



# Open Meetings Act and Freedom of Information Act: An Overview

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# 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

- 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

## Definition of Public Record

Public records , used, in the possession of, or retained by a public body in the performance of an official function. Pursuant to the recent amendments, public records no longer include computer software that may be requested are any writings (or other recordings) prepared, owned



# 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

- 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 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.
- 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.
- 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 Library is an individual designated by the Library in accordance with the Act to accept and process requests for public records.
- 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

## The Library's Response

- The public body must respond to every request.
- After receiving a request for a public record, the public body has five (5) business days to respond. So, forward any written requests for records immediately to the Library Director.
- For facsimile, electronic mail, or other electronic transmissions, the request is not considered “received” until one (1) business day after the transmission is made.



# Freedom of Information Act

## THREE OPTIONS UPON INITIAL REQUEST

- Library can grant, deny or grant in part and deny in part. Any denial must be in writing but we recommend all correspondence in writing.
- Library can request a deposit up to ½ of the good faith estimate if the total amount of the request is over \$50.00.
- Library 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

## WHAT CAN BE DENIED:

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



# Freedom of Information Act

- Exempt by Statute – Michigan Library Privacy Act
  - Patron Records
  - Internet Use
  - Video Surveillance – consult attorney
- Privacy -- Information of a personal nature, where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- Bids or Appraisals – only for a certain time period
- Social Security Numbers
- Attorney-Client Privileged Information.
- Records exempt because the Library and requester are parties in a civil action.



# 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

## What cannot be denied:

- 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 or 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

- We recommend that the Library request that all fees be paid before the Library 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 Library 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.



# Open Meetings Act

## OPEN MEETINGS ACT

- The Open Meetings Act was expressly enacted for the purpose of requiring certain meetings of public bodies to be open to the public, to require notice and the keeping of minutes of the meetings, to provide enforcement of the Act, to provide invalidation of decisions under certain circumstances and to provide penalties for non-compliance.
- All meetings subject to the Open Meetings Act must be open to the public and held in a place available to the general public.



# Open Meetings Act

- The Americans with Disabilities Act requires the Library to provide disabled individuals with a reasonable opportunity to request necessary, reasonable auxiliary aides and services to participate at public meetings.
- A public body may not place conditions on attendance such as requiring visitors to sign in or provide names.
- The right to attend a meeting of a public body includes the right to tape record, videotape and broadcast the public proceedings via live radio and television. Keep this rule in mind if your Library prevents videotaping generally in the Library.
- All persons in attendance at a public meeting have the right to address the public body.



# Open Meetings Act

- Applies to Library Board Meetings
- Committees and Subcommittees that have only advisory authority may not fit the definition of Public Body, since they have no decision-making authority. However, “advisory” committees are very narrowly construed.





# Open Meetings Act

## Definition of Meeting

- To be a “meeting,” the public body must be “deliberating toward or rendering a decision on a public policy.” Committees that have only advisory authority may not fit the definition of public body, since they have no decision-making authority. OAG, 1997, No. 6935 (April 2, 1997).
- “Meeting” within the purview of the Open Meetings Act requires (1) a quorum (2) deliberation or rendering a decision (3) on a matter of public policy. OAG, 1979-1980, No 5437 p 36 (Feb 2, 1979).
- Implications of new technology such as e-mail or chat rooms.



# Open Meetings Act

## What is not Considered a “Meeting” under the Open Meetings Act?

- The Open Meetings Act does not apply to a conference or informational gathering, provided that the meeting does not involve deliberation and is not designed to circumvent the Act. OAG, 1982, No. 6074.
- A public body may convene to listen to the concerns of a neighborhood group or board of directors without complying with the Open Meetings Act, provided that the body does not deliberate toward or render a decision. OAG, 1978, No. 5364.



# Open Meetings Act

## **Public Meetings Must be Properly Noticed.**

- Within ten (10) days after the public body's first regular meeting of the calendar or fiscal year, it must post a notice at its principal office stating the dates, times and places of its regular meetings.
- If a public body changes its regular meeting schedule, it must post a new notice stating the changes within three (3) days after the meeting at which the change was made and at least 18 hours before the rescheduled meeting.
- If the public body chooses to recess a meeting for more than 36 hours, it may only reconvene the meeting after posting a public notice stating the date, time and place where the meeting will be reconvened.



