following, which may not exceed 15 calendar days from the date the request was received:

(a) Grant the request by producing the requested records.

(b) Issue a written notice to the ~~requesting person~~ requestor denying the request.

(c) Grant the request in part by producing a portion of the requested records and issue a written notice to the ~~requesting person~~ requestor denying the request in part.

The public body's specification may include all relevant information, but must, at minimum, indicate the anticipated number of records to be produced in comparison to the average number of records produced per request for responses in the previous year.

(8) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the ~~requesting person~~ requestor may do ~~either~~ any of the following:

(a) Appeal the denial to the head of the public body under section 10.

(b) Commence a civil action, under section 10.

(c) Appeal the denial to the Commission, under section 10c.

(9) Notwithstanding any other provision of this act to the contrary, a public body that maintains a law enforcement records management system and stores public records for another public body that subscribes to the law enforcement records management system is not in possession of, retaining, or the custodian of, a public record stored on behalf of the subscribing public body. If the public body that maintains a law enforcement records management system receives a written request for a public record that is stored on behalf of a subscribing public body, the public body that maintains the law enforcement records management system ~~shall~~ must, within ~~10~~ 5 ~~business~~ calendar days after receipt of the request, give written notice to the ~~requesting person~~ requestor identifying the subscribing public body and stating that the ~~requesting person~~ requestor ~~shall~~ must submit the request to the subscribing public body. As used in this subsection, "law enforcement records management system" means a data storage system that may be used voluntarily by subscribers, including any subscribing public bodies, to share information and facilitate intergovernmental collaboration in the provision of law enforcement services.

(10) A person making a request under subsection (1) may ~~stipulate~~ require that the public body's response under subsection (2) be electronically mailed, delivered by facsimile, or delivered by first-class mail. This subsection does not apply if the public body lacks the technological capability to provide an electronically mailed response.

(11) If a public body determines that it is not possible for it to respond within the time required by subsection (2), it may petition the Commission for an extension. The public body bears the burden of demonstrating, by clear and convincing evidence, that adherence to the timelines required in subsection (2) would require a material disruption of the public body's ordinary business. Should the public body demonstrate such a burden, the Commission may permit the public body additional time to produce responsive records, but such additional time must be the minimum time the Commission determines to be reasonably necessary for a public body working diligently to respond to the request. Should the public body fail to satisfy its burden of proof, it shall be responsible for any reasonable attorneys' fees and costs

incurred by the requesting party in responding to the public body's petition, as well as fines and fees as provided by section 10b of this act, and shall produce records in a period determined by the Commission not to exceed 15 calendar days.

Comment

- MCL § 15.233(1): This amendment requires a public body to acknowledge receipt of a request within 24 hours of receipt on business days. This eliminates a potential delay — in current law, a public body is not required to communicate with a requestor until the fifth business day after receiving a request. Thus, a requestor has no way to know if a public body has received their request for five business days. This amendment resolves that issue.

- MCL § 15.233(2): This change significantly accelerates the FOIA process. Currently, a public body can take five business days to produce a good-faith deposit and has no obligation to act until that deposit is received. They can take an additional 10 business days via an extension. Nearly all public bodies opt for this extension, meaning even the request for a deposit is not sent for three weeks. That time is excessive for most requests. As amended, public bodies have either five or 15 calendar days to produce records, rather than five to 15 days to begin the process of locating and reviewing them. Also, to discourage public bodies from taking extensions in every instance, this amendment requires them to justify an extension by comparing the burden posed by a particular request to the average burden of requests over the past year.

- MCL § 15.233(3): This amendment eliminates a loophole by no longer requiring a FOIA requestor to demonstrate a public body failed to respond intentionally. Whether a public body failed to respond of its own will is irrelevant, as that failure to respond still delayed or prevented the release of public documents. Currently, a failure to respond can only be addressed through an appeal or through litigation, and a requestor should not face the additional burden of showing a public body's failure to adhere to FOIA was willful.

- MCL § 15.233(4)(d)(3) and MCL § 15.233(8)(c): These amendments provide an additional appellate option in the form of an appeal before the Commission.

- MCL § 15.233(10): This amendment makes clear that only the requestor has the ability to specify the means through which records are to be delivered.

- MCL § 15.235(11): This amendment creates relief for public bodies in situations where the newly created statutory deadlines for fulfilling a request within five or 15 calendar days are not sufficient to process a request. To receive an extension, a public body would be required to seek the Commission's approval. Alone, however, this requirement could lead public bodies to file petitions for every FOIA. To prevent this, the amendment changes the standard by which a public body could be afforded an extension. It must now show its ordinary business would be materially disrupted.

  This is intended to incentivize public bodies to only use the petition process when absolutely necessary. To further encourage this, a public body that loses its petition is required to pay the requesting party's attorneys' fees and will be ordered to produce records within a reasonable time. In

addition, an unsuccessful petition is considered a violation of FOIA, leading to fines as provided in section 10b. Taken together, these risks should limit the petition process to its intended application, namely, large requests that cannot be completed within the default period, even when a public body is exercising reasonable diligence.

Section 6: MCL § 15.236 – FOIA coordinator.

Sec. 6.

