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

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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.

• 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 counsel, 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 or 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 MIFOIA?

• A writing which encompasses “handwriting, typewriting, printing, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or 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.
Who can make a request for records under MIFOIA?

• Any person other than incarcerated felons 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.
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 MIFOIA?

• A public body must respond to a request for public records within five business days after receipt of the request.

• Four possible initial responses to a FOIA request:
  1. Grant the request;
  2. Written notice denying the request;
  3. Grant the request in part and issue a written notice denying the request in part;
  4. Written notice extending the time to respond for not more than ten business days.
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.
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 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.
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 information.
Most Commonly Used Exemptions for Business Information (continued)

- Section 390.1554(1)(d) of CRIIIA, describing information that is exempt from disclosure: “Trade secrets or other proprietary information in which a public university or college holds an interest or that a public university or college owns that is determined by the public university or college to have potential commercial value, if a general description of the nature of the information and a description of the extent of the interest held by the public university or college in the information is made available to a person upon request.”

- Section 390.1554a exempts certain investment fiduciary information.
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
Most Commonly Used Exemptions for Business Information (continued)

- Who makes this determination?
  - The FOIA Officer for MSU.
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.

• 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.
Procedures (continued)

- Once the University has responded 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 they are reviewed by President Simon.