

# Tweets, Texts and More

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Detroit • Troy • Port Huron • Grand Blanc • Lansing • Ann Arbor  
Grand Rapids • Traverse City • Marquette • Merrillville, IN

- State Law
- Federal Law
- Legislative= Boards enact policy
- City Managers implement policy
- May enact all laws reasonably necessary to protect health, safety and welfare of your residents—very broad
- Raise Revenue

# Tips and Tricks of Effective Leaders

- Continual Civic Education—attend one or two classes each and every year!!!—especially employment related seminars
- Authority, Board and Commissions—learn your role and purpose of your Authority, Board or Commission –know your boundaries





# Text Messages and Emails

- Not just Kwame Kilpatrick in trouble
- Phones paid by whom
- Do you really need to put that in writing???
- 24 Hour Rule
- Once its in writing its there forever

# Text messages and Emails

- Duty to preserve evidence
- Subpoena to cell phone providers
- Experts in downloading info
- Scrubbing not just for pots and pans
- Examples

All Texts.txt  
From Dane Nelson at Jun 8, 2014 20:46:09  
She should confirm that in writing to Pat and Sarah as a prelude to a  
Whistleblower case.  
Sent to Dane Nelson at Jun 8, 2014 20:46:50  
I told her to document it all. She said she was. She considered quitting last week  
over this. I told her get fired. I have a good lawyer.  
Sent to Dane Nelson at Jun 8, 2014 20:48:43  
Pat came by today too. She said things are no better w/ communications. Heather  
told Pat she had an anxiety attack having to come back from vacation. Sad thing is  
maybe I am better off, not sure.  
Sent to Dane Nelson at Jun 13, 2014 20:40:27  
I immediately read the agenda. Find it interesting they are firing out all the field work  
to engineering companies. Terminating me is so saving their \$\$.  
Sent to Dane Nelson at Jun 13, 2014 20:40:41  
Todd did not apply for the Utility Dir. job.  
Sent to Dane Nelson at Jun 13, 2014 20:49:07  
Love it. \$5000 to Jones and Henry for brick arch oversight. And \$2000 to Tetra  
Tech for division street. Makes sense to re  
From Dane Nelson at Jun 13, 2014 20:50:56  
I assure the fix is in somewhere for a new position for him. Money was and is not  
the issue at city hall. It is about control.  
Sent to Dane Nelson at Jun 13, 2014 20:57:21  
I assume he is hoping for the combined DPW Parks job.  
Sent to Dane Nelson at Jun 13, 2014 20:52:32  
Tryire for  
Sent to Dane Nelson at Jun 13, 2014 20:54:39  
You going to saure Monday?  
From Dane Nelson at Jun 13, 2014 20:54:53  
Sure.  
Sent to Dane Nelson at Jun 13, 2014 20:55:56  
Mark is out of town so I will likely abandon the kids and come say hi. they have  
things to study for  
Sent to Dane Nelson at Jun 16, 2014 15:39:26  
Are you going to Sauce?  
From Dane Nelson at Jun 16, 2014 15:20:04  
Yes. I am thinking about it  
Sent to Dane Nelson at Jun 16, 2014 13:22:43  
Ok I think I will go at 7 PM eat I have no cook. You are welcome to join me. I may  
take work just in case no one shows. I invited Chuck to join me no answer yet. Cindy  
also never got back with me. She was possibly going to the meeting she wasn't sure  
sat. when I talked to her  
Sent to Dane Nelson at Jun 16, 2014 21:17:53  
I was just kidding you by the way. I am just a nervous nelly.  
From Dane Nelson at Jun 17, 2014 17:42:04  
Just got to opera house to see the wizard with grand kids. Got your message. Don't  
be so nervous. It's a long process. Take care.  
Sent to Dane Nelson at Jun 19, 2014 10:28:29  
Who did you say was being let go as City Manager earlier this week  
From Dane Nelson at Jun 19, 2014 10:29:43  
Pete Auger at Auburn Hills.  
Sent to Dane Nelson at Jun 19, 2014 10:29:59  
Was he cut?  
From Dane Nelson at Jun 19, 2014 10:30:08  
Yeh  
Sent to Dane Nelson at Jun 19, 2014 10:30:23  
Bummer  
Sent to Dane Nelson at Jun 19, 2014 10:31:03  
Thanks. Duve and I were just talking about it  
From Dane Nelson at Jun 19, 2014 10:31:25  
By all accounts, your manager. Sounds like it totally caught him off guard.  
From Dane Nelson at Jun 19, 2014 10:33:51  
About every week, I hear about another manager in the same situation. The best  
plan is to go on your own terms when you are safe before they get you. Kevin Nelson  
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All TEXIS.TX1

