



## New FOIA Bill Introduced – HB 5879

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The following is a summary of the proposed changes that HB 5879 would make to the Freedom of Information Act, 1976 PA 442, if enacted. Many of these changes would directly impact litigation fees and costs for defending FOIA violations.

- A public body would be required to limit its fees to \$.10 per page. This is likely lower than many municipalities currently charge.
- The public body shall not charge a fee for copying during an on-site inspection unless the person requests the public body to provide copies or the person requests and uses the public body's equipment to make the copies.
- The proposed legislation adds a new Section 5(8) that requires the public body to **produce** the copies of the documents or **make the documents available for inspection** by the 5 business day (or 10 day extension) deadline. If this law is enacted, public bodies would no longer be able to require the full payment of the fees before copies are made, which the prior Attorney General opinions have concluded is appropriate.
- Further, in Section 5(8), the fee is reduced by 20% for each day that the documents are not available past the deadline. The public body will not get paid at all if the documents are more than 5 days late. There is no exemption for voluminous requests or requests that require a great deal of redaction. Section 5(8) does clarify that the deadlines are extended and no charge reduction is required during the time that a public body is waiting for the payment of a deposit.
- HB 5879 would specifically allow the requester to appeal or file a circuit court action over the fee charged by a public body. Currently, challenges involving fees are not specifically addressed by the FOIA. Interestingly, the new bill does not provide any relief or remedy to the public body if the copies are made and the requester refuses to pay.

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### **PRACTICE AREAS**

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- Section 10(1)(c) appears to limit the public body from charging more than \$100.00 for all requests submitted by a requesting person within a 6 month period. The specific language states that if the public body imposes a fee in excess of the fee permitted by Section 4 of the FOIA, the requester may do the following:

*If the amount of fees exceeds 10 cents per page **or** if the fees for search, examination, review, and deleting and separating exempt from nonexempt information exceeds \$100.00 cumulatively for all requests submitted by the requesting person to the public body in a 6-month period, commence an action in the circuit court for fee reduction within 180 days of the public body's notification to the person of the fee amount. (Emphasis added).*

Interestingly, we cannot find this \$100.00 maximum requirement elsewhere in the HB 5879, and it is not specifically mentioned in the proposed revisions to Section 4 of the FOIA, which regulates fees. Thus, it is not clear if HB 5879 intended to impose this maximum fee. However, if there is a maximum fee, this could be very costly for public bodies.

- HB 5879 adds a provision to Section 10(5) that would supersede by statute the current precedent of allowing FOIA exemptions to be asserted at trial in support of a denial even if the exemptions were not asserted in the response letter. Under the proposed legislation, "[t]he public body shall not assert an exemption under Section 13 that it did not assert in either a written denial of the request under Section 5 or an appeal under subsection (1)(a)." Put another way, if the document was properly exempt from disclosure but for a different reason than the one cited by the public body, the public body can not raise that different exemption as a defense at trial.
- Section 10(6) is amended to **require** the court to award attorney's fees and costs when a requester prevails in part whether on the substantive denial or on the request for a reduction of fees; currently, the court has discretion or "may" award the fees if the request was improperly denied in part. Also, currently the FOIA has no attorneys' fee recovery for fee challenges.
- Punitive damages are increased from \$500 to \$5,000.00 for "arbitrary and capricious violations" of the FOIA.

If you have any questions regarding the proposed changes, please contact Anne Seuryck (616.726.2240)