Understanding and Effectively Using Michigan's Freedom of Information Act to Gain Access to Government Records

by Steven P. Joppich

At some point, lawyers, paralegals and legal assistants in virtually every area of practice are likely to have occasion to submit a request for records to a governmental entity. Some will encounter the need on a regular basis, others rarely. Still others may not recognize the availability or existence of these records and will miss out on important information that could make a difference in the matter they are handling. In short, public records can be a valuable resource and an attorney's proper understanding of the law surrounding requests for these records can be an important asset to any legal practice. The purpose of this article is to provide attorneys and their support staff with a general understanding of the Michigan Freedom of Information Act ("FOIA"),[1] and some insight on how to most effectively and efficiently utilize it when the time comes in their legal practice to do so.

The FOIA facilitates requests for records made to state, county and local governmental bodies. In this regard, the Act contains a significant public policy statement:

> 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.[2]

The Making and Processing of a FOIA Request

Under the FOIA, every public body will have a "FOIA Coordinator," who is the person responsible for accepting, processing, approving and denying requests for the public body's public records under the FOIA.[3] Although a FOIA request can be sent generically c/o the "FOIA Coordinator" at the public body's general mailing address, it is usually a simple matter of a phone call to the public body or some basic online research that will reveal the name of the FOIA Coordinator to whom the request can be personally addressed. Furthermore, a public body may have a FOIA Coordinator designated for particular departments (e.g., a police department, fire department, clerk's department, water and sewer department, etc.) and pinpointing the

proper individual to get your request to may help avoid delays in obtaining a response.

When making a request for public records, it is also important to keep in mind that the public body is permitted to charge a fee in connection with searching for and providing a copy of the public record.[4] That fee is limited to actual mailing costs and 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.[5] In calculating the cost of labor, the public body can charge no more than the hourly wage of the lowest-paid employee of the public body who is capable of retrieving the information necessary to comply with the request.[6] Under certain limited circumstances a fee may be waived, but with most requests a fee should be expected.[7]

Upon receiving a request under the FOIA, the public body, through its FOIA Coordinator, is required to timely respond. That response must be issued in writing to the requesting party within five business days after the public body receives the request. Within that five-day period, the public body is permitted to issue a written notice extending the response period for up to 10 additional business days.[8] Either within the initial five-day period or any extended period, the FOIA Coordinator, on behalf of the public body, must respond in writing indicating that the request is granted, denied, or granted in part and denied in part.[9] That response should also describe any fees that are required to be paid in connection with the request, and if any records have been denied, a description of the reasons for denial and the rights of the requesting party to appeal or challenge the decision of the FOIA Coordinator.[10]

Formulating an Effective Description of the Records You Need

Although every FOIA request will be responded to under the FOIA, that doesn't necessarily mean the requesting party will receive what he or she wants or needs. In a way, the old saying of "garbage in, garbage out" could apply to a poorly worded description of the records being sought. In terms of how to describe the requested material, the FOIA is of only limited assistance. It merely states that the request must describe the desired public record "sufficiently to enable the public body to find the public record."[11] A FOIA request that is overly broad could result in either reams of mostly marginally relevant documents being provided at heavy expense, or a denial of the request for the reason that the requesting party has failed to describe the records with enough detail to enable the FOIA Coordinator to find them. The latter result will leave the requesting party with the option of submitting a subsequent, more detailed request, or initiating a legal challenge of the denial in circuit court. In all events, the requesting party will have needlessly wasted a substantial amount of time, effort and expense.

Suffice it to say that, as a practical matter, the most effective FOIA request is one that results in receipt of just the records that are needed in a prompt manner and at a reasonable cost. In order to efficiently achieve such desired results, the key usually lies in the wording of the request letter to the FOIA Coordinator. Of course, the request should clearly notify the public body that it is submitted under the FOIA, but the critical area is the manner in which the requested public records are described. In this author's experience, FOIA requests submitted by attorneys are often worded like interrogatories or requests for production of documents. This is only natural for attorneys and may be appropriate in a given situation. However, in most instances, this method of describing documents in a FOIA request is unnecessary and may end up being counterproductive.

