

Freedom of Information Act Implementation Guidelines



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Michigan Department of Agriculture & Rural Development
Freedom of Information Act
Implementation Guidelines

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MICHIGAN DEPARTMENT OF AGRICULTURE & RURAL DEVELOPMENT

FREEDOM OF INFORMATION ACT

IMPLEMENTATION GUIDELINES

I. DEPARTMENT POLICY

The Freedom of Information Act (FOIA), MCLA 15.231, et seq., provides that all persons 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. The Michigan Department of Agriculture & Rural Development agrees that public access to the official acts of government is a necessary and proper element of a free society. ***Therefore, it is the policy of the Michigan Department of Agriculture & Rural Development to conduct its affairs in compliance with the Freedom of Information Act and further, to provide as much public access as possible to the public records of this agency.***

The Freedom of Information Act creates the right of all persons to inspect, copy, or receive copies of public records. The Act identifies categories of records that are exempt from disclosure. The Act also requires those requests for disclosure be made in writing. It is the policy of the Michigan Department of Agriculture & Rural Development that any written request for records not exempt by a specific provision of the Act, or of another Act, will be provided within five (5) business days after receipt unless there are extenuating circumstances, in which case the requested record will be provided within 15 business days after receipt with a one time 10 business day extension is taken. Oral requests for information are allowed by the Act; however, staff members should ask for oral requests to be reduced to writing and then respond to those requests consistent with this policy, if it is appropriate to do so. If the request remains an oral request, staff members are encouraged to respond consistent with other departmental and divisional policies and procedures regarding service to the public.

The Freedom of Information Act ***does not*** require the creation of a record or a summary of a record(s) and the department ***will not*** do so in response to a FOIA request.

II. DEFINITIONS

- A. "Freedom of Information Coordinator" means *a designated member of the Michigan Department of Agriculture & Rural Development.*

- B. "Person" means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. "Person" does not include an individual serving a sentence of imprisonment in a correctional facility.
- C. "Public Record" means a writing prepared, owned, used, in the possession of, or retained by this department in the performance of an official function. Computer software is not a public record but information stored in a computer is considered a public record. A public record, if not exempt from disclosure under Section 13 of the Act, or of another Act, must be disclosed upon request of any person.
- D. Subpoena – A subpoena is an order of the court, which may require that records be produced. *A subpoena is not handled under FOIA.* Questions regarding the production of records under a subpoena should be addressed to Brad Deacon.
- E. "Writing" means handwriting, typewriting, printing, photostating, photographing, 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. ***This also includes e-mails that have been received, sent, archived or residing in "trash" and voice mail messages.***
- F. "Written Request" means a writing received by the department that asks for information and includes any writing received by mail, fax, e-mail, internet, or any other electronic means.

III. FOIA COORDINATOR

- A. *The FOIA Coordinator for the Michigan Department of Agriculture & Rural Development*
 - 1. will accept, process, refer, grant or deny FOIA requests.
 - 2. will maintain such records as are required by law and policy.
 - 3. will provide appropriate training to Associate FOIA Coordinators and other departmental personnel.
 - 4. All FOIA questions will be referred to the FOIA Coordinator. If the Attorney General must be consulted, the FOIA Coordinator is authorized to do so.

5. All questions and requests for assistance will be directed to the FOIA Coordinator.
- B. Each Division Director is designated as an Associate FOIA Coordinator and may designate staff to perform FOIA duties.
- C. The Assistant to the Director is designated as the Associate FOIA Coordinator for records of the executive office.
- D. The Assistant to the Deputy Director is designated as the Associate FOIA Coordinator for records of the Commission.
 1. Associate FOIA Coordinators will grant all FOIA requests meeting the requirements of the Act.
 2. Associate FOIA Coordinators may issue a time extension letter when necessary.
 3. Associate FOIA Coordinators may deny a FOIA request only in the event that the requested record does not exist.
 4. The department FOIA Coordinator is the only person authorized to deny or partially deny a FOIA request for any reason other than that stated in 3. above, except that in processing a denial, the FOIA Coordinator may consult with the affected Division Director. The FOIA Coordinator shall notify the Chief Deputy Director of a denial that is potentially controversial.