(1) A public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, ~~shall~~ must designate an individual as the public body's FOIA coordinator. The FOIA coordinator ~~shall~~ must be responsible for accepting and processing requests for the public body's public records under this act and ~~shall~~ must be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county.

(2) For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

(3) An FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial under section 5(4) and (5).

(4) The Senate majority leader shall designate the Senate's FOIA coordinator. The Speaker of the House of Representatives shall designate the House of Representatives' FOIA coordinator. The Governor shall designate the FOIA coordinator for the Governor's office.

(5) A public body which has designated a FOIA coordinator must make the FOIA coordinator's official e-mail address, official mailing address, and official telephone number publicly available. Public bodies which directly or indirectly maintain an official internet presence must conspicuously post this information in a location that is available to the public. This subdivision also applies to any individual designated pursuant to subdivision (3) of this section.

Comment

- MCL § 15.236(4): This amendment is necessary due to the fact the Legislature and governor would be made subject to FOIA by earlier amendments.
- MCL § 15.233(5): Although rare, some public bodies do not have easily accessible contact information for their FOIA coordinators. To encourage greater transparency, this information should be freely accessible to the public. Only the FOIA coordinator's official contact information should be provided — personal contact information need not be listed under this amendment.

Section 10: MCL § 15.240 – Options by ~~requesting person~~ requestor; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10.*

(1) If a public body makes a final determination to deny all or a portion of a request, the ~~requesting person~~ requestor may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court~~, or if the decision of a state public body is at issue, the court of claims,~~ to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(c) Submit to the Commission a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(2) Within ~~10 business~~ 7 calendar days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body ~~shall~~ must do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the ~~requesting person~~ requestor upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the ~~requesting person~~ requestor upholding the disclosure denial in part.

~~(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.~~

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the ~~requesting person~~ requestor may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record or portion of a public record is not exempt from disclosure ~~shall~~ must order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which

* There are no sections 7, 8 or 9 currently in Michigan's FOIA statute.

the public record or an office of the public body is located has venue over the action. The court ~~shall~~ must determine the matter de novo and the burden is on the public body to sustain its denial. In defending an action commenced under subsection (1)(b), a public body is limited to the reasons given in its response denying the request. If the public body failed to timely respond to the request, it waives the right to assert any exemptions in section 13 as a basis to withhold all or any portion of a public record. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court. Notwithstanding the above, a court may permit the redaction of material pursuant to an exemption not asserted in a public body's initial response if it determines the release of the exempted material would lead to the disclosure of privileged material, social security numbers, medical information, violate the law, or when the public interest in disclosure is overwhelmingly outweighed by the public interest in non-disclosure.

(5) An action commenced under this section and an appeal from an action commenced under this section ~~shall~~ must be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails, in whole or in part, in an action commenced under this section, the court or Commission ~~shall~~ must award reasonable attorneys' fees, costs, and disbursements. ~~The award shall be assessed against the public body liable for damages under subsection (7).~~

~~(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $10,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $15,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.~~

(7) If an attorney or law firm appeals a request filed by that attorney or law firm to a court or the Commission, and prevails as provided in subsection (6), that attorney or law firm is entitled to whatever fees and costs would be awarded if the attorney or law firm had represented a third-party client in that appeal, including the attorneys' fees that would have been awarded for such representation.

Comment

- MCL § 15.240(1)(b): This amendment eliminates a provision requiring cases against state agencies to be filed in the Court of Claims. That provision may be good for state agencies, as they need to travel only a short distance to defend a FOIA lawsuit. But that requirement placed requestors at a severe disadvantage. They may need to pay attorneys for hours of travel time to prosecute their cases. Given the choice between the state or citizens having to bear the burden of travel, it is preferable that the state absorb that burden.

- MCL § 15.240(1)(c): This amendment adds the option to appeal a public body's FOIA determination to the Commission.

- MCL § 15.240(2)(d): As a matter of law, a FOIA appeal that is made to a public body is not considered "received" until the next meeting of the head of that public body. From that date, a public body would then have 10 business days to reach a decision on the appeal. Providing an additional 10 business day extension increases delays unnecessarily, particular for those public bodies that only meet on a monthly basis.

- MCL § 15.240(4) and (6): These two amendments interact to make clear that even if a requestor successfully demonstrates only a portion of a redacted record was improperly exempted, they have nevertheless prevailed in a FOIA appeal. The amendment to subsection (4) also closes a significant loophole, under which public bodies claim new exemptions after being sued. This practice makes it impossible for requestors to understand the likelihood that their suit will be successful and inappropriately shields public bodies from liability for poor initial responses.

  Some discretion is, however, afforded a reviewing court, to prevent the disclosure of particularly significant information that could lead to criminal liability, or otherwise disclose information that would cause significant and material harm to a person. Courts should, however, only permit additional redactions when the consequences of release would be both significant and a cause a manifest injustice. This discretion should not be employed simply because the information to be disclosed is embarrassing or damaging to a public body; instead, it should only be employed in special circumstances.

- MCL § 15.240(7) (old): This provision has been eliminated in light of a unified damages provision added later in the act.

- MCL § 15.240(7) (new): This amendment makes clear that an attorney representing himself or herself in a FOIA appeal nevertheless is entitled to reasonable attorneys' fees and costs upon prevailing in a lawsuit challenging a public body's FOIA determination. Under current law, attorneys cannot collect fees for representing themselves in FOIA matters.

