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# FOIA Denials: Common Basis Further Explored

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# Disclaimer

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- 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.
- All pictures are for educational purposes.



# Michigan Freedom of Information Act

- The Michigan Freedom of Information Act (MIFOIA) is a state law designed to guarantee public access to public records of government bodies.
- “It is the public policy of this state that all persons, except those persons incarcerated . . . 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.” Michigan Freedom of Information Act, 1976 PA 442, MCL 15.231, *et seq*





# FOIA Responses

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- Four ways to respond to a FOIA request (all responses must be in writing):
  1. Grant the request
  2. Deny the request
  3. Grant the request in part and deny the request in part
  4. Extend the time to respond for not more than ten business days
- MIFOIA provides that all public records are subject to disclosure unless an applicable exemption applies that would permit the public body or municipality to withhold the records requested.

# Common Basis for FOIA Denials

# Invalid Requests

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Unless qualified as indigent, a requestor must include all of the following to submit a valid FOIA request:

- Requesting person's complete name
- Requesting person's address
- Requesting person's valid telephone number or electronic mail address
- A description of the public record(s) sought that sufficiently describes the record(s) so as to enable the public body to find the public record;
- If made by a person other than an individual, the complete name, address, and contact information of the person's agent who is an individual.

***If any of this information is omitted from a request received by a public body, the request would fall outside of the technical scope of the FOIA.***



# Responding to an Invalid Request

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- Although the MIFFOIA does not dictate whether a public body is statutorily required to respond to an invalid request with a denial, it is generally recommended.
- Issuing a formal denial to a response creates a paper trail that could head off any potential arguments that the public body failed to respond to a request within the FOIA's statutory time limitations.
  - In the denial, the public body may indicate to the requestor that the request may be resubmitted with the proper information.



# Example of Denial Language

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A valid Freedom of Information Act (“FOIA”) request must contain a requestor’s: (1) complete name; (2) address written in compliance with United States Postal Service addressing standards; and (3) e-mail address or telephone number. MCL 15.233(1). Your request does not include an address. The Township is therefore denying your request on the grounds that it fails to conform to MCL 15.233(1)’s requirements due to a lack of a valid mailing address.

Since your request has been denied, you have the right to (1) submit a FOIA appeal that specifically states the word “appeal” and identifies the reason or reasons for a reversal of the disclosure denial or (2) seek Circuit Court review of this FOIA decision as stated in Section 10 of the Michigan Freedom of Information Act. MCL 15.240. Furthermore, you have the right to seek attorneys’ fees, as outlined in Section 10, if the court determines the Township has not complied with Section 10 and orders disclosure of all or part of the public record.





# Capitol Info Ass'n v Ann Arbor Police

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A requestor submitted the following FOIA request:

“I hereby demand that you provide me with a copy of all correspondence with all Federal law enforcement/investigative agencies [sic ] specifcly [sic ] including but not limited to the: Federal Bureau of Investigation, National Security Agency, Central Intelligence Agency, United States Secret Service, United States Department of Justice, United States Department of State, Federal Marshal, Military Intelligence Agency, Internal Revenue Service, Defense Investigative Services, United States Postal Service that pertain to persons living in Ann Arbor, Michigan. This request shall cover the time period of January 1, 1983 through the present.”

The public body had denied this request for lack of specificity and the Court of Appeals upheld that denial. The COA found that the request was “absurdly overbroad” and would “require defendants to search their files for correspondence with a wide spectrum of federal agencies dealing with any of more than 100,000 persons during an extensive period of time.” Thus, the request failed to sufficiently describe the records requested.



# Tooles Contracting Group, LLC v Washtenaw Cnty. Rd Comm

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A requestor submitted a FOIA request asking for:

“any documents related to the Washtenaw County Road Commission's hiring or utilization of Minority-owned and/or Disadvantaged Business Entities on Washtenaw County Road Commission Projects.”

- That request was originally denied on the basis that the public body did not possess responsive records.
- The public body argued that the request was vague and implied that the requestor wanted only documents related to programs for disadvantaged businesses that the public body administered; and, because it did not administer any such programs, it was correct when it indicated no responsive records existed.
- The requestor had subsequently obtained records from another body however that they argued should have been disclosed pursuant to this request. The public body argued its original response was correct because the request was not drafted sufficiently to enable the public body to know that the requestor was seeking those records.



# Cont'd.

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- The court determined that the request itself was not ambiguous.
- It was determined that the request was “sufficiently particular to limit the Road Commission's search to a narrow set of documents, which should have been readily identifiable by those persons familiar with the hiring and utilization of minority-owned or disadvantaged businesses.”  
Id.

When considering whether a request sufficiently describes a record sought, and keeping in mind also that the courts view FOIA as a pro-disclosure statute, ask your holders of records whether the request results in a set of identifiable documents, or would they need to conduct a broad search across a wide-ranging spectrum of individuals, bodies or types of records?



# Personal or Non-Public Records

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- The FOIA only requires the mandatory disclosure of “public records.”
- If a record request does not constitute a “public record,” it is not subject to mandatory disclosure and there is no need to address whether an exemption applies.
- A “public record” is defined by the FOIA to mean, in relevant part, 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.”
- A “writing” is also defined broadly to include both physical and electronic means of recording.
- A public record does not include computer software however, and by definition also excludes personal records or non-public records.
- The State of Michigan’s record retention schedules identify a personal record as “records that document non-government business or activities.”



# Personal Records

Happy Birthday, Sharlene!  
We'll see you and Bob  
tonight at Manhattan's  
steak house to celebrate.  
Drinks on me!



