

Correction to the "On the Record" article in the January/February 2008 *Michigan Township News*

The section titled, "**How Can a Township Extend the Response Period?**" should read:

"A township can extend the period to respond to a FOIA request by providing written notice to the requesting person within the first five business days. The notice must specify the reasons for the extension and the date by which the township will: 1) grant the request, 2) issue a written notice to the requesting person denying the request, or 3) grant the request in part and issue a written notice to the requesting person denying the request in part.

"Reasons for taking an extension may include, but are **not** limited to, the 'unusual circumstances' described in the FOIA as: 1) the need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records, or 2) the need to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the particular office receiving or processing the request."

Feel free to contact the author, MTA Member Information Liaison Catherine Mullhaupt, with any questions regarding this correction or the relevant sections of the FOIA, at (517) 321-6467 or catherine@michigantownships.org.

On the Record: Michigan's Freedom of Information Act

In 1973, Senate Counsel Fred Thompson (yes, the actor, U.S. senator and presidential candidate) asked a White House aide during the congressional hearings on the Watergate break-in about the possibility of White House tape-recordings—and the aide, under oath, admitted that a system was in place for taping conversations and phone calls.

After a dramatic battle of legal wills, a number of tapes were released by the White House, but one had an 18-1/2 minute “gap.” It didn’t matter whether that gap was intentional or accidental—the damage to the public image of the Oval Office was irreparable. The “gap” became one of the most public representations of the Nixon administration’s covert activities and cover-up.

Following Richard Nixon’s resignation in 1974, individual states and the federal government adopted “sunshine” laws requiring government officials to conduct meetings in public—hence the Open Meetings Act—and to allow public access to public records. In Michigan, the latter took the form of the Freedom of Information Act (FOIA), Public Act 442 of 1976, MCL 15.231, *et seq.*, which took effect on April 13, 1977.

Thirty years later, transparency and public access to public records are as important to public policy as ever. Although the FOIA was a new statutory requirement when first enacted, it is now one of the basic areas of statutory compliance that every township should be prepared to provide. Even the smallest township should organize its records in a manner designed to support FOIA compliance. The good news is that by doing so, a township will also be in a better position to manage its records more efficiently.

Catherine Mullhaupt,
MTA Member Information Services Liaison



WHAT DOES THE FOIA REQUIRE?

In a nutshell, the FOIA requires that the public be able to request to receive copies of or to inspect public records. A township is required to designate a FOIA coordinator and train township officials and employees to properly fulfill FOIA requests. The township board must adopt a fee schedule and policy if it charges fees for FOIA requests. The township must respond to a FOIA request within specified time periods. The township may deny all or part of a FOIA request, and the requesting person has a right to appeal any denial to the township board or in circuit court or both.

Of course, there's a lot more to it than that. This article highlights some of the areas that seem to raise the most questions.

WHAT CAN A PERSON REQUEST UNDER THE FOIA?

Under the FOIA, a person has a right to request to: 1) inspect, 2) receive a copy of, or 3) subscribe to regular issuances of identifiable public records. The request must be in writing and must sufficiently describe the public records or information that is included in identifiable public records.

What is a Public Record?

There are several factors that determine whether something is a "public record" for FOIA purposes.

1) The record must be "a writing." The FOIA defines a "public record" as 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." (MCL 15.232)

Note that, although computer software is *not* a public record, the FOIA definition of "software" refers only to the instructions that make a computer function or process information. Computer-generated "writings" *are* records, and may be public records subject to FOIA disclosure.

The FOIA defines a "writing" as "handwriting, typewriting, printing, photostating, photography, 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." (MCL 15.232)

Even though Al Gore had not yet "invented" the Internet when the FOIA was adopted in 1976, the FOIA definition of "writing" anticipates future forms of writing, such as e-mail and other digital or electronic "means of recording or retaining meaningful content."

2) The record must be involved in the performance of an official function of the public body. Under the FOIA, a record is a "public record" based on its *content*, depending primarily on its involvement in the performance of an official function by a public body.