Feels the same . sad but true.  
Sent To Dane Nelson at Jun 19, 2014 10:34:54  
For sure.  
✓ From Dane Nelson at Jun 25, 2014 14:48:16  
Just heard Shane is in hospital with kidney stones ; JB has double vision and is seeing his Ann Arbor doctor. I googled that and one cause could be heart related. Maybe stress is coming home.  
Sent To Dane Nelson at Jun 25, 2014 14:49:24  
Yikes. Your kidding right?  
From Dane Nelson at Jun 25, 2014 14:50:24  
Not this time. I was told Shane will go back to work tomorrow.  
Sent To Dane Nelson at Jun 25, 2014 14:52:56  
How. strange the paper hasn't caught wind of this. I have someone who wants to call them so bad  
✓ From Dane Nelson at Jun 25, 2014 14:54:26  
✓ I have not removed my curse on the city yet.  
Sent To Dane Nelson at Jun 25, 2014 14:55:26  
I will call you in a bit  
Sent To Dane Nelson at Jun 27, 2014 18:32:08  
I know you are up north and might not get this but thought I would send it anyway. They set a special meeting for Monday to discuss union negotiations and promoting Todd  
From Dane Nelson at Jun 27, 2014 18:32:45  
getting reception at the cabin. Probably police, as they need a deal before getting stuck with health care increase. Maybe a little surprising. Todd, of course, is no surprise, except they are not following the need for a degree in the new job description. I still sense trouble brewing over there.  
Sent To Dane Nelson at Jun 27, 2014 18:46:28  
Yeah, Nancy talked with Vince and he told her the city is looking to fund the road. Presumably with oil money but who knows. This Todd hurts. I understand but it hurts probably worse than most things have. Oh well? HOPE FISHING IS GOOD. Tell the guys HI.  
From Dane Nelson at Jun 27, 2014 19:32:00  
Waiting on th bank til dark+cc.  
From Dane Nelson at Jun 27, 2014 19:37:00  
Waiting on th bank til darkness.  
Sent To Dane Nelson at Jun 27, 2014 19:39:42  
Very pretty are the fish biting?  
From Dane Nelson at Jun 27, 2014 19:39:16  
Small ones. The big ones come out when it gets dark- if the bugs do. Pretty muggy which is a good sign.  
Sent To Dane Nelson at Jun 27, 2014 19:38:38  
Excellent. Hope the fishing and/or practicing goes well tonight  
From Dane Nelson at Jun 30, 2014 16:58:24  
Is the chief dead or alive?  
From Dane Nelson at Jun 30, 2014 17:00:32  
Exhausted the poor boy.  
Sent To Dane Nelson at Jun 30, 2014 17:01:13  
That doesn't look much like fishing  
Sent To Dane Nelson at Jun 30, 2014 17:28:16  
Must be all the fish he caught  
Sent To Dane Nelson at Jun 30, 2014 21:15:28  
Are you coming here tomorrow?  
From Dane Nelson at Jun 30, 2014 21:37:52  
In the morning yes.  
From Dane Nelson at Jun 30, 2014 21:40:00  
About 10:30 should be good  
Sent To Dane Nelson at Jun 30, 2014 21:40:05  
Is there a good time I can call you?  
Sent To Dane Nelson at Jun 30, 2014 21:43:08  
I have a mtg at 930 and one at 1030. If I get a break in between I will call. Dave wants to talk to you about howl and apparently time may be critical.  
Sent To Dane Nelson at Jul 1, 2014 9:34:26  
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# Tips and Tricks of Effective Leaders

- Liability and Litigation
- Protected by a large umbrella called Governmental Immunity
- Do what is right
- **Don't have unfounded worries about being sued**

# Governmental Immunity

- As a general rule, governmental agencies are immune from tort liability when they are engaged in a governmental function.
- Governmental agency employees also enjoy broad immunity protection when they are engaged in a governmental function.
- City Managers enjoy the highest level of immunity

