

FOIA

February 11, 2021



Freedom of Information Act (FOIA)



- FOIA regulates and sets requirements for the release of "public records" held by "public bodies" in Michigan.
- All public records are subject to disclosure unless specifically exempted by the Act.
- The best policy for a public body is to accept the pro-disclosure intent and language of the Act and to respond accordingly.

Policy of the Act



It is the public policy of this state that all **persons**, except those 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.

Categories of Records





What are Non-Record Materials?

- 1. Non-Records:** Recorded information in the possession of a public body that is not needed to document the performance of an official function.
- 2. Transitory Records:** Records relating to activities that have temporary value and do not need to be retained once their intended purpose has been fulfilled.
- 3. Personal Records:** Records that document non-government business or activities.

What is an “Official Record”



A “writing” that is “prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.”

What is a “Writing”



As defined in the Act it 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, hard drives, solid state storage components, or **other means of recording or retaining meaningful content.**”



Keep in Mind That:

1. Format of a record does not matter
2. Where a record is kept does not matter
 - a. Documents in your car or home office
 - b. Work emails on a personal account
 - c. Personal emails on a work account
3. The email address used does not matter
4. Cell phones do matter because text messages and voicemail messages may be subject to FOIA if they meet the definition of a public record

Examples of Record Categorization



- Non-Records:
 - Duplicates or drafts
 - Newspaper articles or reference materials
- Official Records:
 - Budget or procurement documents
 - Meeting Minutes



Intersects with Record Retention

- What needs to be retained and for how long?
- Meeting minutes – office of record?
- Handwritten notes – Is it evidence of government activity?
- CANNOT DESTROY PUBLIC RECORDS WITHOUT A RECORDS RETENTION POLICY APPROVED BY THE STATE OF MICHIGAN

Questions or Comments?



Components of the Draft MICRC FOIA Policy



1. FOIA Procedures and Guidelines

- a. Policy of how MICRC processes FOIA requests.
- b. Comports with Public Act 442 of 1976, MCL 15.231 *et seq.*

2. Written Public Summary of MICRC FOIA Procedures and Guidelines

- a. Required in Section 4(4) of the Act.
- b. Structured more informally in a FAQ format.

What is a FOIA request?



- A FOIA request is a legal process, by which a person can submit a written request to access, review, or obtain a copy of a public record.
- All persons, except those who are incarcerated, may submit a FOIA request to the MICRC FOIA Coordinator.
- Pursuant to your Rules, General Counsel serves as the FOIA Coordinator.

What is NOT a FOIA Request?



- Request to complete a form or survey is not a FOIA request.
- Request to answer question(s) is not a FOIA request.
- Request to draft or create a document, where none exists, is not a FOIA request.
- Request to provide a narrative explanation of a document or action is not a FOIA request.

Applicability to MICRC



- The MICRC is a public body as defined in Section 2(h)(ii) of the Act.
- Therefore, all records prepared, owned, used, in the possession of, or retained by the MICRC in its official capacity are public records.
- This does not mean that all public records must be disclosed or released to a person who submits a FOIA request.
- Certain information and records may be exempt from disclosure under the Act or by another state or federal statute.



What Information or Records are Exempt?

- Section 13 of the Act provides a list of information or records that may be exempt from disclosure.
- There are also federal and state laws that preclude the disclosure of specific information or records under those laws, which are in turn exempt under Section 13(d) of the Act.
- If a person seeks information or records that fall under one or more of the listed exemptions, the MICRC may deny a portion of or an entire FOIA request.



Sampling of Exemptions under the Act

- Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- Information or records subject to the attorney-client privilege.
- Investigating records compiled for law enforcement purposes.
- Records or information specifically described and exempted from disclosure by statute.

For example, HIPPA, Federal Privacy Act, Michigan Crime Victim's Rights Act, Michigan Tax Code.

- Certain trade secret information.
- Appraisals of real property to be acquired by the public body.
- Records or information relating to a civil action in which the requesting party and the public body are parties.

Processing of a FOIA Request



- MICRC receives a FOIA Request
 - Must be in writing and sufficiently describe the record
- Search for the record (potential labor costs)
- Evaluation by FOIA Coordinator to separate exempt from non-exempt information (potential labor costs)

Timing & Types of Responses



Within five (5) business days of the receipt of the FOIA the MICRC may:

1. Extend time to respond by ten (10) business days
2. Request payment of a good faith deposit (if more than \$50.00)
3. Grant the request
4. Grant in part and deny in part
5. Deny the request

Potential Fees



- The Act permits the MICRC to charge a fee to process FOIA requests.
- There must be a detailed itemization of such fees which may include:
 - Labor costs by multiplying the number of hours it will take to process the FOIA request by the hourly rate of the lowest paid employee capable of performing the work.
 - Copying or duplication costs and actual mailing costs.
- If fees over \$50, a good faith deposit of ½ total estimated fee will be required.



Appeals of Fees and Disclosure Determinations

If the MICRC charges a fee or denies all or part of a request, the requestor may:

- File an appeal with the MICRC.
- Sue the MICRC.
- File an Appeal and Sue the MICRC.

Questions or Comments?