Section 10a: MCL § 15.240a – Fee in excess of amount permitted under procedures and guidelines or MCL 15.234.

Sec. 10a.

(1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the ~~requesting person~~ requestor may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court~~, or if the decision of a state public body is at issue, in the court of claims,~~ for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. If a civil action is commenced against the public body under this subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action ~~shall~~ must not be filed under this subdivision unless 1 of the following applies:

(i) The public body does not provide for appeals under subdivision (a).

(ii) The head of the public body failed to respond to a written appeal as required under subsection (2).

(iii) The head of the public body issued a determination to a written appeal as required under subsection (2).

(c) Submit to the Commission a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4 of this act.

(2) Within 10 ~~business~~ calendar days after receiving a written appeal under subsection (1)(a), the head of a public body ~~shall~~ must do 1 of the following:

(a) Waive the fee.

(b) Reduce the fee and issue a written determination to the ~~requesting person~~ requestor indicating the specific basis under section 4 that supports the remaining fee. The determination ~~shall~~ must include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.

(c) Uphold the fee and issue a written determination to the ~~requesting person~~ requestor indicating the specific basis under section 4 that supports the required fee. The determination ~~shall~~ must include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.

~~(d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.~~

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).

(4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 ~~shall~~ must reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is

located. The court ~~shall~~ must determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section ~~shall~~ must be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If the ~~requesting person~~ requestor prevails in an action commenced under this section by receiving a reduction of ~~50~~25% or more of the total fee, the court ~~may, in its discretion~~, must award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. ~~The award shall be assessed against the public body liable for damages under subsection (7).~~

~~(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of $500.00, which shall be deposited in the general fund of the state treasury. The court also award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.~~

~~(8)~~(7) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

(8) If an attorney or law firm appeals a request filed by that attorney or law firm to a court or the Commission, and prevails as provided in subsection (6), that attorney or law firm shall be entitled to whatever fees and costs would be awarded if the attorney or law firm had represented a client in that appeal, including the attorneys' fees that would have been awarded for such representation.

Comment

The changes to this section are primarily intended to decrease the likelihood of public bodies charging excessive fees for FOIA requests and to reduce costs for requestors who appeal the fee charged them by a public body.

- MCL § 15.240a(1)(c): This amendment adds the option to appeal a public body's FOIA fee determination to the Commission.
- MCL § 15.240a(2): This amendment changes the requirement that a public body consider an appeal from 10 business days to 10 calendar days, accelerating the appeal process and reducing the time a requestor may have to wait to obtain documents. Given that an appeal to a public body is not considered "received" until its next meeting, this change will not cause an undue burden.
- MCL § 15.240a(2)(d): As a matter of law, a FOIA appeal that is made to a public body is not considered "received" until the next meeting of the head of that public body. From that date, a public body would then have 10 business days to reach a decision on the appeal. Providing an additional 10

business day extension increases delays unnecessarily, particularly for those public bodies that only meet on a monthly basis. This amendment removes this unnecessary 10-day extension option.

- MCL § 15.240a(6): This amendment lowers the threshold for the portion of a fee that must be reduced before a requestor will be awarded attorneys' fees. This incentivizes more accurate fee estimates. At present, public bodies frequently issue large fee estimates that are later reduced. This can lead requestors to abandon their requests rather than pay the estimated fee. This section also makes the payment of attorneys' fees mandatory, which further promotes well-supported fee estimates.
- MCL § 15.240a(8) (new): This amendment makes clear that an attorney representing himself or herself in a FOIA appeal nevertheless is entitled to reasonable attorneys' fees and cost upon prevailing in a lawsuit challenge a public body's FOIA fee determination. Under current law, attorneys cannot collect fees for representing themselves in FOIA matters.

Section 10b: MCL § 15.240b – Failure to comply with act; civil fine.

Sec. 10b.

(1) If the court or the Commission determines, in an action commenced under this act, that a public body ~~willfully and intentionally~~ failed to comply with this act, ~~or otherwise acted in bad faith,~~ the court or Commission ~~shall~~ must order the public body to pay, in addition to any other award or sanction, a civil fine of not less than $2,500.00 or more than $~~7,500.00~~ $25,000.00 for each occurrence. In determining the amount of the civil fine, the court or Commission shall consider the budget of the public body, any endowment benefitting the public body, other economic factors affecting the public body's overall financial condition, and whether the public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

(2) If a public body has been previously found to have violated this act within the past 2 years, minimum fines must be as follows:

   a. For a second violation: $7,500;

   b. For a third violation: $10,000;

   c. For a fourth or subsequent violation: $15,000.