# Governmental Immunity

- Highest level immunity extends to those acts that are within the scope of authority
- Must be acting within the scope and course of your authority.
- You are liable for your own conduct—not the conduct of others

# Governmental Immunity

- Five Statutory Exceptions to Immunity:
- Failure to Maintain Highways / Sidewalks (whether reasonably safe and convenient for public travel)
- Negligent Operation of Government Owned Vehicles—(Serious impairment of an important bodily function)

# Governmental Immunity

- Public Building Defects (inside or connected to the building)
- For profit activities
- Operation of Hospitals

# Governmental Immunity

- Must be asserted as an affirmative defense
- Defendant will rely upon all defenses available to it under the Governmental Tort Liability Act, MCL 691.1407, et seq.

# Governmental Immunity

- **Federal counterpart is “qualified immunity.”**
- In either case, immediate right to appeal from the entry of an order denying dismissal on the grounds of governmental immunity
- Great strategy
- Great leverage



# Employment Law

- Federal and State Claims
- Federal—EEOC, Title VII, Race , Gender
- State—Elliott Larsen Civil Rights Act

# Employment Law

- Very expensive
- Time consuming
- Written documentation
- Same sex claims of discrimination are rising dramatically

# Employment Law

- Dig up as much dirt as possible
- Texts, emails, social media. Medical records, educational records, recreational records
- Leave no stone unturned

# Breach of Contract Claims

- Not covered by immunity protections.
- Very costly
- Let contracts run their course
- Do not terminate a contract unless very solid and valid reasons—let it expire

# Breach of Contract Claims

- Document your files
- Document changes in writing

# Three Ways To Fail A Drunk Test



Three\_Ways\_To\_Fail\_A\_Drunk\_Test.wmv

TRY CASES

**... AND IMPRESS**

**... AND WIN**

# TRY MORE CASES

- Statistics in your favor
- Plaintiff(s) not prepared
- Push the envelope
- **Use the “CSI Factor”**



# CSI FACTOR

- Thursdays at 9:00 p.m.
- Juries are expecting TV-style forensics
- Sharp crisp graphics
- Internet
- Social Media
- Demand for forensic evidence is huge
- Not just for court

# CSI FACTOR

- Evidence presented by video =  
3 times more memory recall by jurors
- Expect technology
- Expect quick investigations
- Do not waste their time
- Attention spans decreasing

**Weather**

The weather was snowy, rainy, and icy with temperatures in the 30's.

**Details**

- 6:19 a.m. The investigator initiates surveillance in the vicinity of 530 Indianwood Rd., Lake Orion, MI 48326. Upon arrival, visibility is low and roads are icy. A documentary video time shot is obtained. No activity is observed at this time. (Time Stamp)
- 7:04 a.m. A documentary video time shot is obtained. No activity is observed at this time. (Time Stamp)
- 7:53 a.m. Upon spot checking the residence, three vehicles are observed; a 2012 dark blue Ford Edge (Bearing a MI Tag: CBP2123 that is registered to Mark Waite), a burgundy Ford Taurus covered with snow, and a dark 2002 Ford F350 (Bearing a MI Tag: BSV2617 that is registered to Mark Waite). The truck has a yellow snow plow attached to the front. A boat on a trailer is also observed parked in front of the residence. The residence is a tan brick ranch that sits back in a wooded area, with a horse shoe driveway in the front of the dwelling. Documentary video is obtained. No activity is observed at this time.
- 9:00 a.m. A documentary video time shot is obtained. No activity is observed at this time. (Time Stamp)
- 9:40 a.m. The Ford Edge departs from the residence with the claimant as the passenger and her husband as the driver. Mobile surveillance is initiated.
- 9:52 a.m. The vehicle drives to a medical building at 7210 N Main Street, Clarkston, MI 48346. Independence Pointe Urgent care is attached to the medical offices. The claimant's husband drives to the entrance and the claimant exits the passenger's side of the vehicle. The claimant enters the building alone utilizing a cane in her right hand. Her husband parks in the rear of the parking lot backwards, in view of the door, and waits in the vehicle while it's running. (The claimant is observed wearing a burgundy fleece and black jogging pants with a heavy white stripe along the outside of each leg.) (Video Obtained)



— CONFIDENTIAL —

DEFENDANT 00002



1:26 p.m.