Unlike discovery in a lawsuit, the idea in a FOIA request is not to gain admissions, nor in most instances is it used to gain every possible document of even the most remote relevance to the issue at hand – a subpoena or other discovery tools are better suited and intended for such purposes. To explain further, Michigan courts have described the "core purpose" of FOIA as contributing to "public understanding of the operations or activities of the government" and the right of citizens "to be informed about what their government is up to."[12] As such, although it can certainly be used by attorneys to assist in advising clients about various matters, the core purpose of FOIA is not to provide discovery in litigation.

Moreover, FOIA Coordinators are public administrative officials who are usually very knowledgeable about handling FOIA requests, but they are typically not attorneys and may not be accustomed to deciphering legalese. Broadly worded, all-encompassing or complicated descriptions may result in time extensions, misinterpretations, documents that are not needed or relevant, a denial of all or parts of the request, and extra FOIA fees and legal expenses that could have been avoided by a more appropriately worded request.

As a practical matter, upon receipt of a request for records, the objective of the FOIA Coordinator is basically to locate the requested records if they exist and respond to the request in compliance with the FOIA. As a result, it is in a requestor's best interest to assist the FOIA Coordinator by specifically identifying the needed documents in a manner that enables them to be easily identified and located among the public body's massive compilation of records, which are often located at multiple sites.

This requires some effort on the requesting party's side of the equation to describe the exact records he or she needs with details that will help narrow the search as much as possible. Including the dates, names of parties, addresses, places, types of documents, description of event and any other available identifying information involved will be helpful. Also, identifying the department or departments of the public body where the records are located (e.g., police, fire, etc.), if possible, will also assist in achieving the desired result. Investing in these efforts at the beginning of the process will increase the likelihood for everyone to save time, work and cost.

The Request Must Be For "Public Records"

FOIA requests will sometimes include questions about government policies, actions or other facts, or they will ask the FOIA Coordinator to list things such as wages for certain employees. While a FOIA Coordinator or other public official may, as a courtesy, respond to such inquiries in order to be helpful, these types of inquiries are not subject to FOIA.[13] FOIA is specifically limited to providing actual, existing public records, and the FOIA Coordinator is not required to answer questions, compile lists or create documents in response to FOIA requests.[14] The statute carefully defines "public records" in the following manner:

> "Public record" means a *writing* prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.[15]

In the Information Age, the question of what constitutes a "writing" naturally arises. This is answered by FOIA's definitions in a somewhat outdated manner:

> "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, or other means of recording or retaining meaningful content.[16]

It should be recognized, however, that the mere possession of a record by a public body does not necessarily render it a "public record."[17] Rather, per the FOIA's definition of "public record" (quoted above), the use or retention of the document must be "in the performance of an official function."[18]

A recent case in point is *Howell Education Association v. Howell Board of Education*,[19] where the Court of Appeals addressed the issue of whether personal e-mails of public employees generated through the school district's e-mail system that were retained or stored by the public body constitute public records. The e-mails at issue in the case involved internal union communications by teachers on school district computers. Looking to the FOIA's definition of "public record," the court acknowledged that in order for the e-mails to be subject to disclosure under the FOIA, they had to have been stored or retained by the public body *in the performance of an official function*. In applying this standard, the court found that the subject e-mails did not involve teachers acting in their official capacity as public employees, but rather in their personal capacity as union

members. The court went on to find that the records were retained by the public body as part of a routine back-up system that did not distinguish between business-related documents and personal documents. Thus, the court concluded that the subject e-mails were not "public records" subject to disclosure under the FOIA because they were not retained in the performance of any kind of official function, but instead as a "byproduct" of a computer system that automatically retains all e-mails.