Another definition of a public record is provided by MCL 399.5, which states: "A record that is *required to be kept by a public officer in the discharge of duties imposed by law, that is required to be filed in a public office, or that is a memorial of a transaction of a public officer made in the discharge of a duty* is the property of this state and shall not be disposed of, mutilated, or destroyed except as provided by law."

Even the smallest township should organize its records in a manner designed to support FOIA compliance.

The determination of whether a document is a public record may sometimes be complicated, and numerous court and attorney general opinions have addressed the issue. If a township needs a determination of whether a record is a "public" record, it should consult with its local legal counsel for specific guidance.

HOW SHOULD A TOWNSHIP RESPOND TO A FOIA REQUEST?

Unless otherwise agreed to in writing by the person making the FOIA request, a township must respond to a written request for a public record within five business days after the request is received by doing one of the following: 1) granting the request, 2) issuing a written notice to the requesting person denying the request, 3) granting the request in part and issuing a written notice to the requesting person denying the request in part, or 4) issuing a notice extending for not more than 10 business days the period during which the township respond to the request. Only one extension can be issued for a particular request. The 10-business day extension begins on the first business day after the fifth business day of the initial response period.

A person making a FOIA request may agree in writing to a deadline other than those required by the FOIA. If there is any reason to believe that the request may take more than the original five-business-day period, township personnel may ask the person making the request if he or she would like to agree to waive the FOIA deadlines and state a later delivery date on the FOIA Request Form. This is completely optional, and no one can be required to agree to a delivery date later than 15 business days after the request is received as a condition of receiving the request.

How Can a Township Extend the Response Period?

Under unusual circumstances, a township can extend the period to respond to a FOIA request by providing written notice to the requesting person within the first five business days. The notice must specify the reasons for the extension and the date by which



the township will: 1) grant the request, 2) issue a written notice to the requesting person denying the request, or 3) grant the request in part and issue a written notice to the requesting person denying the request in part.

The two types of “unusual circumstances” that allow a township to extend response time are: 1) 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, or 2) the need to collect the requested public records from numerous field offices, facilities, or other establishments that are located apart from the particular office receiving or processing the request. Note that the necessity must be based on the need to properly process the request, not the convenience to the township. (MCLs 15.232 and 15.240)

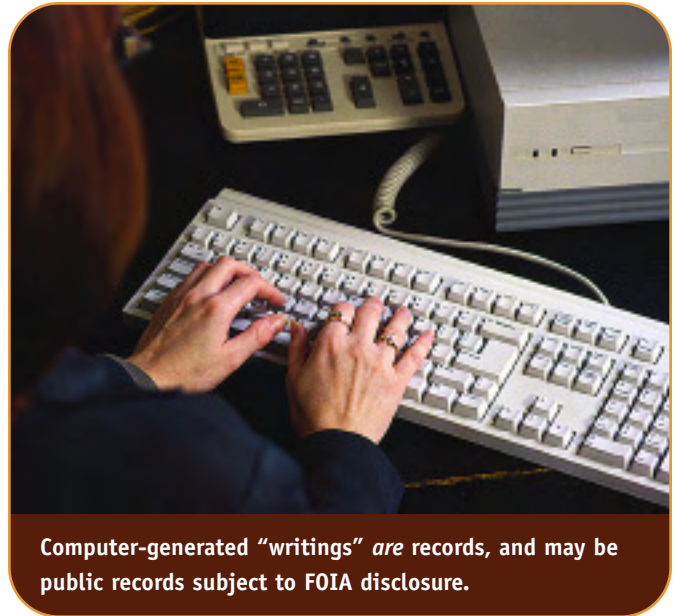
What is a Denial?

In practice, providing anything less than what was requested is a “denial.” This includes denying the entire request or denying some records because they are exempt, redacting exempt information, or denying because the records requested do not exist or the request did not sufficiently identify records for the township to determine which records were requested. Failure to respond to a FOIA request within the first five business days has the same legal status as a denial.