IV. RECEIPT OF REQUEST AND RESPONSE

Requests received shall be responded to by doing one of the following:

1. Granting the request.
 2. Issuing a written notice to the requestor denying the request.
 3. Granting the request in part and issuing a written notice to the requestor denying the request in part.
 4. Issuing a notice of a 10 business day extension. If this extension is taken, then by the end of the 10 business days, the request must be responded to with one of the first three choices above.
- A. Written requests for information will be date stamped on the **front** of the document upon their arrival at a departmental facility. Any departmental member or facility may receive a FOIA request. If a date stamp is not available, handwrite the received date on the **front** of the document.

It **must** be legible when copies are made. A fax or e-mail request is considered to be received the day *after* it arrives at a fax machine or in a MDARD e-mail inbox.

Also, if a written request is sent via e-mail and delivered to a spam or junk folder, the request is not received until one day after the public body first becomes aware of the written request. Notation should be made of both the time the written request is delivered to the spam or junk folder and the time the public body first became aware of that request.

1. FOIA requests will be immediately forwarded by hand, fax, or e-mail directly to the division or office that may possess the requested record. Because a response must be made within five (5) business days, all FOIA requests will be expedited directly to the involved division's Associate FOIA Coordinator. U. S. Mail and Interdepartmental mail will not be used because of the time delays involved in these methods of delivery.
 2. FOIA requests received at a field work site for information retained at that work site may be granted directly from the work site after conversation with the appropriate division's Associate FOIA Coordinator. Copies of the request should be sent to the division Associate FOIA Coordinator upon fulfillment to be maintained until the end of the calendar year. All FOIA responses should include one of the notices (letters) found at the end of this document. See VII. B.
 3. Any departmental member or office that receives a FOIA request and does not know the proper place to refer that request will *immediately* refer it to the FOIA Coordinator in the manner described above.
 4. It is not necessary that a request refer to the Freedom of Information Act in order to be a FOIA request. Any written request for a "writing" as defined above is considered, by law, to be a FOIA request and must be responded to within five (5) business days.
 5. Records may be provided without receipt of a written request. However, staff members should ask that the request be reduced to a writing (e-mail, fax, or regular mail.)
- B. Routine FOIA requests for information will be processed by the staff of the involved division and approved for release by the division Associate FOIA Coordinator.
1. The information will be sent to the requestor in the manner that the request was received. In the event the records are voluminous and unable to be sent via email, records will be sent in hard copy or electronically via CD, DVD or flash drive.

2. Requestors may arrange to pick up the information at an MDARD office if that is their wish.
 3. If a written or verbal request for information is for a record that is available on the MDARD website, the staff member shall inform the requestor about the pertinent website address. Written notices may contain a link to those documents instead of providing paper copies. However, MDARD will still provide a hard copy if the requestor wishes and may charge for that record and up to 100% of the fringe benefits for that portion of the response.
- C. The Associate FOIA Coordinator will mail a notice similar to that described in Attachment A with all FOIA responses that are granted. *Responses via fax or e-mail also require a notice. A copy shall be retained with the request in accordance with Section VIII of these guidelines.*
- D. If an Associate FOIA Coordinator cannot locate the requested record, he/she will mail (e-mail or fax) a notice similar to that described in Attachment B to the requestor within five (5) business days of receipt of the request.
- E. If an Associate FOIA Coordinator cannot respond within five (5) business days, and requires an additional 10 business day extension, the Associate FOIA Coordinator will mail a time extension notice to the requestor similar to that described in Attachment C.
1. The FOIA Coordinator must be advised of this action.
 2. This notice must be mailed within five (5) business days of receipt of the original request.
 3. The notice must contain a date when the reply is expected and a reason(s) for the delay.
- F. Requests for certified copies of records will be met when the Associate FOIA Coordinator signs and mails the certification form found in Attachment D. Certification forms will have the Department Seal affixed.
- G. The Act provides a right to inspect records by the requestor and that the public body must furnish reasonable accommodation for the requestor. The public body must also make reasonable rules necessary to protect the public records from loss, unauthorized alteration, mutilation, or destruction and to prevent excessive and unreasonable interference in discharging its functions. It is MDARD's policy that:
1. Anyone requesting inspection will be accompanied at all times;
 2. No person shall be given access to records through a computer

terminal, rather the records will be printed and given to the requestor for review. Information requiring redaction will be redacted and a photocopy made prior to the requestor's review.