The female and the claimant exit the restaurant and the claimant is carrying a small carryout container in her right hand. The claimant is walking in a fluent manner to the vehicle and enters the passenger side. The vehicle then departs from the area. Mobile surveillance continues.  
(Video Obtained)



— CONFIDENTIAL —

DEFENDANT 00008

Theresa Waite timeline · Now

Theresa Waite 22 hours ago · 1021 Love Child, M... · 6 mobile · 18

Well on time and sis are we ready and parked? we've been waiting a long time so get your flight passes in and let's get nuts here!!!! 1 r.t.

Share

it's people that...

Sharon Waite Preston where are u heading? 22 hours ago · 10 mobile

Jenny Kojayczak take care of the man for me 22 hours ago

Elizabeth Henny Murrain Oh my God, you're here!! 21 hours ago

Theresa Waite Angus Sharon cancelled this period for sure. So we leave tomorrow night for the hotel near the airport, then we fly out Thursday morning 22 hours ago · 10 mobile · 10

Theresa Waite Jimmy no worries we will take good care of you guys. See you all then!! 22 hours ago · 10 mobile

Carly Waite Better get some chicken's tomorrow how peas start 🍗 22 hours ago · 10 1

Theresa Waite ok my son I will try to get over there! However I don't think there should be much of there I could get for a souvenir 22 hours ago · 10 mobile

— CONFIDENTIAL —

DEFENDANT 00015

# TIPS AND TRICKS

- Video all Plaintiff Depositions
- Video all Expert Depositions
  - slight cost increase
  - adds pressure
  - great playback
  - split screen technology
  - Impeachment
  - body movements
  - order e-transcripts
- PC or iPad

# SOCIAL MEDIA SEARCH

- every case
- push the envelope
- Facebook, Linked In, Twitter
- golfer = [golfleaguetracker.com](http://golfleaguetracker.com)
- bowler = [bowl.com](http://bowl.com)
- hunter = licenses
- litigations histories
- driving records
- criminal histories
- Google

Injured plaintiff?





# Keeping Legal Costs in Check

- Insist on a Plan
- Plan will help keep costs down
- An initial plan of attack in writing

# Keeping Legal Costs in Check

- Plan contents
- Jurisdiction
- Venue
- Statute of Limitations
- Judge and Jury
- Plaintiff attorney
- Facts of case

# Keeping Legal Costs in Check

- Recommendations for activity
- Early motion to dismiss, depositions, mediation
- Budget
- **Insist on 30 day reports...every 30 days**

# Arbitration

- Be very careful about agreeing to arbitration in any contract or court proceeding
- Expensive
- No discovery
- Rigged
- Rarely any real wins for defendant
- No appeal rights—none!!

# SUMMARY OF THE ACT

- ⤴ The Open Meetings Act, 1976 PA 267; MCLA 15.261 et seq; MSA 4.1800(11);
- ⤴ **“the Act’ has an effective date of March 31, 1977. Enacted in the wake of the Watergate scandal.**
- ⤴ Requirements interpreted broadly; exemptions interpreted narrowly.
- ⤴ Basically the Act provides that all meetings of a public body shall be open to the public and shall be held in a place that is available to the general public. Section 3(1).

- ⌘ Similarity of purpose to the Freedom of Information Act. MCL 15.231 (2) provides as follows:
- ⌘ (2) 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.
- ⌘ Purpose is to promote governmental accountability.

# A. Public Bodies Subject To The Act

## **The Act applies to all public bodies....**

- ✧ which are defined as 'any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement.' Section 2(a).

## B. Exclusions From The Act

- ⌘ Section 3(8) states that the Act shall not apply to the Workers Compensation Appeal Board, the Employment Security Appeals Board, the Teacher Tenure Commission when acting as a board of review from the decision of a controlling board, an arbitrator or arbitration panel appointed by the Employment Relations Commission and an arbitration panel selected pursuant to the malpractice arbitration act of 1975.
- ⌘ Section 3(9) excludes meetings of a committee of a public body that meets for the purpose of adopting a non-policymaking resolution of tribute or memorial.
- ⌘ Section 3(10) exempts social or chance gatherings or conferences not designed to avoid the Act.; these chance meetings are excluded from the coverage of the Act.



