



Avoid Common Freedom of Information Act Mistakes

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Freedom of Information Act

- FOIA was originally adopted in 1976
- Part of the “sunshine laws.”
- Sticking to deadlines and knowing the technical aspects of the law will prevent most common mistakes



Freedom of Information Act

- Who May Request a Public Record?
 - Under the Freedom of Information Act, any "person" has the right to inspect, copy or receive copies of public records of a public body.
 - "Person" means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity.
- The definition of "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.



Freedom of Information Act

What Must the Request Include?

- The FOIA does not define a "request" or provide specific requirements that must be contained in a request. The requester does not have to specifically state that the request is made pursuant to the FOIA.
- The FOIA states that the person has the right to inspect, copy or receive public documents upon providing a written request that describes a public record sufficiently to find the public record.



Freedom of Information Act: Common Mistake

- Mistake: Applying the requirements of the FOIA only when the request specifically references the FOIA or the requester uses the public body's specific FOIA form.
- Remedy: Err on the side of applying the FOIA to any *written* request, even if it is an informal e-mail.



Freedom of Information Act

- The requesting party may submit a continuing request for public records created, issued or disseminated on a regular basis. A continuing request for future records is valid for up to six months and may be renewed.
- The request does not have to be a formal written letter. The request can be made in the form of an e-mail or fax.



Freedom of Information Act: Common Mistake

- Mistake: Granting a “subscription” request for documents not regularly created.
- Remedy: Make sure that the documents are regularly created during the course of business such as agendas or minutes.



Freedom of Information Act

Definition of Public Record

“Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.



Freedom of Information Act

- Recent case found that “public records” does not include private e-mail correspondence, even if the e-mail was sent or received on a public computer.
- Keep you record retention policies in mind.



Freedom of Information Act: Common Mistake

- Mistake: Not turning over “public records” that may be contained on an official’s personal computer.
- Remedy: Training officials to understand that the definition of “public record” may include documents on a home computer if the official uses that computer for business. Officials should set up a “public use” e-mail account to separate “official” business from personal business.



Freedom of Information Act

- In addition to providing access to public records, the public body must furnish reasonable opportunity and facilities for inspection and examination of the records. Public records must be made available during regular business hours.
- The public body may adopt reasonable rules to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions, for example, a FOIA policy.



Freedom of Information Act: Common Mistake

- Mistake: Requiring a requester to inspect records instead of providing copies.
- Remedy: Currently, the public body does not have the choice; the requester makes the choice.



Freedom of Information Act

- The FOIA does not require the public body to make or prepare any particular records that it has not already created.
- The FOIA does not require the public body to create a compilation, summary or report for a requesting party.



Freedom of Information Act: Common Mistake

- Mistake: Carrying the limitation on creating a “compilation” too far.
- Remedy: To the extent the public body can provide the underlying information, the public body should do so. For example, if the requester asks for the average hourly wage of city sanitation workers, the city could provide the hourly wages and let the requester do the calculation.



Freedom of Information Act

- If requested, the public body is required to provide a certified copy.



Freedom of Information Act

Who is the FOIA Coordinator?

- The "FOIA Coordinator" for a city, village, township or county is an individual designated by the municipality in accordance with the Act to accept and process requests for public records.
- For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA Coordinator.
- The FOIA Coordinator is responsible for accepting and processing requests for the public body and responsible for approving a denial under Sections 5(4) and 5(5) of the Act. Those sections relate to a written notice denying a request or a part of a request. The FOIA Coordinator may designate another individual to act on his or her behalf in accepting and processing the requests.
- Written requests must be retained by the public body for one (1) year. The FOIA Coordinator is responsible for keeping a copy of the request.



Freedom of Information Act

- Upon receipt of a request, the public body has 5 business days to respond.
- The request is not considered “received” if sent by e-mail, fax, or other electronic means until 1 business day after it is transmitted.



Freedom of Information Act: Practice Pointer

THREE OPTIONS UPON INITIAL REQUEST

- Municipality can grant, deny or grant in part and deny in part. Any denial must be in writing but we recommend all correspondence in writing.
- Municipality can request a deposit up to ½ of the good faith estimate if the total amount of the request is over \$50.00.
- Municipality can send a notice of extension for up to 10 business days. The notice must state the reasons for the extension and the date by which the board will respond to the request.



Freedom of Information Act: Common Mistake

- Mistake: Not responding within the 5 business days.
- Remedy: Strictly adhering to the dates. For example, if a city calls the requester and asks for clarification and the requester does not call back, the city should respond in some way permitted by the FOIA, such as an extension by the 5th business day.



Freedom of Information Act: Common Mistake

- Mistake: Asking for the deposit at the end of the extension period.
- Remedy: Ask for the deposit within the first 5 business days, otherwise the public body may be in violation of the FOIA.



Freedom of Information Act

Circumstances when a Request can be Denied.