3. Costs may not be charged for surveillance, unless the requestor is reviewing **original** records or if the records must be reviewed for exempt information prior to the review.
4. Review will occur during normal business hours.
5. The review will occur at a time and for a duration that has the least disruption to normal business activities.
6. The review will occur at the normal location of the records or at another location to be determined by MDARD.
7. The requestor may bring his/her own photocopying equipment, if desired.

V. EXEMPTIONS

- A. While the intent of FOIA is to provide public access to public records in the possession of public bodies certain *discretionary* exemptions are stated in Section 13. These exemptions do not mandate that information be withheld but rather *allow* information to be withheld if a public body so desires and requirements of the specific exemptions are met.
- B. It is important to note that investigative records compiled for law enforcement purposes, including **MDARD investigations, must be released** unless disclosure would:
 1. Interfere with a law enforcement proceeding.
 2. Deprive a person of a right to a fair trial or impartial administrative adjudication.
 3. Constitute an unwarranted invasion of personal privacy.
 4. Disclose the identity of a confidential source.
 5. Disclose law enforcement investigative techniques or procedures.
 6. Endanger the life or physical safety of law enforcement personnel.

During the course of an ongoing investigation by MDARD it is certainly permissible to withhold information under the authority of Section 13 (1)(b)(i) and/or (ii) if the circumstances warrant. The burden of substantiating the circumstances availing the public body to the exemption

would fall on the department if challenged in court. *It will not be enough to simply state the exemption; we will be required to articulate the circumstances substantiating the exemption.* At the conclusion of the investigation, it can no longer be argued that the release of information will interfere with law enforcement proceedings or deprive a person of the right to a fair trial or impartial administrative adjudication.

Following the investigation and any administrative or criminal proceedings those requesting exemption of information identifying complaints often cite Section 13(1) "Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." It should be noted that this exemption requires "a **clearly** unwarranted invasion of an individual's privacy." This is distinguished from the standard stated in Section 13(b)(iii), applicable during the investigation and proceedings, "Constitute an unwarranted invasion of personal privacy." It is obviously the intent of the legislature to raise the standard to be met before withholding information following closure of the investigation and proceedings.

Absent specific circumstances clearly supporting the application of Section 13(1)(a) it is the policy of MDARD that the names and city of complainants will be released, if requested in writing, at the conclusion of an ongoing investigation and criminal or administrative proceedings or during the investigation if Section 13(1)(b)(i)(ii) and/or (iii) do not apply.

VI. DENIAL OR PARTIAL DENIAL OF REQUEST

- A. If a request for information falls within one of the exemptions specified in the Act, or in another Act, and a denial is contemplated, the FOIA Coordinator shall consult the affected Division Director. (If the FOIA Coordinator and affected Division Director do not agree on the denial, the Chief Deputy Directory will be consulted.) Within five (5) business days of receipt of the original request, the Associate FOIA Coordinator shall prepare a denial notice similar to that contained in Attachment E for signature by the FOIA Coordinator. The FOIA Coordinator will mail the denial notice. Copies of the denial notice will be forwarded to the appropriate Division for retention. The Act requires this notice to contain:
- a. The legal basis under this Act or another Act for the denial (*section of law*),
or
 - b. A certification that the record does not exist if that is the reason for denial,
or
 - c. A description of that portion of a record that is separated or deleted from the main body of the record pursuant to one of the Act's exemptions, if such a separation is made,
and

- d. An explanation of the requestor's remedial right to either:
 - 1) Submit a written appeal to the Director that specifically states the word "appeal" and identifies a reason for reversal of the disclosure denial,
or
 - 2) Seek judicial review of the denial,
and
- e. Notice of the right to receive attorney fees and damages if, after judicial review, the court orders disclosure of all or a portion of the record.

B. Information contained in a requested record that is enumerated as an exception in the Act, or in another Act, will be redacted from the record before mailing it to the requestor. ***Just because some information is exempt from FOIA does not mean that the entire record is exempt.***

(For example, a request for personnel records is valid but the record contains a social security number, which is exempt. Redact the social security number and release the redacted record.)