## C. What Is A Meeting?

- ⌘ **The term 'meeting' is defined as a...**
  - '... convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy.' Section 2(b)
- ⌘ **Quorum....decision is deliberated or rendered...decision** concerns a matter of public policy
- ⌘ **'Decision' means a determination, action, vote, or** disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.

- ✧ Thus, a quorum of the public body's members must be present when the body meets for the purpose of deliberating toward, rendering a vote or taking other action by which the public body effectuates or formulates public policy. However, chance meetings or social gatherings at which a quorum may be present are not included within the definition of meeting.
- ✧ Meetings with a quorum present held to deliberate a public question must be held at a public meeting. Thus, if the members of a public body gather, a quorum being present, for the purpose of deliberating, the meeting is subject to the provisions of the Act even if there is no intention that the deliberations shall lead to the rendering of a decision on that occasion. In other words, a public body may not meet informally in advance of a public meeting to determine what will be decided formally at the public meeting.

- ✧ When members of a public body meet to discuss their individual elections and political concerns, they are not considering matters of public policy within the meaning of the Open Meetings Act.
- ✧ Same holds true when you meet with a neighborhood organization for the purpose of observing and gathering information

## D. Notice of Meetings

- ⌘ Public bodies which have a regular meeting schedule must post the schedule of their meetings for the following calendar or fiscal year within ten (10) days after the first meeting of the public body in that calendar or fiscal year.
- ⌘ The notice must state the dates, times and places of the regular meetings. Section 5(2). In keeping with legislative intent, the notice of the first meeting shall also be posted in accordance with the requirements of section 5. If the schedule of regular meetings is changed, the new dates, times and places of the regular meetings must be posted within three (3) days after the meeting where the change is made. Section 5(3).

- ✧ Where a regular meeting is rescheduled or a special meeting is called, a public notice stating the date, time and place of the meeting must be posted at least eighteen (18) hours prior to the meeting. Section 5(4).
- ✧ Where a public body recesses a meeting for more than thirty-six (36) hours the meeting may not be reconvened unless notice has been posted at least eighteen hours before the meeting as required in section 5(4). The state legislature is not required to post eighteen (18) hours notice where it recesses or adjourns for less than eighteen (18) hours.

- ⤴ The notices must contain the name of the public body to which the notice applies, its telephone number and its address. Section 4(a).
- ⤴ The notice must also state where the official minutes of the public body are stored and are available for inspection. Section 9(2).

- ⌘ Notice for a meeting of a public body must always be posted at its principal office and any other locations considered appropriate by the public body. Section 4(b).
- ⌘ If the public body is a part of a state department, a legislative or judicial branch of state government, an institution of higher education, or part of a political subdivision or school district, the notice shall also be posted in the principal office of the state department, institution of higher education, Clerk of the House of Representatives, Secretary of the State Senate, Clerk of the Supreme Court or political subdivision or school district.

- ⌘ If a local public body does not have a principal office, the notice is posted in the office of the County Clerk in the county in which the public body serves; the public notice for a state public body is posted in the office of the Secretary of State.
- ⌘ Annual requests for copies of all notices are allowable.



## E. Emergency Meetings

- Public bodies may meet in emergency session without complying with the notice requirements in the event that it is necessary to hold a meeting to deal with a severe and imminent threat to the health, safety or welfare of the public when 2/3 of the members serving on the body decide that delay would be detrimental to the efforts to lessen or respond to the threat. Section 5(5).

## F. Rules For Conducting Meetings

- ⌘ Public bodies may establish rules to ensure the orderly conduct of meetings and the rules must be recorded by the public body. Section 3(5).
  - ⌘ See Oak Park City Council Rules of Procedure approved November 11, 2013, included in your handout.
- ⌘ Right of a person to attend includes right to tape record, take **photographs, video tape, broadcast on television...radio.**
- ⌘ You may not require a person to give his or her name as a condition to attending the meeting.
- ⌘ No rule may place any condition on the attendance of a person at a meeting of a public body. Section 3(4). Rules established under these provisions must be flexible and should be designed to encourage public participation and attendance rather than to discourage it.