A FOIA denial is significant because the requesting person may appeal the denial to the township board or go directly to circuit court, so it may subject the township to legal liability if the request was improperly denied. Note that not all denials are improper, but the township may still have to defend its denial in court.

If a township denies a FOIA request in whole or in part, the requesting person must be given a written notice containing:

- 1) an explanation of the basis under the FOIA 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;
- 2) a certificate that the public record does not exist under the



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name given by the requester or by another name reasonably known to the township, if that is the reason for denying the request or a portion of the request;

- 3) a description of a public record or information on a public record that is separated or deleted pursuant to MCL 15.244, if a separation or deletion is made;
- 4) a full explanation of the requesting person’s right to do either of the following:
 - a) submit to the township board a written appeal that specifically states the word “appeal” and identifies the reason(s) for reversal of the disclosure denial, or
 - b) seek judicial review of the denial under MCL 15.240; and
- 5) notice of the right to receive attorney fees and damages as provided in MCL 15.240 if, after judicial review, the circuit court determines that the township board has not complied with this section and orders disclosure of all or a portion of a public record.

The township FOIA coordinator must sign the written notice of denial.

When Can a Document or Information be Denied?

There are several situations in which a FOIA request may be denied because the record does not exist or the record or information requested is exempt from disclosure:

The requested document never existed. A public body is not required to create a *new* public record or a compilation, summary or report of information in response to a FOIA request.

The requested document has been properly destroyed. Public records must be retained by a public body, but some records may be destroyed in compliance with an approved record retention schedule. If a public record did exist, but has been destroyed in accordance with the record retention schedule, then it is not subject to a subsequent FOIA request. A public body should not, however, destroy a public record that is subject to a current FOIA request, even in compliance with a record retention schedule, until after the FOIA request is fulfilled.

The requested document did exist, but does not exist at the time the FOIA request was received. This is a tricky one. A record should not be destroyed *following* receipt of a FOIA request for that record. But records are occasionally lost through fire, flood or other disasters or mishaps over time. It is very important for a township to make reasonable efforts to determine if a requested record exists in the possession or custody of the township. That includes records that the township still owns, even though they are currently in the possession of another unit or party (like the county, historical society, library, or former township official or employee).

It is also important to note that under the Michigan Penal Code, all official books, papers or records created by or received in any office or agency of the state of Michigan or its political subdivisions are declared to be public property, belonging to the people of the state of Michigan, and they can only be destroyed in compliance with an approved record retention schedule.

MCL 750.491 states that, "Any person who shall wilfully carry away, mutilate or destroy any of such books, papers, records or any part of the same, and any person who shall retain and continue to hold the possession of any books, papers or records, or parts thereof, belonging to the aforesaid offices and shall refuse to deliver up such books, papers, records, or parts thereof to the proper officer having charge of the office to which such books, papers, or records belong, upon demand being made by such officer or, in cases of a defunct office, the Michigan historical commission, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$1,000.00."

This section of the criminal law applies equally to the public and public officers or employees.

The requested document or information is exempt from disclosure. The FOIA separates public records into records that are *subject to* disclosure and records that are *exempt from* disclosure.

Records that are "subject to" disclosure *must* be made available upon written request for inspection or copies.

Requests to inspect or receive copies of records that are "exempt from" disclosure *may* be denied in whole, or records may be "redacted" (edited) to block out or remove information that is exempt from disclosure.

This is the area of the FOIA that creates the most confusion—and liability—for public bodies. The simplest approach is to assume that *all* public records of the township are subject to disclosure. Even records exempt from disclosure may be disclosed by the public body. Occasionally there will be records, or information included in records, that the township should exempt from disclosure—under criteria specified by the FOIA. Unless a specific record or information in a specific record meets all the criteria of an exemption specified by the FOIA, it should not be exempted from disclosure—in other words, it should be provided to the public.