Not All Public Records Have to Be Disclosed

The FOIA and certain other laws, such as the Open Meetings Act,[20] have been nicknamed "sunshine laws," because their aim is to open up and let the sun shine in on public records and actions such that the public can see them and partake in the democratic process.[21] This label, however, is not entirely accurate, because the FOIA lists 25 categories of public records that can be exempted from the Act's general requirement of public disclosure.[22] As a result, the sun does not necessarily shine on the records or information falling into these categories of exemption.

There is good reason, however, for each of the exemptions. For instance, they protect against revealing certain sensitive information regarding police officers, police informants, public infrastructure and buildings, Social Security numbers, attorney-client communications, medical information, security information, and many other matters with which an attorney making a FOIA request will want to become familiar. Space for this article does not permit a discussion of each of the exemptions and the massive amount of case law that has developed over the past four decades around them. However, a sampling of the Supreme Court's discussion of statutory construction and one of the more heavily litigated exemptions will perhaps provide a comprehensive appreciation of the legal intricacies involved with many of the exemptions.

As a general proposition, the Michigan Supreme Court has consistently instructed that the FOIA is a pro-disclosure statute and the exemptions must be narrowly construed.[23] In support of this construction, the Court has noted that the FOIA has two built-in administrative biases in favor of disclosure: (1) the exemptions are permissive, because they permit withholding exempt records but do not require it; and (2) while there are sanctions for improperly withholding a public record, there are no penalties for wrongfully releasing a document.[24]

The "personal privacy exemption" has been the subject of numerous appellate rulings involving the FOIA. It is found in Section 13(1)(a) of the FOIA and allows for the exemption

OCBA Board of Directors Election Results

Thanks to all of this year's candidates for participating in this election. Their willingness to run is a wonderful testament to their affiliation with the OCBA and their interest in serving its members, our community, and in making a difference. Here are the results of the election for the OCBA's Board of Directors:

Elected to a three-year term ending June 30, 2014; five to be elected:

Michael K. Lee, *Lee & Correll*
Thomas H. Howlett, *The Googasian Firm, P.C.*
Gerald J. Gleeson II, *Miller, Canfield, Paddock & Stone, P.L.C.*
Victoria A. Valentine, *Valentine & Associates*
Daniel D. Quick, *Dickinson Wright PLLC*

Elected to a one-year term ending June 30, 2012; one to be elected:

Keefe A. Brooks, *Brooks Wilkins Sharkey & Turco, PLLC*

Other candidates were:

Kaveh Kashef, *Clark Hill PLC*
Sarah E. Kuchon, *Hohauser Law Firm*
Robert M. Sosin, *Alspector, Sosin & Noveck, P.L.L.C.*
Melinda N. Deel, *Melinda N. Deel, PLLC*
J. Adam Behrendt, *Bodman PLC*
Jonathan L. Engman; *Fabrizio & Brook, P.C.*

This year, a total of 833 ballots were cast. Of 2,666 eligible voters, 31.25 percent cast a ballot.

In 2010 a total of 993 valid ballots were counted. The total number of eligible voters was 2,535 with 39.17 percent participation in the election.

of "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Broken down, the two elements under this exemption involve determinations of 1) whether the information is of a personal nature, and 2) whether its disclosure would constitute a clearly unwarranted invasion of an individual's privacy. Most attorneys will recognize that these elements are packed with significant privacy law complexities, especially when the pro-disclosure nature of the FOIA is injected into the mix.

One of the more significant and comprehensive Supreme Court analyses of the personal privacy exemption can be found in *Mager v. Department of State Police*, which involved a FOIA request for the names and addresses of private individuals who own registered handguns. Looking at the first element of the exemption, the Court explained that information is of a "personal nature" when it reveals something "of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives."[25] Applying this standard, the Court concluded that records listing the names and addresses of private individuals who own guns in Michigan constituted information of a personal nature.