# G. Rights Of The Public

## 1. Right of the Public to be Present

- ✧ Under section 3(1) all persons shall be permitted to attend any meeting unless a closed meeting may be held in accordance with the provisions of sections 7 and 8. No conditions on attendance may be placed on the public such as requiring that an attending person provide his name or other information. Section 3(4). A person shall not be excluded from a public meeting except for a breach of the peace actually committed at the meeting. Section 3(6).

## 2. Rights of the Public to Address the Meeting

- ⌘ Section 3(5) provides that a person shall be permitted to address a meeting of a public body. The section further provides that public bodies may establish rules which regulate the conditions under which the public may address the meeting. These rules must be reasonable, flexible and designed to encourage public expression and not discourage or prohibit it.
- ⌘ The rules regulating the right of public address may include such controls as the length of time any one person may be permitted to address the body, the portion of the agenda set aside for public address, and a requirement that persons wishing to address the public body identify themselves and make it known ahead of time that they wish to address the body in order to facilitate the planning of time allotments to various portions of the agenda.

# H. Minutes of Meetings

- ⌘ Minutes shall be kept of each meeting, whether such meeting is open or closed. Sections 9(1) and 7(2).
- ⌘ Minutes shall contain at least the following information: date, time, place, members present, members absent, decisions made at the open meeting, the purposes for which a closed meeting was called, and all roll call votes taken at the meeting. Section 9(1).
- ⌘ In the event a closed session is held, minutes shall also be taken but these minutes are not available to the public and may only be disclosed by order of a court. Minutes of closed sessions must be retained for one year and one day after approval of the minutes of the regular meeting at which the closed session was approved. Section 7(2).

- ⌘ The minutes of the open meetings of public bodies are public records open to public inspection and shall be available at an address designated on the posted public notice.
- ⌘ Also, copies of the minutes shall be available to the public at the reasonable copying cost. Section 9(2).
- ⌘ Proposed minutes of open meetings shall be available within eight (8) business days after the meeting to which the minutes refer.
- ⌘ Approved minutes shall be available for public inspection within five (5) business days after the meeting at which the minutes are approved by the public body. Section 9(3).

# I. Closed Sessions

Upon a two-thirds roll call vote of the members of a public body elected or appointed and serving, a public body may meet in closed session for any of the following reasons:

1. To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained. Section 8(d).
2. To consult with its attorneys regarding trial or settlement strategy in connection with specific pending litigation, but only when an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. Section 8(e).

3. To review the specific contents of an application for employment or appointment to a public office when the candidate requests that the application remain confidential. However, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this Act. Section 8(g).
4. To consider material exempt from discussion or disclosure by state or federal statute. Section 8(h).



Closed sessions may also be held by public bodies for the following reasons without a two-thirds roll call vote:

1. To evaluate, consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual agent, when the named person requests a closed hearing. Section 8(a).
2. To consider the dismissal, suspension, or disciplining of a student when the public body is part of the school district, intermediate school district or institution of higher education which the student is attending, when the student or student's parent or guardian requests a closed hearing. Section 8(b).
3. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing. Section 8(c).
4. Partisan caucuses of members of the state legislature. Section 8(g).

# J. Remedies

## 1. Invalidation of Action

- ⌘ Where a violation is shown to have been committed, the decision made by a public body may be invalidated if the court finds that the noncompliance or failure has impaired the rights of the public. Section 10(2).
- ⌘ The complaining party must establish the fact that the Act has been violated and that the rights of the public have been prejudiced.

- ✧ Where the decision of a public body is challenged on the ground that it was not made in compliance with the requirements of the Act, the public body may, without being deemed to make any admission contrary to its interest, re-adopt the decision in compliance with the Act. Decisions so re-adopted are effective from the date of re-enactment and may not be declared invalid by reason of the initial fault. Section 10(5).

- ⌘ A lawsuit to invalidate a decision of a public body for a violation of the Act must be commenced within sixty (60) days after the approved minutes are made available to the public. Section 10(3)(a).
- ⌘ In cases involving the approval of contracts, the receipt of acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, the legal action must be instituted within thirty (30) days. Section 10(3)(b).
- ⌘ Actions must be brought in the county in which the local public body serves or, if the decision challenged is that of a state public body, actions shall be brought in Ingham County. Section 10(4).