- 1. The accepted method of redactions is to make a copy of the document, black out the information to be redacted with a felt tip pen, then make a second copy of the blacked out document for release to the requestor.
- 2. Other methods may be used so long as the redacted information cannot be recreated.
- 3. The information to be released will be given to the FOIA Coordinator who will mail it with a notice similar to that contained at Attachment F. *Note that the items identified as exempt must be listed or explained in the notice.*
- 4. The FOIA Coordinator will mail the partial denial notice. Copies of the partial denial notice will be forwarded to the appropriate division for retention.

VII. APPEALS

- A. Any person who is denied full access to the record sought or wishes to appeal a fee may appeal to the Director in writing.
 - 1. The denial/partial denial and fee notices advises all denied requestors of this right.
 - 2. The appellant must include the word "appeal" in their request.

3. Any department member or facility receiving such a letter must immediately hand deliver, fax, or e-mail it to the FOIA Coordinator.
- B. The Director will review the initial decision with the Division Director and FOIA Coordinator and render a decision within 10 business days to either:
1. Grant the request for release of records or fee reduction.
 2. Partially grant the request for release of records or fee reduction.
 3. Deny the request for release of records or fee reduction.
 4. Under unusual circumstances, issue a 10-business day extension in order to reply to the request in one of the above ways.
- C. In addition, denied requestors may seek judicial review within 180 days of the denial of records. It is not necessary *to appeal to the Director before seeking* judicial review.

VIII. RECORD RETENTION

- A. All Associate FOIA Coordinators will retain FOIA requests in their division files for the current calendar year.
1. For requests that are granted or denied, the request, the reply notice, any extension notice and any billing worksheet must be retained. Either a copy of the documents provided or an inventory listing the records shall be retained.
 2. For requests that are partially granted (information redacted), it will be necessary to retain the redacted page(s) actually released in addition to that specified in I. above.
 3. Division Directors are free to require the retention of additional records at their discretion.
- B. At the conclusion of each calendar year (December 31), all Associate FOIA Coordinators will forward all FOIA file material for that year to the FOIA Coordinator.
1. The FOIA Coordinator will retain these records for one additional year before destruction, according to Act. Some information may be retained for a longer period of time for a variety of reasons, including, but not limited to, a litigation hold.
 2. The FOIA Coordinator will issue an annual summary of requests received during the prior year for executive review.

IX. FEES AND BILLING

A. FOIA permits charging a fee for the actual incremental cost of duplicating or publishing a record, including labor directly attributable to those tasks. FOIA prohibits charging a fee for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information, unless the costs incurred for those activities would be excessive and beyond the normal or usual amount for those services (unreasonably high costs) and the public body specifically identifies the nature of these unreasonably high costs. ***The department has determined that anything in excess of one (1) hour is considered an unreasonably high cost.*** In addition, given the cost of processing, we will bill only fees in excess of \$50 (labor plus copies and mailing).

1. Potential fees are calculated by the sum of the cost of:
 - a. labor for the search, location, and examination of public records;
 - b. labor for the review of public records and separation and deletion of exempt from nonexempt material;
 - c. nonpaper physical media (e.g. CD, DVD, flash drive)
 - d. duplication and publication of public records at a cost of \$.10 per page for 8-1/2 x 11 and 8-1/2 x 14 sized paper;
 - e. Labor for the duplication or publication of public records;
 - f. Actual cost of mailing public records in a reasonably economical and justifiable manner.
 - g. Note that the hourly rate represents the lowest paid staff member capable of performing the task, regardless of who actually completed the task. Additionally, 50% of the fringe benefits should be included.
 - h. Labor costs should be billed in 15 minute increments with all partial time increments rounded down.

Staff should be prepared to document labor cost in the response notice (e.g. *“staff would need to set aside routine work to review 55 bankers boxes and 5 lateral file drawers of documents...”*) Please contact the FOIA office for more guidance.

