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REAL SOLUTIONS

Election-Related Freedom of Information Act Requests: Common Examples and Best Practices

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DISCLAIMER

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
- Please contact an attorney if you need assistance related to a specific legal issue.





We will address:

- What a municipality may expect with election-related FOIA requests
- Common examples that we see with election-related FOIA requests
- Potential approaches and best practices in responding to such requests
- Any questions you may have

WHAT TO EXPECT



- Municipalities have reported receiving an increased number of FOIA requests related to election procedures
- Election-Related FOIA requests, often result in voluminous information, including copies of:
 - Ballots
 - Voter information
 - Other records related to election administration



- The Michigan Freedom of Information Act is designed to provide citizens with access to public records.
- Goal is transparency, and the ability to obtain information on a public body's official activities.
- FOIA is a pro-disclosure statute.



FREEDOM OF INFORMATION ACT ACT 442 OF 1976

FOIA COORDINATOR



- Townships are required to appoint a FOIA Coordinator. MCL 15.236(1).
- The FOIA Coordinator is the individual that oversees responding to FOIA requests.
- Designated by the Township Board.
 - Can be a Board member
 - Can be a Township employee
- Duties typically include drafting responses to requests, locating responsive records, redacting exempt information, and copying responsive records.

RESPONDING TO A REQUEST

THE BASICS



FOIA REQUEST

- MCL 15.233(1) provides “upon providing a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.”
- A “public record” is defined as “a writing 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.” MCL 15.232(i).
- The FOIA has a broad stated purpose that it is the policy of the state that people “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 . . . so that they may fully participate in the democratic process.” MCL 15.231(2)





FOIA REQUEST TIMELINE

When a municipality receives a request for records under the FOIA, it must respond within five business days by doing one of the following:

- Granting the request;
- Denying the request;
- Granting the request in part and denying the request in part; or
- Issuing a notice requesting an additional ten business days to respond to the request.



ELECTION-RELATED FOIA REQUESTS

COMMON EXAMPLES



BALLOTS

- A FOIA requestor may provide a written request seeking copies of voted ballots or the requestor may seek to examine the voted ballots themselves.
 - A voted ballot is an untraceable ballot cast during an election at the polls or by absentee ballot.
 - Ballots should not be disclosed when the ballots are traceable to the individual voter and compromise the secrecy of the ballot.
- When ballots are disclosed under FOIA, no person other than the clerk or office staff designated by the clerk should have any form of direct or indirect access to the ballots, ballot containers, or ballot bags.
- If you receive a request for ballots, you should follow all ballot disclosure procedures or directions set forth by the State of Michigan and consult legal counsel.



VOTER INFORMATION

- A FOIA requestor may provide a written request seeking records containing voter information, such as a list of absentee voters located in the QVF software or absentee voter jacket information.
 - Generally, a voter's name and address are subject to disclosure unless coupled with other information that raises privacy concerns.
 - Certain specific data derived from the QVF electronic pollbook may also be subject to disclosure under FOIA, including lists of registered voters.
 - A municipality should not simply deny a request for records because it may contain some personal information in addition to other non-exempt information. Instead, the FOIA requires the municipality to “separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” MCL 15.244(1).



Under Michigan Election Law, MCL 168.509g, a municipality is prohibited from disclosing the:

- record a person declined to register to vote;
 - office that received a registered voter's application;
 - voter's driver's license or state personal identification card number;
 - month and date of birth of a registered voter;
 - telephone number provided by a registered voter;
 - digitized signature of a registered voter;
 - last four digits of an individual's social security number.
- To the extent the responsive records contain any of this exempt information, the public body should redact the exempt information but otherwise disclose the nonexempt information.

OTHER QVF OR POLLBOOK DATA OR SOFTWARE

A FOIA requestor may provide a written request for certain software or election data, such as QVF extracts or pollbook flash drives. While computer software does not constitute a “public record” subject to disclosure under the FOIA, this does not include computer-stored information or data.

- requests to inspect or receive a copy of election software itself will fall outside of the bounds of the FOIA. However, certain information or data contained within the election software may nonetheless be subject to disclosure.
- depending on the request, the disclosure of election-related information or data could cause security concerns and may warrant withholding or redaction.



VAGUE AND OVERBROAD REQUESTS

It is possible that your municipality may receive a vague or overbroad request for election records, such as a request seeking “all evidence” relating to an election.

- While municipalities have a general obligation under the FOIA to provide requestors with public records, a request must first sufficiently describe a public record(s) to enable the public body to find the record(s) requested. MCL 15.233(1).



REQUESTS FOR ANSWERS: NO PUBLIC RECORD

It is also possible that your municipality will receive FOIA requests seeking either records that are no longer in your municipality's possession, or requests to answer election-related questions.

- Generally, the FOIA does not require a municipality to make a compilation, summary, or report of information, or a new public record to respond to a request.
- If your public body possesses a public record that contains the information requested, there may still exist an obligation under the FOIA to disclose the responsive public record containing the information requested.
- To the extent your public body does not possess or maintain a public record that responds to questions asked or no longer holds responsive records, a denial may be appropriate for lack of responsive records. A denial for lack of responsive records requires the public body certify that the public record does not exist under the name given by the requester or by another name reasonably known to the public body.



ELECTION-RELATED FOIA REQUESTS

APPROACH AND BEST PRACTICES



Tip One

- Seek independent legal counsel with experience in responding to FOIA requests
- Rely on the guidance provided by the Michigan Secretary of State or Bureau of Elections



Tip Two

- Appropriately respond to the request under MCL 15.235 within 5 business days of receiving the request.
- Note, a municipality can request a ten-business day extension if needed under MCL 15.235(2)(d).



Tip Three

- For responsive records, the municipality should determine whether the estimated costs to process will exceed \$50.
- If the municipality's good-faith calculation exceeds \$50, the municipality can likely request a good-faith deposit of $\frac{1}{2}$ of the total estimated fee before searching or copying the records.



QUESTIONS



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