## 2. Injunctions and Mandamus

- ⌘ Besides invalidating a decision, an action may also be brought by the Attorney General, Prosecuting Attorney of the county in which the body serves, or any person, to compel compliance or to enjoin further noncompliance with the Act. Section 11(1).
- ⌘ A person who succeeds in obtaining injunctive relief against a public body for violation of the Act shall recover court costs and actual attorney fees. Section 11(4).

### 3. Personal Civil Liability

- ⌘ A public official who intentionally violates the Act is personally liable in a civil action for actual and exemplary damages of not more than \$500.00 plus court costs and actual attorney fees to a person or group of persons bringing the action. Section 13(1).
- ⌘ The official may not be liable more than once for each single meeting and such actions must be commenced within 180 days after the date of the violation giving rise to the cause of action. Section 13(2).
- ⌘ Actions for damages under section 13 may be joined with actions for injunctive or exemplary relief. Section 13(3).

## 4. Criminal Penalties

- ⌘ A public official who intentionally violates the Act is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00.
- ⌘ A second violation by the same official within the same term of office is punishable by a fine of not more than \$2,000.00 and/or a term of not more than one year in prison. Section 12.



# The Freedom of Information Act: A Comprehensive Overview



MCL 15.231 provides as follows:

(2) 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.

Amended by P.A.1994, No. 131, § 1, Imd. Eff. May 19, 1994; P.A.1996, No. 553, § 1, Eff. March 31, 1997; P.A.1997, No. 6, Imd. Eff. May 16, 1997.



- Who may make a FOIA request? The Act states that “all persons are entitled to full and complete information . . . .”

- A person is “an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity.

## APPOINTMENT OF A FOIA COORDINATOR

- A FOIA Coordinator is an individual designated by the public body to accept and process requests for public records. MCL 15.232.

Every municipality must have a FOIA Coordinator.

- A FOIA Coordinator shall keep a copy of all written FOIA requests for a minimum of one year. MCL 15.233.
- A FOIA Coordinator must have and shall furnish a reasonable facility to inspect. MCL 15.233.

## ABILITY TO INSPECT PUBLIC RECORDS

- **A person wishing to inspect or receive a copy of a public record shall make a written request to the FOIA Coordinator. MCL 15.233, MCL 15.235.**
- **A written request can be made by fax or electronic mail. Under this format, however, it is not “received” by FOIA Coordinator until one (1) business day after the electronic transmission.**
- **An individual has an opportunity to subscribe, for up to six months, to future issues of a public record that is created, issued or disseminated on a regular basis. MCL 15.233(1).**
- **Can you ignore a FOIA request made by a citizens to a public employee other than the FOIA Coordinator? No.**
- **A public employee shall promptly forward a FOIA request to the FOIA Coordinator. MCL 15.233(1).**

- **A public employee is not required to make a “compilation, summary or report of information.” MCL 15.233(4).**
- The public records must exist as part of your ordinary course of doing business. You need not put information in any form that is different from that which already exists.
- Tips:
  - ✓ The requesting party does not have to name a specific document. *Herald Co. V Bay City*, **rev’d** on other grounds, 463 Mich 111 (1998).
  - ✓ Information on computer discs may be obtained.

## COLLECTION OF FEES FOR PROVIDING PUBLIC RECORDS

- **A public body “may charge a fee for a public record search, the necessary copying of a record or for providing a copy.”**  
MCL 15.234(1).
- The fee is limited to actual mailing costs, costs of duplication, labor, and costs of search, examination, review and separation of documents. MCL 15.234 (1).
- Costs of labor = you may not charge more than the hourly rate of the lowest paid public body employee capable of retrieving the necessary information. MCL 15.234(3).

- **You may not consider the identity of the requesting person in accessing fees.** MCL 15.234(3).
- **Fringe benefits paid may form part of employee cost.** Attorney General Opinion 7017.
- **An indigent person or a person on public assistance may not be charged for the first \$20 of the request.** An affidavit is necessary.
- **Deposits.** If the charge for the record will exceed \$50, a good faith deposit not to exceed one-half ( $\frac{1}{2}$ ) of the cost may be demanded. MCLA 15.234(2).
- **Search for records must generally take place during normal business hours.**
- **Fees should be paid in full prior to actual delivery of records.** Attorney General Opinion 6977.
- **You must use the most economical means available for making copies of public records.** MCL 15.234.

