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## IMPORTANT INFORMATION PERTAINING TO THE ISSUANCE OF PROTECTIVE ORDERS

On November 14, 2021, the Tribunal issued a newsletter establishing a new procedure for the issuance of protective orders. A second newsletter was issued on July 29, 2022, clarifying that procedure. In those newsletters, the Tribunal indicated that stipulations for protective orders for discovery purposes would be granted with no in camera review, and that an in camera review would be required only for (1) non-stipulated (single-party) motions, and (2) cases where a stipulated protective order was previously granted and valuation disclosures or other documentation containing purportedly protected information are to be offered at hearing. This change in procedure has resulted in some confusion and ultimately proven to be impracticable, particularly as it relates to providing parties with guidance and a timely determination as to what information is and is not protected for the purpose of a Tribunal hearing.

In that regard, the Tribunal is part of the executive branch and not the judicial branch of government, and unlike state courts, it is subject to the Freedom of Information Act (FOIA) and the Open Meetings Act (OMA). The consequence of this is that while the Tribunal may issue protective orders under MCR 2.302(C)(8), in reality, the information is only protected from disclosure to the extent that it is also exempt under FOIA and OMA. Significantly, the Tribunal cannot conduct a closed session or otherwise refuse to disclose information or documents unless they are exempt under FOIA and OMA, and it therefore finds it necessary to limit protective orders to information that would be exempt from disclosure under these statutes.<sup>1</sup>

As a result, the Tribunal is reinstating the policy in effect prior to the November 14, 2021 Newsletter, of conducting an in camera review in every instance in which a motion for protective order is filed. Going forward, parties requesting a protective order will be required to identify in their motion for protective order the specific statutory provision(s) that would exempt the information sought to be protected from disclosure and allow the Tribunal to conduct a closed session.<sup>2</sup> Failure to identify applicable sections of FOIA,

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<sup>1</sup> See *Herald Co v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862, 866 (2003).

<sup>2</sup> FOIA exemptions are governed by MCL 15.243. As it pertains to the Tribunal, it is likely that the only applicable exemption is found in MCL 15.243(1)(d), which exempts "[r]ecords or information specifically described and exempted from disclosure by statute." *Id.* Under OMA, closed sessions are governed by MCL 15.268. Again, as it pertains to the Tribunal, it is likely that the only applicable exemption is found in

OMA, and other relevant statutes (such as the Uniform Trade Secrets Act) in a motion for protective order will result in denial of the motion, and the parties will be required to refile the motion in accordance with this guidance (with appropriate filing fee) for any further consideration or determination on the protected status of specific information.

For all motions for protective order filed prior to the issuance of this newsletter, the Tribunal will hold the motion(s) in abeyance and schedule an in camera review. However, the in camera review will commence as an oral argument on the motion for protective order, to allow the parties to identify the applicable exemption(s) under FOIA, OMA, and other relevant statutes. Failure to identify specific exemptions or otherwise establish sufficient grounds for the conducting of an in camera review at the oral argument will result in immediate adjournment of the in camera review and denial of the motion for protective order.

Parties should also note that the Tribunal is required to “separate exempt and nonexempt material, describe where practicable the exempt material, make the nonexempt material available, and state on the record the purpose of [a] closed session before initiating the closed session.”<sup>3</sup> To facilitate this process, the parties will be required to submit to the Tribunal and the opposing party at least one business day prior to the in camera review the attached form that (1) describes in summary fashion each item for which protection is sought, (2) the name of the document in which each item is located, (3) the location of each item within the named document, and (4) the basis of the requested protection for each item.<sup>4</sup> The parties will also be required to organize their documents for the in camera review in accordance with the previously filed list, and only those documents containing items for which protection is sought may be submitted. Failure to comply with this requirement will result in a recess of the in camera review, during which time the parties will be required to reorganize the documents in accordance with this guidance prior to review by the presiding judge.

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MCL 15.268(h), which states that a public body may meet in a closed session to “consider material exempt from discussion or disclosure by state or federal statute.” *Id.*

<sup>3</sup> *Herald Co*, 258 Mich App 86. See also MCL 15.244, MCL 15.267, MCL 15.268, and MCL 15.269.

<sup>4</sup> This form is also available in the “Entire Tribunal Forms/Samples” section of the Tribunal’s website.



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**MICHIGAN TAX TRIBUNAL  
PROTECTIVE ORDER/IN CAMERA REVIEW LIST**

DOCKET #(s) \_\_\_\_\_

IN CAMERA REVIEW DATE: \_\_\_\_\_

DOCUMENT	PAGE NO.	DESCRIPTION	BASIS FOR PROTECTION	PROTECTED	NOT PROTECTED