2. Additional considerations:

- a. The department can bill for the time spent monitoring requestors inspect an **original** record if they request to review the record in person. Costs for time to monitor will be based on the hourly rate of the lowest paid person *in the department* capable of performing the required task plus 50% of fringe benefits.
 - b. Any request for record inspection and any request to make their own copies should be brought to the attention of the FOIA Coordinator.
 - c. Costs for time to duplicate records will be based on the hourly rate plus 50% of the benefits of the lowest paid person *in the department* capable of performing the required task. Note: You may also charge for copying, redacting and re-copying documents for inspection.
 - d. The \$50.00 billing floor is established to avoid additional costs incurred in billing for the typical request that takes one hour to locate and copy and consists of 50 pages or less.
 - e. Costs change yearly with changes in salaries (See *Attachment I for current year costs*).
 - f. Under FOIA, if someone claims to be indigent, the public body must wave the first \$20.00 of costs beyond what has already been waived in these Guidelines. Contact the FOIA office for a copy of the necessary affidavit to be signed by the requestor.
 - g. There will be no charge for labor directly associated with redaction if it is known that the same records had previously been redacted and the redacted version is still available.
- B. If the estimated fee exceeds \$50.00, the following should occur:
1. The division FOIA coordinator will prepare a response notice similar to that contained in Attachment G for signature by the department FOIA Coordinator. Be sure to include an index number relevant to the program area fulfilling the request. ***Please note that this letter can be adapted to accommodate a partial denial similar to Attachments B and F. See the Department FOIA Coordinator for assistance.***
 2. The division FOIA coordinator will prepare a FOIA Billing Worksheet, Form AG-053. (See *Attachment I*) prior to compiling the documents for fulfilling the request. This will be sent to the requestor with the notice.

3. When a deposit check (or the final check comes in) the Accounting Service Center will use the index number provided on the check stub and deposit the check and provide a copy of the transaction detail to the department FOIA coordinator who will inform the division coordinator to complete the necessary work to fill the request.
4. Once the deposit has been received, the division FOIA coordinator will complete the necessary work to fill the request. The division FOIA coordinator will then prepare a second notice similar to that contained in Attachment H for signature by the department FOIA coordinator.
5. The final payment request notice is sent to the requestor. Once the final payment has been received and deposited, the requested records can be forwarded to the requestor.
6. In the event that a response notice has been sent to a requestor with a deposit request and no response is received from the requestor, the FOIA request is considered complete.

X. UPDATE AND REVISION

The responsibility to update and revise these guidelines rests with the Department FOIA Coordinator.

**MICHIGAN DEPARTMENT OF AGRICULTURE & RURAL DEVELOPMENT
FREEDOM OF INFORMATION ACT
RESPONSE BILLING WORKSHEET**

If payment is required as indicated in the accompanying notice, requested information will not be released until the payment described below is received. Please call the MDARD staff member who signed the notice or return this form if you decide you do not wish to receive the records. After 90 days it will be assumed that you no longer require the requested records.

Requestor's Name and Address:		
Bill Calculation	Amount	
LABOR: Searching for, locating, and examining the material: No. of Hours: <u>0.00</u> x Wage Rate (including up to 50% for fringes) <u>\$0.00</u> Reviewing the material, including separating exempt from non-exempt material: No. of Hours: 0.00 x Wage Rate (including up to 50% for fringes) <u>\$0.00</u>	\$	0.00
POSTAGE: (Actual Cost)	\$	0.00
DUPLICATING: Labor: No. of Hours: 0.00 x Wage Rate (including up to 50% for fringes) \$10.00 Paper: No. of Pages: _____ x Copying Rate \$.10 per page	\$	0.00
NON PAPER PHYSICAL MEDIA: Describe (e.g. CDs, DVDs, flash drives, etc.)	\$	0.00
Make check (business/personal) or money order payable to: STATE OF MICHIGAN Mail Check/Money Order to: Michigan Department of Agriculture & Rural Development, P.O. Box 30776, Lansing, MI 48909 <p style="text-align: center;">Please note this number _____ on your check or return a copy of this invoice with your payment.</p>	TOTAL \$	0.00
PLEASE NOTE THAT IF A DEPOSIT IS REQUESTED, THE INDICATED AMOUNT IS AN ESTIMATE. THE ACTUAL COST MAY VARY FROM THIS AMOUNT.	DEPOSIT \$	0.00
For Internal Use Only		
REQUESTED INFORMATION TO BE: <input type="checkbox"/> Mailed upon receipt of final payment <input type="checkbox"/> Paid and picked up in person	Check / M.O. # From:	BALANCE TO BE PAID* \$ 0.00
Date Payment Received:	Date Documents Mailed:	Date Documents Picked Up:
Deposit payment in Agency Account Number:	Cost Center:	Object Code:

Distribution: Requestor
 Division FOIA File
 FOIA Coordinator
 Accounting Service Center