(3) If the court or the Commission determines in an action commenced under this section that the public body has willfully, arbitrarily, or capriciously violated this act, the court or Commission must order the public body to pay a civil fine not less than $5,000.00, nor more than $50,000.00, which must be deposited in the general fund of the state treasury. The court or Commission may also award, in addition to any actual or compensatory damages, punitive damages in the amount of $5,000.00. The fine and any damages shall not be assessed against an individual, but must be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function. Fines described by this subsection are in addition to any other fines and costs permitted by this section. In determining the amount of the civil fine, the court or Commission shall consider the budget of the public body, any endowment benefitting the public body, other economic factors affecting the public body's overall financial condition, and whether the public body has

previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

(4) If a public body files a petition for an extension of time as provided by MCL 15.235(11), and fails to obtain relief in the form of an extension, that public body shall be fined $100.00 per day for each day beyond the date records would have been required to be produced under section 5(2) of this act. If the Commission or circuit court determines that the petition for an extension of time was arbitrary, capricious, or made in bad faith, the Commission or circuit court shall award fines as provided in subsection (1) and (2) of this section. In determining the amount of the civil fine, the court or Commission shall consider the budget of the public body, any endowment benefitting the public body, other economic factors affecting the public body's overall financial condition, and whether the public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

Comment

- MCL § 15.240b(1): This amendment both adds the Commission as a body that can levy fines and significantly increases the possible penalties under FOIA. In doing so, it offers guidance that the financial status of the public body should be considered in crafting an appropriate fine. This encourages large, sophisticated actors (such as the state or major universities) to maintain a robust FOIA compliance team, while at the same time encouraging lenity for smaller public bodies.

- MCL § 15.240b(2): This amendment is designed to encourage public bodies to take complying with FOIA seriously. By creating a structure of escalating fines, public bodies will need to be more concerned with compliance than at present, where low fines can be more easily dismissed as a cost of doing business. This would also make it more difficult for public bodies to simply pay the fines for violating FOIA as a means to prevent the disclosure of certain information.

- MCL § 15.240b(3): This amendment significantly increases penalties for egregious violations of FOIA. In addition, the amendment makes punitive damages available in these circumstances. Taken together, these increased penalties deter public bodies from blatantly violating FOIA.

- MCL § 15.240b(4): This amendment makes clear that if a public body fails to demonstrate that more time is needed to respond to a request than is provided in section 5(2), it will be fined for the delay associated with the extension petition. Certain petitions undertaken for improper reasons, meanwhile, are treated as a violation of FOIA to be fined as though the public body failed to respond. This ensures that public bodies do not abuse the petition process to obtain a de facto extension during the pendency of the appeal.

Section 10c: MCL § 15.240c – Open Government Commission.

Sec. 10c

(1) The Michigan Open Government Commission is hereby created as an independent executive agency.

(2) The Commission shall consist of 9 members appointed as follows:

(a) 1 appointed by the Senate Majority Leader.

(b) 1 appointed by the Senate Minority Leader.

(c) 1 appointed by the Speaker of the House.

(d) 1 appointed by the House Minority Leader.

(e) 1 appointed by the Governor from recommendations by the Michigan Association of Broadcasters.

(f) 1 appointed by the Governor from recommendations by the Michigan Press Association

(g) 1 appointed by the Governor from recommendations from the Michigan Coalition for Open Government.

(h) 2 appointed by the Governor.

(3) The members first appointed to the Commission must be appointed within 60 days after the effective date of this section.

(4) Members of the Commission shall serve for terms of 4 years or until a successor is appointed, whichever is later, except that for members first appointed, 3 shall serve for 1 year, 2 shall serve for 2 years, and 2 shall serve for 3 years:

(a) For members appointed by the Michigan Association of Broadcasters, Michigan Press Association, or Michigan Coalition for Open Government, the members first appointed shall serve for 1 year.

(b) For members appointed by the Governor, the members first appointed shall serve for 2 years.

(c) For members appointed by the majority and minority leaders of the Legislature, the members first appointed shall serve for 3 years.

(5) If a vacancy occurs on the Commission, the vacancy must be filled in the unexpired term in the same manner as the original appointment.

(6) The senate majority leader, senate minority leader, house majority leader, and house minority leader, acting in agreement, may remove a member of the Commission for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office.

(7) The first meeting of the Commission must be called by the Governor no later than 90 days after the effective date of this act. At the first meeting, the Commission shall elect from among its members a chairperson and other officers as it considers necessary or appropriate. After the first meeting, the

Commission shall meet at least monthly, or more frequently at the call of the chairperson or if requested by 3 or more members.

(8) A majority of the members of the Commission constitute a quorum for the transaction of business.

(9) The business that the Commission performs shall be conducted at a public meeting held in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. The Commission may meet in closed session to deliberate on the merits of an asserted exemption, exclusion, or privilege from disclosure for a writing. Notwithstanding any provisions of the open meetings act, MCL 15.261 *et seq*., the Commission is permitted to conduct meetings electronically.

(10) A record prepared, owned, used, in the possession of, or retained by the Commission in the performance of an official function is subject to this act. Unredacted records provided to the Commission for purposes of appellate review are not subject to disclosure under this subsection.

(11) Members of the Commission shall serve without compensation. Members of the Commission may be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as members of the Commission.

(12) In addition to any other duties prescribed by this act, the Commission may do all of the following:

(a) Receive complaints from requestors regarding responses to requests for information under this act.

(b) In response to a citizen complaint, investigate a public body's policies regarding Freedom of Information requests.

(c) In response to a citizen complaint, investigate a public body's response to a citizen request under this act.

(d) In response to a citizen complaint and request for an opinion, investigate and issue an opinion that is binding and enforceable as to the public body and the person bringing the complaint absent appeal to the court, resolving the following issues concerning a request under this act:

(i) The amount of the fee authorized under this act.

