

THE NEW FOIA REQUIREMENTS

Recent Amendments to the
Freedom of Information Act in
Michigan (MCL 15.234.amended)

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Changes on FOIA Policies & Fees

- All public bodies need to prepare for substantial changes to the Freedom of Information Act (FOIA) that take effect July 1, 2015 under Public Act 563 of 2014.
- The statutory amendments affect the fees that may be charged for a request for public records, the documentation that must accompany a FOIA response, formal policy requirements, and penalties that may be imposed.
- New statutory provisions also allow for a requester to challenge the fees charged.
- Most of the changes favor the requester, with additional significant burdens placed on the public body receiving a request for public records.

Procedures and Guidelines

- All public bodies must establish procedures and guidelines to implement FOIA.
- Must create a written public summary of the specific procedures and guidelines.
- Must include a standard form for detailed itemization of any fee in responses to written requests.
- Must provide free copies of procedures and guidelines and its summary upon request at the public office and provide copies with EACH response, or include a link on the agency's website.
- The public body may NOT charge a fee or deposit if it has not established procedures and guidelines consistent with each of these requirements.

Fees for a Public Record Search

- A public body must first establish and make publicly available free copies of its procedures and guidelines to implement the FOIA process, including the use of a standard form for detailed itemization of any fee amount in its responses to written requests for public records.
- A public body must also post on its website a written public summary of its procedures and guidelines
 - How to submit written requests
 - Explaining the public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal.
- This written public summary (or a website link to it) must be included in the public body's response to a FOIA record request.

Public Records Online

- If the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any charges under FOIA.
- If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on the website, the public body must notify the requestor in its written response that all or a portion of the requested information is available online.
- The written response must include a specific webpage address where the requested information is available.
- On the detailed itemization, the public body must separate the requested public records that are available on its website from those that are not available on the website, and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

The following costs are being charged / estimated in compliance with Section 4 of the Michigan Freedom of Information Act, MCL 15.234, according to the [Public Agency]'s FOIA Procedures and Guidelines. If the [Public Agency] is seeking a 50% deposit prior to providing the public records sought, the estimate is itemized on this form, lines 1-5 below.

If all or a portion of the requested information is available on the [Public Agency]'s website, the [Public Agency] is required to tell you it is available on the website and, where practicable, include a specific webpage address where the information is available. In this case

- None
- Some
- All

of the requested material can be found at the following webpage(s):

If the webpage is all the information you need, it is provided without charge. If, however, you still wish to receive a copy of material from the webpage, please let us know. The FOIA charges will apply if the [Public Agency] is required to produce copies of material from the webpage.

Requestor has stipulated that some / all of the requested records that are already available on the [Public Agency]'s website but requests they be provided in a paper or non-paper physical digital medium and acknowledges that providing the records in that format shall be subject to the [Public Agency]'s normal charges outlined below.

Responding to Verbal Requests

- A public body may provide requested information available in public records without receipt of a written request.
- If a verbal request for information is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor of the location of the material online (e.g. website address).

Itemization of Fee Components

6 Fee Components
(1-3)

1. labor costs for searching, locating and examining public records;
2. labor costs for separating exempt from non-exempt information;
3. the actual and most reasonably economical cost of providing records on non-paper physical media, e.g., computer discs or electronic records, if requested in that form and the public body has the technological capability of providing it in that form;

Itemization of Fee Components

6 Fee Components
(4-6)

4. the actual total incremental cost of necessary duplication or publication of paper copies, not to exceed 10 cents per page for letter and legal size paper;
5. labor costs directly associated with duplication or publication of paper or electronic records; and
6. the actual cost of mailing at the least expensive form of postal delivery.

Labor Costs

(searching, separating, and copying)

- The public body shall not charge more than the hourly wage of its lowest-paid employee capable of performing that task in the particular instance, regardless of whether that person is available or who actually performs the labor.
- However, a public body may use contract labor for the separation and redaction of exempt materials, and charge its actual contract labor costs, not to exceed six times the minimum wage.

Labor Costs continued:

- Labor costs shall be itemized
 - hourly wage; and
 - the number of hours charged.
- The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits
 - not to exceed actual fringe benefits costs
 - Invoice for these charges must clearly state the percentage multiplier used to account for benefits in the itemization.
- Labor costs for searching and separating must be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.
- Labor costs for copying may be in any increments of the public body's choosing, but partial increments must be rounded down.
- A public body may not charge for redaction of documents that were already redacted in response to a previous FOIA request, if redacted copies remain in the public body's possession.