Section 13 of the FOIA, MCL 15.243, lists the categories of public records exempt from disclosure. The township bears the burden of



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proving that an exemption applies to a specific record. The exemptions provided by the FOIA must be considered on a case-by-case basis for each specific requested record. The exemptions are not broad categories—the township must determine that all criteria of an exemption apply to the specific record or information that has been requested.

For example, the FOIA states that: “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 simply apply to any information regarding an individual person. It is interpreted narrowly by Michigan courts to require a two-part determination. First, the township must determine that the information is “of a personal nature,” meaning intimate or embarrassing details of an individual’s private life,

evaluated by the customs, mores, or ordinary views of the community. If the information is not of a personal nature, then it must be disclosed. If it is of a personal nature, then the township must determine whether disclosure is “a clearly unwarranted invasion of an individual’s privacy” because the information is unrelated to the workings of the government.

Because an improper exemption of a record or information from disclosure is a FOIA denial, a township may wish to consult its local legal counsel for guidance regarding a specific request for a record that the township believes is subject to a FOIA exemption.

WHAT FEES CAN A TOWNSHIP CHARGE FOR FOIA REQUESTS?

Section 4 of the FOIA, MCL 15.234, provides the guidelines for setting FOIA fees. Unless another statute specifically authorizes fees that a township may charge for record search, copying or inspection, a township may only charge fees that comply with Section 4.

FOIA fees can only recover “actual” and “incremental” costs. That means: 1) they must be the **actual** costs incurred for that specific FOIA request, and 2) they must be limited to **only** the costs incurred in fulfilling that specific FOIA request, over and above the township’s regular costs of doing business.

In real life, this boils down to the paper and ink for copies, the stamps and envelopes for mailing, and the actual time involved (if fees are charged for labor). There’s no such thing as a minimum charge for all requests—the cost of each request must be individually calculated.

Where do you get the cost of making a copy? It’s the cost of one piece of paper (1/500th of a ream of paper), plus the average cost of ink for one printed page. Based on anecdotal surveys and experience, it would appear that the current reasonable range for the cost of one single-sided copy is between 3 and 15 cents, although that

amount could be higher, depending on the circumstances. If the township has purchased or leased a copier, the copier company should be able to give a cost of a copy. A township may also wish to consult with its auditor for a reasonable rate.

However, if the township does not have access to a copier/printer, and it must pay to make copies through an outside copy service, library, post office, etc., then the township charges exactly what it paid to have the copies made. But this must be the way the township typically makes copies—not just FOIA requests.

If the type of record to be copied requires a more specialized type of copy, like a blueprint or oversized site plan, then the township charges exactly what it must pay to have the copy made. The same is true for copies of media other than paper, like audio or video tapes or computer file discs or tapes; the township charges the actual cost to purchase the media. If it cost \$1.89 to buy a cassette tape, that's what the township can charge for that copying request.

What about overhead costs? Overhead costs cannot be included in FOIA fees. The FOIA specifies that “the fee shall be limited 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 . . .” (MCL 15.234) The simple rule of thumb is that a town-

ship cannot include in a FOIA fee any costs (other than labor costs) that it would have incurred anyway if it never received the FOIA request.

How about labor costs? Labor costs may be charged for *making copies and mailing* any FOIA request.

A township may only, however, charge labor for *searching for records and/or editing out exempt material* if the township would incur specific, unreasonably high costs as a result.

In either case, a township may charge only “the hourly wage of the lowest paid township employee *capable of retrieving the information* necessary to comply with the request . . .” (MCL 15.234) Labor costs may include the cost of employment benefits.

HOW SHOULD A TOWNSHIP HANDLE REQUESTS TO INSPECT RECORDS?