The Court then turned to the question of whether disclosure of that information to the public would constitute a clearly unwarranted invasion of gun owners' privacy. In doing so, the "core purpose" of FOIA became a central focus of the Court's analysis and ruling. The Court quoted the following passage from the U.S. Supreme Court's decision in a case[26] involving a similar privacy exemption under the federal freedom of information laws:

> The basic [FOIA] policy of full agency disclosure unless information is exempted under clearly delineated statutory language, indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case – and presumably in the typical case in which one private citizen is seeking information about another – the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

The Court in *Mager* then affirmed the trial court's finding of an unwarranted invasion of personal privacy:

> Applying that [U.S. Supreme Court] analysis to the present case, it is certain that any reasonable balancing would find disclosure to be unwarranted. The Legislature has stated the purpose of the Michigan FOIA in terms similar to those enunciated by the U.S. Supreme Court. As the U.S. Supreme Court explained ... fulfilling a request for information on private citizens – a request entirely unrelated to any inquiry regarding the inner working of government, or how well the Department of State Police is fulfilling its statutory functions – would be an unwarranted invasion of the privacy of those citizens.

As such, it appears that requests that are for public records containing personal information of private citizens will receive some scrutiny in terms of whether the request relates to the inner workings of government.

In Conclusion

The Freedom of Information Act provides a potentially valuable tool for attorneys to utilize in their practice. Knowing how to effectively and efficiently make requests under the FOIA, however, requires some attention to detail, an understanding of how the requests are processed, and the case law and exemptions involved.

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Footnotes

1 Public Act No. 442 of the Public Acts of 1976, as amended, being MCL 15.231 *et seq.*
2 MCL 15.231(2).
3 MCL 15.232(b) and MCL 15.236.
4 MCL 15.234.
5 MCL 15.234(1).
6 MCL 15.234(3).
7 MCL 15.234(1).
8 MCL 15.235. A public body, however, is limited to only one such notice of extension for a particular request.
9 *Id.*
10 *Id.*
11 MCL 15.233(1). The legislative intent of this requirement is to relieve public bodies from the intolerable administrative burdens that would result if wholesale requests had to be fulfilled. Capitol Information Asso. v. Ann Arbor Police, 138 Mich App 655; 360 NW2d 262 (1984).
12 *Mager v. Department of State Police*, 460 Mich 134, 147-148; 595 Nw2d 142 (1999). *See also* FOIA, Section 1(2), MCL 15.231.1(2).
13 MCL 15.233(4) and (5).
14 *Id.*
15 MCL 15.232(e) (emphasis added).
16 MCL 15.232(h).
17 Detroit News, Inc v. Detroit, 204 Mich App 720, 724; 516 NW2d 151 (1994).
18 *Id.* at 725; MCL 15.232(e).
19 287 Mich. App. 228; 789 N.W.2d 495 (2010), lv den 488 Mich 1010 (2010)(reconsideration pending).
20 For example, the Open Meetings Act, Public Act No. 267 of 1976, as amended, being MCL 15.261, *et seq.*
21 While many consider this to be a development in the law from the 1970s, these types of laws date back to the late 19th century in Michigan. See *Wexford County Prosecuting Attorney v. Pranger*, 83 Mich. App. 197, 201, n 2; 268 NW2d 344 (1978).
22 FOIA Section 13(1), being MCL 15.243(1). Similarly, the Open Meetings Act lists 10 circumstances in which a public body is permitted to meet in a closed non-public session. MCL 15.268.
23 *See, e.g., Swickard v. Wayne County Medical Examiner*, 438 Mich. 536, 558; 475 N.W.2d 304 (1991).
24 *Michigan State Employees Association v. Michigan Department of Management and Budget*, 428 Mich. 104, 110, n 2; 404 N.W.2d 606 (1987), citing Easterbrook, "Privacy and the Optimal Extent of Disclosure under the Freedom of Information Act," 9 J Legal Stud 775, 776-777(1980).
25 *Mager, supra*, 460 Mich at 142.
26 Dep't of Air Force v. Rose, 425 U.S. 352, 360-361; 96 S. Ct. 1592; 48 L. Ed. 2d 11 (1976) (internal quotation marks and citations omitted).