(ii) The validity, applicability, or extent of any exemption or exclusion asserted.

(iii) View the documents that this act requires the public body to make available in response to the request. The Commission shall be empowered to review unmodified versions of all responsive records at issue in an appeal, in order to judge the appropriateness of any claimed exemption.

(iv) The timeliness of a public body's response to a request, or the propriety of an extension of the deadlines taken for a response, as provided in this act.

(e) Hear appeals as provided in sections 10 and 10a of this act.

(f) Order a public body to pay fines, fees, or other monetary penalties as provided in this act, including, without limitation, the monetary penalties described by section 10b.

(g) Offer no less than annual training opportunities, to ensure FOIA coordinators are proficient in this act's requirements.

(h) Notwithstanding the above, the Commission is empowered to investigate and hear cases it determines, in its discretion, warrant review, and is not required to issue an opinion on, or investigate, all complaints submitted to the Commission.

(13) The Commission may do 1 or more of the following:

(a) Recommend policies or remedial actions to a public body after investigating a citizen's complaint.

(b) Recommend changes to this act based on information gathered in receiving, investigating, and responding to a citizen's complaint.

(14) The statutory period for filing a court action under this act is tolled while an appeal is pending before the Commission.

Comment

The changes to this section create an intermediary third body designed to address FOIA matters. Under existing law, requestors that are not satisfied with a public body's response have only two choices: appeal to the same public body that issued the unsatisfactory response or file a lawsuit. The first of these options is rarely successful, and the latter is an investment of time and money that few requestors can justify. The creation of the Commission, however, provides an alternative to litigation that can offer meaningful relief in a less expensive and more timely fashion.

- MCL § 15.240c(1): This amendment creates the Commission as a separate executive branch agency. This approach was taken to avoid the potential issue of the Commission being housed within an existing agency and then being asked to evaluate whether that same agency properly responded to a FOIA request. The Commission need not be made part of the executive branch to function, nor does it necessarily need to be considered a "department," given its small size. The particular contours of the Commission's legal existence can vary, so long as its core powers are retained.

- MCL § 15.240c(2) This amendment clarifies how the members of the Commission are to be selected. As written, the amendment ensures that the views of both Republicans and Democrats will be present on the Commission, but that the party in control of the governor's office will be a majority of political appointees. In addition, representation is given to the views of those entities likely to be most familiar with FOIA in Michigan by permitting them to offer the governor potential candidates that will uphold the nonpartisan purposes of FOIA. This lessens the likelihood that the Commission will become a partisan body, which is a particular concern given that prior amendments subject both the executive and legislative branches to FOIA.

- MCL § 15.240c(3): This amendment ensures that appointing authorities cannot effectively disband the Commission by refusing to appoint commissioners.

- MCL § 15.240c(4): This amendment provides for staggered terms, to ensure that the entire Commission does not become vacant simultaneously.
- MCL § 15.240c(5): This amendment provides for the filling of vacancies as they occur.
- MCL § 15.240c(6): This amendment provides for the bipartisan removal of commissioners for cause. By requiring this process to involve both majority and minority leadership, commissioners cannot be removed for political reasons.
- MCL § 15.240c(7): This amendment provides for the initial meeting of the Commission, the process by which the Commission will select its officers, and the Commission's regular schedule.
- MCL § 15.240c(8): This amendment provides quorum requirement for the Commission's work.
- MCL § 15.240c(9): This amendment requires the Commission to adhere to the requirements of the Open Meetings Act. This increases transparency, which is the overarching goal of the Commission. Given, however, that the Commission will be charged with evaluating whether certain information is properly redacted under FOIA, it is necessary that the Commission be able to discuss potentially protected information in closed session. The Commission is expressly authorized to conduct meetings electronically, both to increase transparency and to permit the Commission to be more responsive in performing its duties.
- MCL § 15.240c(10): This amendment subjects the Commission's records to FOIA. It also provides clarity that unredacted records in the Commission's possession for the purpose of evaluating whether redactions were appropriately applied are not subject to disclosure. This prevents a requestor or third party from filing a FOIA request with the Commission during an appeal in order to obtain unredacted records currently under review.
- MCL § 15.240c(11): Realistically, the Commission can be structured in a variety of ways. As drafted, the Commission would be unpaid, and under proposed MCL § 15.240c(12)(H), have the discretion to accept or reject appeals. The ability to exercise discretion with respect to the appeals coming before the Commission is necessary in light of the Commission's voluntary status.

  An alternative approach, however, may be preferable. It is possible that providing commissioners a salary could make it easier to attract top talent to the Commission, particularly given the legal expertise that would be needed to fill the role of a commissioner.

  Similarly, if the Commission were structured to be a body similar to a grievance commission, and properly staffed, it would be appropriate to remove the Commission's discretion to reject appeals. Lawmakers interested in adopting these amendments should carefully consider whether it is better to have a less-active, less-impactful Commission that is only a minimal expense, or a more formal Commission structured essentially as a small state department that can take on a more expansive role.
- MCL § 15.240c(12): This amendment empowers the Commission to enforce the requirements of FOIA. This includes responding to complaints, investigating policies, hearing FOIA appeals, levy fines, and issue binding opinions as to whether a fee or redaction is appropriate, the timeliness of a

public body's response, the availability of records. The Commission is also empowered to act as a training entity, which is particularly valuable, since FOIA coordinators are not required to undergo any formal training by law. As stated above, MCL § 15.240c(12)(H) is necessary in light of the Commission's voluntary nature — should the Commission be staffed and funded, such discretion may not be necessary (although it could be preserved if the Legislature determines that permitting this discretion will help the Commission be more effective).

