

The Michigan Freedom of Information Act
and
Its Impact on Financial Administrators
at
Michigan State University

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November 29, 2016

MICHIGAN STATE
UNIVERSITY

Organizational Chart

President Simon

Vice President and
General Counsel Robert Noto

Deputy General Counsel Associate General Counsels Assistant General Counsels

FOIA Office

FOIA Office

- Ellen Armentrout, Assistant General Counsel & Freedom of Information Act Officer
- Jackie Kittel, Higher Education Legal Fellow
- Susan Green, Assistant Freedom of Information Act Officer
- Debbie Miller, Executive Secretary

Michigan Freedom of Information Act



(“MIFOIA” or “the Act”)



- State law designed to guarantee public access to public records of government bodies at all levels of Michigan government.
- Purpose of MIFOIA: “It is the public policy of this state that all persons, except those persons incarcerated . . . , 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.”
- MIFOIA provides that all communications of a public agency or public employee are subject to disclosure unless specifically exempted by the Act.



What governmental bodies are subject to the law?



- A state officer, employee, agency, department, division, bureau, board, commission, council, or other body in the executive branch of the state government.
- Agencies, boards, commission, or councils in the state legislature.
- Local government.
- Any entity created by state or local authority *or* which is primarily funded by or through state or local authority.

Governmental agencies or officials *not* subject to the law:

- The governor, lieutenant governor, and their executive offices and employees.
- State legislators.
- The judiciary.
- Private, non-profits that receive public monies in exchange for goods provided or services rendered.



What communications constitute a “public record” under MIFFOIA?

- A writing (which includes handwriting, typewriting, printing, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or a combination thereof, or other means of recording or retaining meaningful content) 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.
- A record includes e-mails, computer disks, tapes, videotapes or information stored on any form of electronic or other media.

Points of Clarification

- Where a record is kept does not matter for purposes of FOIA
 - Personal emails on a work computer
 - Work emails on a personal computer
 - Documents in your car or home office
- The email address one uses does not matter
- Cell phones
 - Text messages and voicemail messages may be subject to FOIA if they meet the definition of a public record

Who can make a request for records under MIFOIA?

- Any person other than someone incarcerated in a state or local correctional facility may request public records in Michigan.

How does a person make a request for records?

- In writing
- Addressed to the FOIA Coordinator*
- Just states “I want”

*Note: Just because a request isn't addressed to the FOIA coordinator does not mean that it is not a FOIA request.

Informal Requests

- If you receive an informal request for information, and you feel comfortable responding, you should feel free to do so
 - No FOIA deadlines
 - No FOIA requirements
- If you receive a request for information that you know is available on the MSU webpage, you must notify the requester of the web address.

What use can be made of the documents?



- “The initial as well as future uses of the requested information are irrelevant.”

Mullin v. Detroit Police Dep’t.

What is the time to respond to a request for information under MIFFOIA?

- A public body must respond to a request for public records within five business days after receipt of the request.
- Five possible initial ways to respond to a FOIA request (all responses must be in writing):
 1. Grant the request;
 2. Deny the request;
 3. Grant the request in part and deny the request in part;
 4. Extend the time to respond for not more than ten business days;
 5. Issue a fee and deposit notice.

Section 13 -- Exceptions to Disclosure under MIFOIA

- Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- Investigating records compiled for law enforcement purposes.
- Records or information specifically described and exempted from disclosure by statute.
 - For example, FERPA, Confidential Research and Investment Information Act ("CRIIA"), Bullard-Plawecki Employee Right to Know Act, Holmes Youthful Trainee Act.
- Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy, if certain conditions are met.

Section 13 -- Exceptions to Disclosure under MIFOIA (continued)

- Information or records subject to the attorney-client privilege.
- Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for the submission of bids or proposals has expired.
- Appraisals of real property to be acquired by the public body.

Section 13 -- Exceptions to Disclosure under MIFOIA (continued)

- Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination.
- Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including health information.
- 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.
- Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety.

Section 13 -- Exceptions to Disclosure under MIFOIA (continued)

- Academic transcripts of an institution of higher education, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.
- Records of a law enforcement agency, the release of which would identify or provide a means of identifying an informant or undercover officer or agent.
- Records of a public body's security measures, including security plans, codes, combinations, passwords, passes, keys, and security procedures.
- Records or information relating to a civil action in which the requesting party and the public body are parties.