1. Labor Cost to Locate:

This is the cost of labor directly associated with the necessary searching for, locating, and examining public records in conjunction with receiving and fulfilling a granted written request. **This fee is being charged because failure to do so will result in unreasonably high costs to the [Public Agency] because of the nature of the request in this particular instance, specifically:** _____

The [Public Agency] will not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in this particular instance, regardless of whether that person is available or who actually performs the labor.

These costs will be estimated and charged in **15-minute time increments**; all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Wage Charged: \$ _____

Charge per ¼ hour: \$ _____

OR

Hourly Wage with Fringe Benefit Cost: \$ _____

Multiply the hourly wage by the percentage multiplier: _____%
(up to 50% of the hourly wage) and add to the hourly wage for a total per hour rate.

Charge per ¼ hour: \$ _____

[For records already available on the [Public Agency]'s website that Requestor has requested in a paper or non-paper digital medium, greater than the 50% limitation, not to exceed the actual costs may be used to calculate Fringe Benefit Costs to be added to the hourly wage].

Overtime rate charged as stipulated by Requestor (overtime is not used to calculate the fringe benefit cost)

To figure the number of increments, take the *number of minutes*: _____, divide by 15-minute increments, and round down. Enter below:

Number of increments

x _____ =

1. Labor Cost

\$ _____

3b. Contracted Labor Cost for Separating Exempt from Non-Exempt (Redacting):

(Fill this out if using a contractor, such as the attorney. If using in-house employee, use No. 3a instead.)

The [Public Agency] will not charge for labor directly associated with redaction if it knows or has reason to know that it previously redacted the record in question and still has the redacted version in its possession.

This fee is being charged because failure to do so will result in unreasonably high costs to the [Public Agency] that are excessive and beyond the normal or usual amount for those services compared to the [Public Agency]'s usual FOIA requests, because of the nature of the request in this particular instance, specifically:

As this [Public Agency] does not employ a person capable of separating exempt from non-exempt information in this particular instance, as determined by the FOIA Coordinator, this is the cost of labor of a contractor (i.e.: outside attorney), including necessary review, directly associated with separating and deleting exempt information from nonexempt information. This shall not exceed an amount equal to 6 times the state minimum hourly wage rate of _____ (currently \$8.15).

Name of contracted person or firm: _____

These costs will be estimated and charged in 15-minute time increments (*must be 15-minutes or more*); all partial time increments must be rounded down. *If the number of minutes is less than 15, there is no charge.*

Hourly Cost Charged: \$ _____

Charge per increment: \$ _____

To figure the number of increments, take the *number of minutes*:
_____, divide by 15-minute increments, and round down.
Enter below:

Number of increments

x _____ =

3b.
Labor Cost

\$ _____

4. Copying / Duplication Cost:

Copying costs may be charged if a copy of a public record is requested, or for the necessary copying of a record for inspection (for example, to allow for blacking out exempt information, to protect old or delicate original records, or because the original record is a digital file or database not available for public inspection).

No more than the actual cost of a sheet of paper, up to maximum 10 cents per sheet for:

- **Letter** (8 ½ x 11-inch, single and double-sided): _____ cents per sheet
- **Legal** (8 ½ x 14-inch, single and double-sided): _____ cents per sheet

No more than the actual cost of a sheet of paper for other paper sizes:

- **Other paper sizes** (single and double-sided): _____ cents / dollars per sheet

Actual and most reasonably economical cost of non-paper physical digital media:

- **Circle applicable:** Disc / Tape / Drive / Other Digital Medium **Cost per Item:** _____

The cost of paper copies **must** be calculated as a total cost per sheet of paper. The fee **cannot exceed** 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. The County **must** utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.

Number of
Sheets:

x _____ = \$ _____

x _____ = \$ _____

x _____ = \$ _____

No. of Items:

x _____ = \$ _____

Costs:

**4. Total
Copy Cost**

\$ _____

5. Mailing Cost:

The [Public Agency] will charge the actual cost of mailing, if any, for sending records in a reasonably economical and justifiable manner. Delivery confirmation is not required.