## THE RESPONSE REQUIREMENTS OF A PUBLIC BODY

- **A written request must be made to the FOIA Coordinator. MCL 15.235(1).**
- **The public body shall response to a request within five (5) business days by doing any one (1) of the following:**
  - 1) grant the request;
  - 2) issue a written notice to the requesting person denying the request;
  - 3) granting the request in part and issuing written notice to the requesting person denying the request;
  - 4) issuing a notice of a ten (10) business day extension to respond to the request. You may not have more than one (1) extension.

You must specify when the response will arrive.

- **If no action is taken within the time for a response, the request is deemed denied. MCL 15.235(3).**



## REQUIREMENTS OF A DENIAL

- 1) A statement under FOIA or other statutory authority as to why the public record is exempt from disclosure. MCL 15.235 (4)(1).; or
- 2) A certificate that the record does not exist; or
- 3) A description of the public record or its information that is withheld or deleted, if a separation or deletion is made;
- 4) **A full explanation of the requesting person's right to do either of following:**
  - a) Submit to the head of the public body a written appeal that **specifically state the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.**
  - b) Seek judicial review of the denial under section 10.
  - c) **Notice of the right to receive attorneys' fees and damages as** provided in section 10 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

## FEES

- **If the requesting party prevails, the court shall award reasonable attorney fees, costs and disbursements. MCL 15.240(6).**
- **If requesting party only prevails in part, discretion by court to award costs and attorney fees. MCL 15.240(6).**
- **Test: Whether the action was reasonably necessary to compel the disclosure AND had substantial causative effect on delivery of or access to documents. *Wilson v City of Eaton Rapids*, 196 MA 671 (1992).**
- **Review by Court of Appeals is on discretionary standard.**

## PUNITIVE DAMAGES

- If public body arbitrarily and capriciously violates the Act by delay or refusal to give documents, the court shall award actual damages and punitive damages in the amount of \$500.

## ITEMS EXEMPT FROM DISCLOSURE

### 1) Invasion of Privacy Exemption

- Information must be of a personal nature
- Release of the information must constitute a clearly **unwarranted invasion of an individual's privacy.**
- Does it reveal intimate or embarrassing details about an **individual's private life.**

- \* state police and local handgun records are exempt because information regarding gun ownership is of a person and intimate nature.
- \* must be related to information on the inner workings of government
- \* release of autopsy report of Judge was not clearly unwarranted invasion of privacy. *Swickard v Wayne County*, 438 Mich 536 (1991).

\* a court must balance the public interest in disclosure against the privacy interest the Legislature intended to protect. *Austin v Department of Community Health*, \_\_\_\_\_ MA \_\_\_\_\_ (8/23/05).

## 2) 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 identify 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.
- \* government has to show how records would interfere with pending investigations.

- \* paper sought disclosure of incident reports prepared by officers who were potential defendants in administrative and criminal proceedings = exempt.
- \* non-exempt material must be made available.
- \* **investigation does not continue to be “open” for purposes of law enforcement exemption after expiration of statute of limitations.**
- \* may refuse to release the name of a person whose arrest is being sought. Attorney General Opinion 5593, 1979.
- \* may withhold arrest records of a person found not guilty or where there was a decision not to prosecute. Attorney General Opinion 5500, 1979.
- \* may refuse to release name of person arrested but not charged.



\* Federal courts have discussed in various cases those subjects that might interfere with law enforcement proceedings:

- evidence
- anticipated testimony
- confidential informants
- methods of surveillance
- witnesses
- inter-office strategy
- attorney work product
- subjects of surveillance

- \* no general exemption for personnel records - use right to privacy; law enforcement exemption.
- \* routine employee evaluations are not exempt.
- \* employment applications of persons applying for police officer are exempt: 1) a lot of personal information; and 2) many of the applicants were police officers in other cities.
- \* psychological tests given to employees or officers are exempt. *Payne v Grand Rapids*, 178 MA 193 (1989).

## Internal Affairs files

- **most recent case is Herald Co. v Kent County Sheriff's Dept, 261 MA 32 (2004).**
- are discoverable
- must argue chilling effect
- are records compiled for employment or law enforcement purposes
- will they interfere with an ongoing investigation

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