- MCL § 15.240c(13): This amendment is largely geared toward promoting greater compliance with FOIA without the need for an appeal. By recommending policy changes to public bodies, the Commission can increase transparency by establishing clear expectations for a public body's responses to FOIA requests. Further, as envisioned, the Commission will play a lead role in the evolution of Michigan's FOIA law, and as such, is an appropriate entity to recommend improvements to the Legislature.
- MCL § 15.240c(14): This amendment clarifies that an appeal to the Commission pauses the statutory time limit for filing a FOIA lawsuit. This ensures that requestors are not forced to choose between an appeal to the Commission, or one to the courts.

Section 11: MCL § 15.241 – Matters required to be published and made available by state agency; form of publications; effect of matter not published and made available; exception; action to compel compliance by state agency; order; attorneys' fees, costs, and disbursements; jurisdiction; definitions.

Sec. 11.

(1) A state agency must publish and make available to the public all of the following:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements that implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in electronic format or in pamphlet, loose-leaf, or other appropriate form in printed, mimeographed, or other written matter.

(3) Except to the extent that a person has actual and timely notice of the terms thereof, a person is not required to resort to, and shall not be adversely affected by, a matter required to be published and made available, if the matter is not so published and made available.

(4) This section does not apply to public records that are exempt from disclosure under section 13.

(5) A person may commence an action in the ~~court of claims~~ circuit court or before the Commission to compel a state agency to comply with this section. If the court or Commission determines that the state agency has failed to comply, the court or Commission shall order the agency to comply and must award

reasonable attorneys' fees, costs, and disbursements to the person commencing the action. ~~The court of claims has exclusive jurisdiction to issue the order.~~

(6) If an attorney or law firm appeals a request filed by that attorney or law firm to a court or the Commission, and prevails as provided in subsection (5), that attorney or law firm shall be entitled to whatever fees and costs would be awarded if the attorney or law firm had represented a client in that appeal, including the attorneys' fees that would have been awarded for such representation.

~~(6)~~(7) As used in this section, "state agency", "contested case", and "rule" mean "agency", "contested case", and "rule" as those terms are defined in the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

Comment

The changes to this section are intended to empower the Commission to address issues regarding documents that must be published automatically.

- MCL § 15.241(5): This amendment empowers the Commission to hear FOIA disputes involving the state. It also makes clear that attorneys' fees and costs are mandatory if a requestor prevails in an action against the state.
- MCL § 15.233(6): This amendment is similar to those above, and ensures that attorneys who represent themselves in FOIA action can obtain attorneys' fees and costs.

Section 12: MCL § 15.242 – Exemption of this act from suspension under a state of emergency.

Sec. 12.*

The provisions of this act may not be suspended in a declared state of disaster or declared state of emergency as provided by the Emergency Management Act of 1976.

Comment

MCL § 15.242: This addition prevents FOIA from being suspended in a time of a declared emergency. During the COVID-19 pandemic, the suspension of FOIA made it impossible to obtain public records. Worse still, some public bodies relied on Gov. Gretchen Whitmer's initial suspension of FOIA as a justification for continued noncompliance with FOIA long after that suspension was lifted. During an emergency, Michigan's citizens need more access to information, not less.

* This would insert a new section into Michigan's FOIA law which currently does not contain a section 12.

Section 13: MCL § 15.243 – Exemptions from disclosure; public body as school district, intermediate school district, or public school academy; withholding of information required by law or in possession of executive office.

Sec. 13.

(1) A public body may exempt from disclosure any of the information listed in this subsection, but it is not required to do so. If a public body chooses to exempt from disclosure any of the following information, it must provide a complete statement of facts that explains why each claimed exemption applies and why the public interest in nondisclosure outweighs the public interest in disclosure in the particular instance. ~~A public body may exempt from disclosure as a public record under this act any of the following:~~

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. This exemption does not apply to e-mail addresses, working groups, or similar information for members, employees, contractors, or vendors of a public body.

(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~~:~~. The application of any of the exemptions contained in this subsection is contingent on the public body describing, in detail, how the exemption applies in the specific instance to the fullest extent possible without revealing information that would negate the purpose of the underlying exemption. This subsection is to be strictly construed against the public body.

(i) Interfere with an ongoing law enforcement ~~proceedings~~ investigation.

(ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.

(iii) Constitute a~~n~~ clearly unwarranted invasion of personal privacy. For the purpose of the exemption under this subsection, the release of law enforcement disciplinary records is not 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, which, if revealed, would meaningfully jeopardize future investigations.

(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.

(A) This exemption does not apply to the final governmental policy developed as a result of commercial or financial information, nor to the fiscal impacts of that policy or documents evidencing the same. A contract evidencing an economic development deal is not subject to this exemption.

(g) Information or records subject to ~~the attorney-client~~ a legal privilege or protection recognized by statute, the common law, or court rule.