Section 13 -- Exceptions to Disclosure under MIFOIA (continued)

- Information or records that would disclose the social security number of any individual.
- An application for the position of president of an institution of higher education.
- Records or information of measures designed to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent those designs relate to the ongoing security measures of a public body.

Some General Rules

- Financial information pertaining to the University goes to the very core purpose of FOIA.
- Contracts and their terms also go to the very core purpose of FOIA.
- It is extremely unlikely that the University could legally withhold from disclosure purely factual information pertaining to the University's finances or business relationships.

Most Commonly Used Exemptions for Business Information

- Confidential Research and Investment Information Act
 - Originally enacted in 1994 to address concerns about confidential research information.
 - Revised in 2004 to address concerns raised regarding financial information.
 - Provides certain exemptions from disclosure for certain specifically identified financial or investment information.

Most Commonly Used Exemptions for Business Information (continued)

- Trade secrets or commercial or financial information voluntarily provided for use in developing governmental policy *if*:
 - Promise of confidentiality
 - Promise authorized by Chief Administrative Office
 - A description of the information is made within a reasonable time after the information is received and kept in a public place
- This provision doesn't apply to information submitted as a condition for receiving a government contract

Most Commonly Used Exemptions for Business Information (continued)

- Subsection (m) of FOIA: 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.
- What this does *not* mean:
 - That all notes are exempt from disclosure
 - That stamping a document “draft” or “confidential” or “for internal use only” renders it exempt from disclosure
 - That emails are confidential

Responsibility

- Who determines whether information is released or withheld?
 - The FOIA Officer for MSU
 - Consistency
 - Accountability

Procedures

- **If you receive a FOIA request, the first thing you should do is send it directly to the FOIA Office at MSU:**
 - Email: foia@msu.edu
 - Fax: 3-1794
 - Phone: 3-3929
- **The FOIA Office is responsible for processing all of the FOIA requests for the University.**

Procedures

(continued)

- Once the FOIA Office receives a FOIA request, the office will send the affected MSU party(ies) a copy of the request and a Query Form.
- The Query Form will:
 - State when the documents are due to the FOIA Office;
 - Request a signature attesting that all of the responsive documents have been provided; and/or
 - Ask how much time it has taken or will take to gather the responsive documents.

Procedures

(continued)

- If processing the request will cost the University \$50 or more, the FOIA Office will likely issue a fee deposit notice along with a non-binding, good-faith estimate of when the documents will be ready for release.
- If processing the request will cost the University less than \$50, the FOIA Office will either provide the responsive documents within five business days, or take advantage of the extension allowed by the Act and provide the responsive documents within 15 business days from receipt. The University will not charge for processing the request.

Procedures

(continued)

A Note about Fees

- Pursuant to the Act, the University calculates fees by multiplying the number of hours processing the FOIA request will take by the hourly rate of the lowest paid employee capable of performing the work.
- All fees collected are deposited into the General Fund and do not go to the FOIA Office or the affected unit.

Follow Up

- Once the University issued a final response to the requester, the requester has options:
 - accept the documents and move on.
 - file an appeal with the University.
 - sue the University.
 - file an appeal with the University **and** sue the University.
- The FOIA Office processes the appeals, but the appeals are reviewed and decided by President Simon.

Examples of FOIA Requests

- Media Requests
 - Coaches' contracts and other information related to Athletics
 - Information pertaining to events taking place on campus
- Attorney Requests
 - Police records
 - Personnel records
- Commercial Requests
 - Information regarding salaries and employment contracts
 - Information regarding contractual arrangements with University vendors
 - Information pertaining to University investments

Examples (continued)

- RFP Requests
 - Vendors who did not get the bid
 - Vendors who did get the bid
- Recent requests
 - Tenure and promotion files
 - Police reports
 - Animal research and care records
 - Personnel files
 - Faculty and staff emails

A Few Things to Remember

- Any document can be requested (and emails are documents!).
- A document must be released unless there is a specific exemption in the statute that allows all or a part of the document to be withheld.
- Financial documents tend to go to the very core purpose of FOIA and are therefore likely to be released.
- If you have any questions, don't hesitate to contact the FOIA Office. We are happy to help.