# Open Meetings Act

## Notice (cont'd)

- Upon written request, the clerk must furnish a copy of the notice to any newspaper or radio or television station located within the state free of charge.
- Special meetings require that the meeting be posted 18 hours in advance of the meeting.



# Open Meetings Act

## Closed Sessions

- A closed session may be called by a majority vote of the members:
  - To consider the dismissal, suspension, discipline, complaints, charges or periodic personnel evaluations of a public officer or employee, if the named person requests a closed hearing; or
  - For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement, if either party requests a closed session.



# Open Meetings Act

- A closed session may be called by a two-thirds roll call vote of the members:
  - To consider the purchase or lease of real property up until the time an option to purchase or lease is acquired;
  - To consult with the municipal attorney regarding trial or settlement strategy in connection with specific pending litigation, if an open meeting would have a detrimental financial effect on the public body;
  - To consider material exempt from discussion or disclosure by state or federal statute; or
  - To review the specific contents of an application for employment or appointment to a public office, if the candidate requests that the application remain confidential. All interviews by a public body for a public office must be open, however.



# Open Meetings Act

## Procedure for Closed Session

- A closed session must be preceded by a vote in an open session.
- The roll call vote and the purpose of the closed session must be stated and included in the minutes of the open session.
- At the conclusion of the closed session a roll call vote must be taken to close the closed session and re-open the open session before the meeting may be adjourned.



# Open Meetings Act

- All decisions of the public body must be made in an open meeting. As a result, no decisions may be rendered in a closed session. Any decision resulting from discussions in a closed session maybe made in a manner that does not disclose information regarding discussions or deliberations of a closed session, however.
- The only topic of discussion in a closed session is one which is authorized under the Open Meetings Act as a legitimate basis for calling a closed session and for which the closed session was called.





# Open Meetings Act

## Open Session Minutes.

- Minutes of each meeting must be kept showing the time, date and place of the meeting. The minutes must also state the names of all members present and absent, any decisions made, all roll call votes taken at the meeting and the reason for any closed sessions held.
- Proposed minutes must be made available for public inspection within eight (8) business days after the meeting at which the minutes were taken.
- Any corrections to the minutes must be made at the next meeting, and the corrected minutes must show the original entry and the correction.
- Approved minutes must be available for public inspection within five (5) business days after the meeting at which the minutes were approved



# Open Meetings Act

## Closed Session Minutes

- During the closed session, a separate set of minutes must be taken by the clerk or designated secretary of the public body. The closed session minutes must be retained by the clerk and are not available to the public.
- The closed session minutes can only be disclosed if required by a civil action filed under the Open Meetings Act.
- Closed session minutes must be retained by the public body for at least one year and one day after approval of the minutes of the meeting at which the closed session was held.
- Discussion of closed session minutes before approval of the minutes may also be made in closed session.



# Open Meetings Act

## Remedies.

- A decision made by a public body may be invalidated if the public body has not complied with the Open Meetings Act.
- In any case where a public body discovers it has failed to comply with the Act or is charged with failing to comply, the public body may re-enact the disputed decision in conformity with the Act. A decision re-enacted in this manner shall be effective from the date of re-enactment and shall not be declared invalid by reason of the deficiency in the procedure used in its initial enactment.
- If a public body violates the Open Meetings Act, a person may commence a civil action to compel compliance or to enjoin further non-compliance with the Act.



# Open Meetings Act

- If a public official is found to have intentionally violated the Act, the official may be held personally liable for court costs and actual attorney fees as well as up to \$500 in damages.
- A public official who intentionally violates the Act is guilty of a misdemeanor punishable by a fine of up to \$1000. For a second offense during the same term of office, the maximum fine increases to \$2000 and the public official may be imprisoned for up to one (1) year.



# Open Meetings Act

**QUESTIONS?**