~~(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)~~(h) 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)~~(i) 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)~~(j) 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)~~(k) 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)~~(l) 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)~~(m) Information that would reveal the exact location of archaeological sites. The department of natural resources 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)~~(n) 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)~~(o) 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)~~(p) Records of a campaign committee including a committee that receives money from a state campaign fund.

~~(s)~~(q) ~~Unless~~ Only if the public interest in nondisclosure outweighs the public interest in ~~non~~disclosure 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)~~(vi) 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)~~ (vii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.

(viii~~ix~~) Disclose ~~personnel~~ records of ~~law enforcement agencies~~ either of the following:

(1) The medical history of a law enforcement officer or agent.

(2) The use of an employee assistance program, mental health service, or substance abuse assistance service by a law enforcement officer or agent, unless the use of the program or service is mandated by a disciplinary proceeding the records of which are not exempt under this section.

~~(x)~~(ix) 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)~~(r) 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)~~(s) 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. This exemption does not extend to electronic e-mail addresses, working groups, or similar information for members, employees, contractors, or vendors, of a public body.

~~(v)~~(t) 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. This exemption is mandatory for purposes of MCL 15.234.

~~(x)~~(u) 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)~~(v) Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, 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, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities, 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. This exemption does not extend to electronic e-mail addresses, working groups, or similar information for members, employees, contractors, or vendors, of a public body.

~~(z)~~(w) Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.

~~(aa) Research data on road and attendant infrastructure collected, measured, recorded, processed, or disseminated by a public agency or private entity, or information about software or hardware created or used by the private entity for such purposes.~~

(2) A public body must exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation. This exemption may be considered mandatory for purposes of MCL 15.234.

(3) This act does not authorize the withholding of 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, 1969 PA 306, MCL 24.201 to 24.328.

(4) ~~Except as otherwise exempt under subsection (1), this act does not authorize the withholding of a public record in the possession of the executive office of the governor or lieutenant governor, or an employee of either executive office, if the public record is transferred to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received by a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government that is subject to this act.~~ A public body applying an exemption described by this section to redact portions of a record must specifically identify which exemption is being applied to each individual redaction. A general description of redactions applied is not sufficient to satisfy this requirement, and it is the legislature's intent that each redaction be accompanied with a specific citation to the statutory exemption being applied.

(5) A public body is not permitted to withhold the existence of a public record under this section, even if the entire contents of such a record would be exempt under 1 or more provisions of this section. An entirely exempt record must be produced, with appropriate redactions as described by this section, including a specific indication of the exemption(s) being applied.

(6) In applying an exemption described by this section, the public body bears the burden of proof of establishing, by clear and convincing evidence, that an exemption applies in the particular instance, and all records are presumed to be subject to disclosure absent such a showing. A public body that, upon appeal, has been determined to have misapplied an exemption is subject to the monetary penalties described by this act.

Comment

The changes to this section are intended to clarify when various exemptions are applicable, to expand the categories of records available under FOIA and to prevent the use of generalized language to redact or exempt records without sufficient explanation.

- MCL § 15.243(1): This amendment codifies existing case law that the vast majority of exemptions are not mandatory and need not be applied as a matter of law. It also requires public bodies that choose to apply permissive exemptions to provide a list of specific reasons why the exemption applies in the particular case, thereby preventing the use of blanket language for exemptions. Finally, this amendment adds a public interest balancing test which would make it more difficult for public bodies to claim exemptions without preventing them from doing so entirely.

- MCL § 15.243(1)(a): This amendment is necessary because the privacy exemption has been applied to largely prevent disclosure of the material covered by the amendment. This information can often be key to holding officials accountable and can lead to more narrowly tailored subsequent requests.

- MCL § 15.243(1)(b): This amendment makes clear that when a public body relies on the privacy exemption for police records, it needs to explain in detail why releasing the information would interfere with an individual's privacy rights. This enables requestors to better evaluate whether the claimed exemption is reasonable.

- MCL § 15.243(1)(b)(i): This amendment is necessary in light of some public agencies' responses to FOIA requests. The phrase "law enforcement proceedings" is sufficiently vague, and in some cases, public bodies have interpreted this phrase as lasting until a trial is complete. The purpose of the exemption is to prevent FOIA from interfering with police investigations. Once an investigation is complete, records should be made accessible.

- MCL § 15.243(1)(b)(iii): This amendment is designed to encourage greater transparency within the law enforcement community. Currently, obtaining a law enforcement officer's disciplinary records is extremely difficult. This makes it more difficult for the public to monitor whether those who are tasked with keeping the public safe are fulfilling their duties appropriately. This amendment specifies that these disciplinary records are not exempt from FOIA.

- MCL § 15.243(1)(b)(v): This amendment is designed to eliminate a loophole in which law enforcement agencies refuse to release records relating to an investigation until the matter is fully resolved at trial. This significantly hinders the public's understanding of not just a particular investigation, but police procedures in general.

- MCL § 15.243(1)(f): This amendment is designed to prevent economic development agencies, such at the Michigan Economic Development Corporation, from using this exemption to avoid disclosing the terms of taxpayer-funded economic development deals.

- MCL § 15.243(1)(g): This amendment consolidates a number of exemptions relating to common law and statutory privileges into a single exemption.