Hey, Bill. I heard the good news  
today. I just wanted to tell you  
congratulations on your new job!  
We will miss seeing you at the  
office every day, but I wish you  
the best of luck with your new  
position.

# FOIA COURT DECISIONS



# Walloon Lake Water Sys, Inc v Melrose Tp

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- Michigan Court of Appeals considered whether a letter written by a member of the public but read aloud at a township board meeting was a “public record” within the meaning of the FOIA.
- Following the meeting, the township came into possession of the letter.
- The COA held that the letter was a public record generally subject to disclosure because “[a]t the township meeting, the letter was read to the board, which considered its contents to decide that the subject of the letter did not require township action.”
- The COA found that “once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record used in the performance of an official function.”
- The FOIA has therefore been construed to “require disclosure of records of public bodies used or possessed in their decisions to act, as well as of similar records pertaining to decisions of the body not to act.”



# Hopkins v Duncan Tp

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- Michigan Court of Appeals considered whether the handwritten notes of a township board member taken for personal use at a board meeting were considered “public records” subject to disclosure under the FOIA.
- In that case, the notes were not circulated among other board members, were not used in the creation of any minutes for any meetings, and were retained by the individual board member.
- The COA there found that “[a] writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it.” However, “[m]ere possession of a record by a public body does not, however, render it a public record; a record must be used in the performance of an official function to be a public record.”





# Takeaway

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A public body must look at how the record was utilized and/or ascertain the record's purpose to determine whether it would be a “public record,” as defined by the FOIA, subject to disclosure.



# Privacy Exemption

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- Section 13 of the FOIA contains a list of exemptions from disclosure, one of which is commonly referred to as the privacy exemption.
- That exemption permits a public body to exempt from disclosure “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” MCL 15.243(1)(a).
- The privacy exemption is commonly relied on to redact or withhold from disclosure names, addresses, contact information or other identifying information contained in sensitive records.



# Applying the Privacy Exemption, the Two-Pronged Test

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Does the information contain “intimate” or “embarrassing details” because they are of a personal nature.

Does the disclosure of the information at issue constitute a clearly unwarranted invasion of an individual’s privacy?



# Cont'd.

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- In making determinations under the second prong, public bodies “must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect.”
- The public interest in disclosure to be weighed is whether the disclosure would contribute “significantly to public understanding of the operations and activities of the government.”
- “Requests for information on private citizens accumulated in government files that reveal little to nothing about the inner workings of government will fail the balancing test.”



# ESPN, Inc v Michigan State Univ

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- ESPN sought to obtain records involving student-athletes with the names of the suspects, victims and witnesses.
- While the names were not information of a personal nature standing alone, having one's name linked with a criminal incident was found to be information of a personal nature. This is because “[p]eople linked with a crime, whether as a perpetrator, witness, or victim, have an interest in not sharing this information with the public.”
- The COA ultimately found that the names of the student-athlete perpetrators were nonetheless subject to disclosure under the second prong because disclosure would serve the core purpose of the FOIA. The disclosure of the names was necessary in that instance for the purpose of “learning whether policing standards [were] consistent and uniform” by “comparing and contrasting the information within the requested reports.”
- The disclosure of an individual's name may alternatively fall within the exemption under the second prong when disclosure would not relate to the inner workings of the government.



# Richman v Ingham Cnty.

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- A complaint had been made against two 911 dispatchers.
- The county had disclosed the records but had redacted the complainant's name, address and phone number under the FOIA's privacy exemption. Under the first prong, the COA found that under the circumstances, the name of the complainant was personal information. The complainant had made their complaint under the promise of confidentiality, presumably wishing to keep the information both private and confidential.
- As to the second prong, the COA found that disclosure would do little to advance the FOIA's core purpose. Instead, the remainder of the non-redacted information spoke to the core purpose by illustrating what the complaint was, how it was investigated, and the ultimate disposition. The name of the complainant was unrelated to how well the county was complying with its public functions. The invocation of the privacy exemption was therefore upheld in this instance.



# Privacy Exemption Cont'd.

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Public bodies should also be aware that where the requested information pertains to the party making the request, it is unreasonable to refuse disclosure on the grounds of invasion of privacy.

In *Lepp v Cheboygan Area Sch*, the mother of a minor sought her son's school file. The school had refused to disclose, claiming to do so would constitute an invasion of her son's privacy. The court ordered disclosure, finding that the requestor had "requested the disclosure in her capacity as both mother of and conservator for her minor son. [The minor] was unable to make the request himself. Disclosure to [the requestor] would, therefore, constitute disclosure to [the minor]. It would be an absurd result to deny disclosure to the person making the request for the reason that disclosure would invade that person's privacy."



# Components of a Denial

- The written notice must contain an explanation of the basis for the exemption or, if applicable, a certification that the Public Record being requested does not exist within the Public Body under the name given by the requester or by another name reasonably known to the Public Body.
- The notice must provide a description of the Public Record that is being withheld or the information on the Public Record that is redacted, if a redaction is made.
- The notice must contain a full explanation of the requesting person's right to appeal the denial to the head of the Public Body or seek judicial review.
- Notification of the right to judicial review must include notification of the right to receive attorney fees and collect damages if the requester prevails



# Final Thoughts

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A public body will be subject to ambiguous FOIA requests and exemption questions. Remember, when resolving ambiguities under the FOIA Michigan courts will rely on the FOIA's pro-disclosure purpose. A public body should therefore ensure it is both properly applying any exemption claimed in its responses and applying those exemptions in light of the FOIA's core purpose.





# Questions

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