A township is not required to have office hours, but a number of laws specifically require that public records be available for public inspection. For example:

The FOIA states: “(3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall 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 protect public records from loss, unauthorized alteration, mutilation, or destruction.” (MCL 15.233)

The Michigan Penal Code states: “Any officer having the custody of any county, city, or township records in this state who shall when requested fail or neglect to furnish proper and reasonable facilities for the inspection and examination of the records and files in his or her office and for making memoranda of transcripts therefrom during the usual business hours, which shall not be less than 4 hours per day, to any person having occasion to make examination of them for any lawful purpose is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00. The custodian of said records and files may make such reasonable rules with reference to the inspection and examination of them as shall be necessary for the protection of said records and files and to prevent interference with the regular discharge of the duties of such officer. The officer shall prohibit the use of pen and ink in making copies or notes of records and files in his or her office. No books, records, and files shall be removed from the office of the custodian thereof, except by the order of the judge of any court of competent jurisdiction, or in response to a subpoena *duces tecum* issued therefrom, or for audit

purposes ... with the permission of the official having custody of the records if the official is given a receipt listing the records being removed.” (MCL 750.492)

MCL 211.10a, part of the General Property Tax Act, requires that: “All property assessment rolls and property appraisal cards shall be available for inspection and copying during the customary business hours.”

All official books, papers or records created by or received in any office or agency of the state of Michigan or its political subdivisions are public property, belonging to the people of the state of Michigan, and they can only be destroyed in compliance with an approved record retention schedule.

Several provisions of the Michigan Election Law require that the public be allowed to inspect various voter registration and election records.

None of these laws require a township to have a township hall. If a township has a hall, the elected officials are not required to maintain an office at the hall, and many township officials maintain home offices.

Township officials are not required to hold general office hours (and there are only minimal requirements for specific statutory office hours during the year). Regardless of where or when township officials work, however, the township’s public records must be maintained so that the public may inspect them. A township should establish policies to accommodate requests to inspect.

MCL 750.492 requires inspections to be allowed “during the usual business hours.” If a township or official does not hold regular hours, a reasonable effort must be made to arrange a time when the requestor may inspect the records, and the person may spend up to four hours per day. If the records are maintained in a private residence, the official may allow the requestor to review the records in the residence or agree to meet at an appropriate alternate facility, such as the township hall or a local library.

MCL 750.492 also specifically prohibits the use of pen and ink for taking notes. Township personnel assisting with inspection of public records must inform any person inspecting records that only pencils, and no pens or ink, may be used to take notes. A person may be required to inspect records at a specified counter or table, and in view of township personnel. A person cannot remove books, records, or files from the place the township provides for inspection.

A township may provide copies of original records because it needs to redact exempt information, to protect old or delicate original records, or because the original record is a digital file or database not available for public inspection. The township may charge a copying fee for this, but I recommend doing this only to the extent that it would be an undue burden on the township to not charge.

HOW SHOULD A TOWNSHIP PREPARE FOR FOIA COMPLIANCE?

Although some townships may never have received a FOIA request, it's never too early to prepare to respond to one. Townships may wish to consider developing a central record filing system that maintains duplicates of non-exempt (or already redacted) records to enable township personnel to quickly respond to FOIA requests, even when the originals are maintained in home offices or separate departments.

Preparing to handle FOIA requests can assist in developing a records management system and promoting public information. For example, many townships have discovered the cost-effectiveness and increased customer service of providing township information on a township Web site. When the township's public records are posted online for the public to access them at their convenience, FOIA requests may decrease. Also, providing township records on a public computer "kiosk" or providing a "reading room" where regularly issued or commonly requested township records are available in digital or paper form can ease delivery of public records and promote transparency in township operations.

For more information, an *MTA Suggested FOIA Compliance Procedures Guide* and a set of *Sample FOIA Forms* are available under "FOIA Compliance Issues" on the MTA Web site at www.michigan-townships.org or by contacting MTA Member Information Services staff at (517) 321-6467.

Current general record retention schedules and records management guidelines are available from the Michigan Department of History, Arts and Libraries at www.michigan.gov/recordsmanagement or by contacting Records Management staff at (517) 335-9132. ■