- **The Documents do not Exist.** If the document does not exist or cannot be reasonably identified, then the public body can deny the request on that basis.
- **No “Public Records” as Defined by the FOIA.** Not every document in the public body’s possession will be considered a “public record” under the FOIA.
- **Not Required to Create Documents.** If the request for information requires the public body to create a new document, then the request can be denied.



Freedom of Information Act

- Certain documents are exempt.
- All records are subject to disclosure unless specifically exempted. A list of 24 types of documents that are exempt from disclosure are set forth in Section 13 under the FOIA. The following list includes exemptions likely to be encountered frequently by public bodies.



Freedom of Information Act

- Exempt by Statute
 - Michigan Library Privacy Act
 - Telecommunications Act
 - HIPAA
 - Child Protection Laws



Freedom of Information Act

- Privacy -- Information of a personal nature, where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.



Freedom of Information Act:

- Law Enforcement Records: Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - Interfere with law enforcement proceedings.
 - Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - Constitute an unwarranted invasion of personal privacy.
 - 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.
 - Disclose law enforcement investigative techniques or procedures.
 - Endanger the life or physical safety of law enforcement personnel.



Freedom of Information Act

- “Frank communication exemption” – very narrow and must meet balancing test

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.



Freedom of Information Act

- Bids or Appraisals – only for a certain time period
- Social Security Numbers
- Attorney-Client Privileged Information.
- Records exempt because the public body and requester are parties in a civil action.



Freedom of Information Act

- Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - The information is submitted upon a promise of confidentiality by the public body.
 - 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.
 - 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.



Freedom of Information Act

- The Denial Letter Must State the Reason that the Document is Exempt
 - The Act states an “Explanation” must be given.
 - If the public body separates or deletes exempt material from the response, it must provide the requesting party with a description of the public record or information on a public record that is separated or deleted.



Freedom of Information Act

- The written notice denying the request in whole or in part should also notify the requesting party of the right to an administrative appeal, the right to seek judicial review, and the right to recover attorney fees and damages if the requesting party prevails in court.
- A failure to respond within the time limits or a failure to respond at all also amounts to a denial.



Freedom of Information Act Common Mistake

- Mistake: Failing to deny the request in writing if the public body does not have the documents. If the public body fails to answer, it will be treated as a denial.
- Remedy: Respond in writing to every FOIA request, even if you don't have the documents.



Freedom of Information Act: Common Mistakes

What to Avoid

- A public body may not deny a request simply because the requester has previously obtained the identical records under the statute.
- A public body may not deny a request because the requester has not paid for requests that were previously made.
- A public body must send a notice denying the request even if the public body does not have the record.



Freedom of Information Act

FEES

- The public body may charge a reasonable fee for providing a copy of public records.
- The fee must be limited to actual mailing costs and the actual incremental cost of duplication, including labor, and the cost of search, examination, review and the deletion and separation of exempt from non-exempt material.
- The public body cannot charge more than the hourly wage of the public body's lowest paid employee capable of retrieving information necessary to comply with a request under this Act. The fee may not be dependant upon the person requesting the information.



Freedom of Information Act

- The public body may only charge for labor, the cost of search, examination, review or the deletion and separation of exempt from non-exempt information if the failure to charge a fee would result in unreasonably high costs to the public body. The public body must establish and maintain procedures in order to charge this part of the labor cost.
- If the party making the request submits an affidavit showing he or she is receiving public assistance or is unable to pay the cost because of indigence, the public body must provide the public records without charge, up to a \$20 limit in costs for each request.



Freedom of Information Act: Practice Pointer

- We recommend that the municipality request that all fees be paid before the municipality actually turns over the records (keep in mind that the response letter must still be sent within 5 business days).
- The reasons: There is no specific “fee recovery” provision under the FOIA. The municipality would have to sue under a breach of contract theory.



Freedom of Information Act

Denials are Subject to Administrative Appeals.

- A requesting party may appeal a denial to the head of the public body in a written appeal that specifically states the word "appeal" and identifies the reason for reversal of the disclosure denial.
- Within ten (10) days after receiving a written appeal, the head of the public body must either (1) reverse the denial, (2) issue a written notice upholding the denial, or (3) reverse the denial in part and issue a written notice upholding the denial in part.
- Under unusual circumstances, the public body may issue one notice extending the response period for no more than ten (10) additional business days.
- A public body is considered to have received a written appeal at the first regularly scheduled meeting of the board following submission of the written appeal.
- If the public body fails to respond to a written appeal or upholds a denial of disclosure, the requesting party may seek judicial review in circuit court.



Freedom of Information Act

Violations of the Freedom of Information Act are Subject to Civil Action.

- A requesting party may bring suit to compel disclosure of withheld records within 180 days after the request was denied. The circuit court may order the public body to produce the records and may punish failure to comply.
- In any lawsuit brought to compel disclosure, the burden is on the public body to establish that the requested records are exempt from disclosure.



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Questions?

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