- MCL § 15.243(1)(m): This amendment eliminates what is commonly referred to as the frank communications exemption. In theory, this exemption attempts to strike a balance between allowing free communications between public officials and letting the public obtain particularly important communication. In practice, this exemption is one of the most abused to conceal information that a public body considers embarrassing or damaging. Further compounding this problem is the tendency of trial courts to overlook or misapply the balancing test in this section, which should strongly favor disclosure. The public deserves to not only have access to the final decisions made by public officials, but also to the process that led to the formation of that decision. To remedy these issues, this exemption is removed.

- MCL § 15.243(1)(q): The amendment is designed to reverse the public interest balancing test when evaluating whether police records should be released. Certain information in police records should undoubtedly be withheld. But placing the burden of demonstrating the public interest in records on the requestor is inappropriate. Public records should, by default, be presumed to be disclosable. Police departments should have the burden of demonstrating that the interest in withholding a record is sufficient to overcome the presumption records should be produced.

- MCL § 15.243(1)(q)(vi): This amendment makes the contents of police staff manuals available to the general public. These manuals can provide valuable insights as to how police officers are supposed to perform their duties and helps the public hold the law enforcement community accountable.

- MCL § 15.243(1)(ix): This amendment makes personnel records accessible to the public, while still exempting certain records which are highly personnel, or which would not advance the public's ability to hold government accountable.

- MCL § 15.243(1)(s): This amendment closes a loophole that has become increasingly common. Public bodies, when faced with FOIA requests, have attempted to exempt working group e-mail addresses by claiming disclosure of those addresses would have security implications. This is an inappropriately broad reading of the security exemption, and the changes here make that clear.

- MCL § 15.243(1)(aa): This exemption has not been abused but appears to be rarely applied. As it is of questionable usefulness, it should be eliminated.

- MCL § 15.243(4): Frequently, public bodies merely identify which exemptions they have applied without associating a particular redaction with a particular exemption. This requires requestors to sue in order to understand what redactions might be appropriate and which ones might not be. By requiring public bodies to associate each redaction with a specific exemption, requestors will be better able to assess the appropriateness of redactions without having to resort to litigation. As a bonus, the additional work required by this amendment helps to disincentivize excessive redactions.

- MCL § 15.243(5): This amendment clarifies that even an entirely redacted record must be produced. Currently, if a public body determines a record is entirely exempt, it can be withheld, without acknowledging the record exists. This makes it impossible for the public to challenge the appropriateness of the redactions. By requiring the record be produced in fully redacted form, requestors would have the opportunity to argue those exemptions are inappropriate.

- MCL § 15.243(6): This amendment makes clear the burden of proof for applying exemptions rests with the public body attempting to apply them. It also raises the burden of proof for a public body to succeed in arguing a redaction was appropriate. Finally, it makes clear that improper redactions are sufficient to give rise to the monetary penalties applicable to violations of this act.

Section 13a: MCL § 15.243a – Salary records of employee or other official of institution of higher education, school district, intermediate school district, or community college available to public on request.

Sec. 13a.

Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws ~~shall~~ must upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college.

Comment

The change to this section is purely for form and does not alter the substance of this section.

Section 14: MCL § 15.244 – Separation of exempt and nonexempt material; design of public record; description of material exempted.

Sec. 14.

~~(1)~~ If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body ~~shall~~ must separate the exempt and nonexempt material and make the nonexempt material available for examination and copying. The public body must also describe, with as much specificity as possible, the nature of the exempt information, including details relating to the contents of the exempt material, the sender(s) and receiver(s) of any exempt correspondence, and other factual information which would better allow a requestor to determine whether an exemption is being applied properly. A public body need not provide information that would defeat the purpose of applying an exemption, but must provide as much information as possible without defeating the purpose of the exemption. This section is to be construed strictly against the public body.

~~(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.~~

Comment

The changes to this section clarify what a public body must do when applying redactions. Currently, public bodies can simply claim an exemption, redact information without specifying which exemption applies to individual redactions and provide no additional information. The amended language is designed to provide requestors with more information, including that which allows the requestor to better evaluate whether a claimed exemption is improper.

Section 15: MCL § 15.245 – Repeal of MCL 24.221, 24.222, and 24.223.

Sec. 15.

Sections 21, 22 and 23 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.221, 24.222 and 24.223 of the Michigan Compiled Laws, are repealed.

Comment

This section requires no changes.

Section 16: MCL § 15.246 – Effective date.

Sec. 16.

This act shall take effect 90 days after being signed by the governor.

Comment

This section requires no changes.

Conclusion

The changes above are designed to fulfill FOIA's original purpose: to provide the people of Michigan with information they need to hold their government accountable and fully participate in the democratic process. These amendments go beyond making incremental changes to address individual issues and are designed to create systemic change. By significantly altering the incentive structure of FOIA, they encourage public bodies to take FOIA seriously and to provide information more quickly and at a lesser expense. If adopted, these amendments could transform Michigan from a state with a longstanding and poor record of public transparency, to one of the more transparent states in the country.

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Steve Delie is the director of labor policy and Workers for Opportunity at the Mackinac Center for Public Policy. In this role, he is in charge of researching, developing and promoting labor reforms through studies, commentary, speaking, media relations and legislative testimony.

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140 West Main Street P.O. Box 568 Midland, Michigan 48640

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