- The [Public Agency] *may* charge for the least expensive form of postal delivery confirmation.
- The [Public Agency] *cannot* charge more for expedited shipping or insurance unless specifically requested by the requestor.*

Actual Cost of Envelope or Packaging: \$ _____

Actual Cost of Postage: \$ _____ per stamp

\$ _____ per pound

\$ _____ per package

Actual Cost (least expensive) Postal Delivery Confirmation: \$ _____

*Expedited Shipping or Insurance as Requested: \$ _____

* Requestor has requested expedited shipping or insurance

Number of
Envelopes or
Packages:

x _____ = \$ _____

Costs:

5. Total
Mailing Cost

\$ _____

[Public Agency]
[Address]
Phone: _____

Statutory Fee Costs

Freedom of Information Act Request Statutory Fee Costs

Date: _____ Prepared for Request No.: _____ Date Request Received: _____



The costs are being charged / estimated in compliance with Section 4 of the Michigan Freedom of Information Act, MCL 15.234(10), as public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

The fees for the requested records are subject to the below statutory provisions and are as set forth in the attached fee calculation sheet.

- The Transcripts and Abstracts of Records Act (MCL 48.101)
- The Enhanced Access to Public Records Act (MCL 15.442)
- Other, _____

Fee Waiver/Reduction

- A public record shall be furnished without charge for the first \$20.00 of the fee for each request by an indigent person (current law) *and for requests from a non-profit organization designated by the state for the protection and advocacy of persons with mental illness.*
- If the requestor is eligible for a requested discount, the public body must note the discount on the detailed itemization.

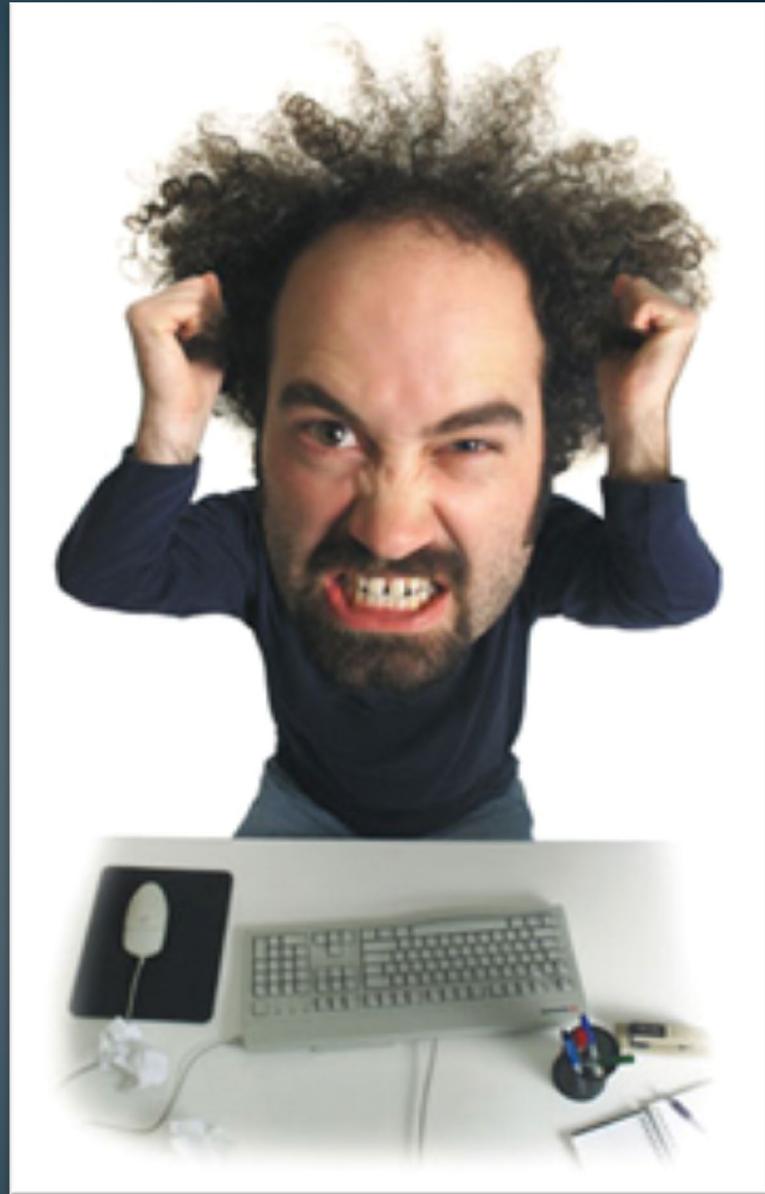
Ineligibility for Fee Waiver

- An individual is ineligible for this fee reduction if:
 1. the individual has previously received discounted copies of public records from the same public body twice during that calendar year; or
 2. the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request.
- A public body may require a statement by the requestor in an affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

Notice of Ineligibility for Fee Waiver or Reduction

If a requestor is ineligible for the discount, the public body must inform the requestor of the specific reason for ineligibility in the written response.

Fee Reduction
for Failure to
Respond
Timely



Daily Calculation

- If a public body does not respond to a written FOIA request (identified as such in the first 250 words of the request) in a timely manner, or the late response was willful and intentional:
 - the public body must reduce the charges for labor costs by 5% for each day the public body exceeds the time permitted for a response to the request (5 business days without and extension to 15 business day with an extension)
- Maximum reduction of 50%
- Fully explain the charge reduction on the detailed itemization

Time a FOIA Request is “Received”

- If a written request is sent by electronic mail and delivered to the public body’s spam or junk-mail folder, the request is not received until 1 day after the public body first becomes aware of the written request.
- The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

Good Faith Deposits = 50%

- A public body's demand for a good faith deposit (50% of the estimated fee) must also contain a “best efforts estimate” by the public body regarding the time frame it will take to provide the public records to the requestor.
 - the time frame estimate is nonbinding
 - but should be reasonably accurate

Good Faith Deposits + 50%

- If a public body has not been paid in full for copies of public records previously requested by an individual, the public body may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent FOIA request from that individual, but only upon meeting several narrow conditions.
 - a. The final fee for the prior written request was not more than 105% of the estimated fee.
 - b. The public records made available contained the information being sought in the prior written request and are still in the public body's possession.
 - c. The public records were made available to the individual, subject to payment, within the time frame estimate described under subsection (7).
 - d. Ninety days have passed since the public body notified the individual in writing that the public records were available for pickup or mailing.
 - e. The individual is unable to show proof of prior payment to the public body.
 - f. The public body calculates a detailed itemization, as required under subsection (4), that is the basis for the current written request's increased estimated fee deposit.

Discontinuation of Increased Deposit (they thought of everything)

- A public body shall no longer require an increased estimated fee deposit from an individual if any of the following apply:
 - a. The individual is able to show proof of prior payment in full to the public body.
 - b. The public body is subsequently paid in full for the applicable prior written request.
 - c. Three hundred sixty-five days have passed since the individual made the written request for which full payment was not remitted to the public body.

FOIA
Coordinator
Office Station



Appeal of Fee Calculation

- The FOIA amendments will allow for challenges to fees charged by a public body.
 - If a public body requires a fee that exceeds the amount permitted by statute or under its publicly available procedures and guidelines, the requesting person may:
 1. appeal to the head of the public body, if such an appeal is provided for in the procedures and guidelines; or
 2. commence a civil action in the circuit court for a fee reduction.
- On an appeal, the head of the public body may waive the fee, reduce the fee, or uphold the fee. If the fee is not waived, the head of the public body must certify that the fee amounts comply with the statute and the public body's procedures and guidelines.
- A court may uphold or reduce the fee.
 - If the court reduces the fee by 50% or more, it may award the requester all or an appropriate portion of reasonable attorneys' fees, costs and disbursements.
 - If the court determines that the public body arbitrarily and capriciously charged an excessive fee, the court shall order a civil fine of \$500 against the public body.

Civil Fines

- The amount of a civil fine that may be imposed by a court on a public body for refusal or delay in disclosing or providing copies of a public record has been increased from \$500 to \$1,000.
- Further, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court may order the public body to pay a civil fine of not less than \$2,500 nor more than \$7,500 for each occurrence, taking into account the public body's budget and whether it was previously assessed penalties for FOIA violations.

Remainder of the FOIA Statute

- All other sections of PA 442 of 1976 survive (MCL 15.231 – 15.233; 15.235 – 15.246)
- For sample forms & policies see:

<http://www.michigantownships.org/foia2015.asp>

THE END OF THE BAD NEWS

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