

A Brief Primer on Recent FOIA Amendments Prepared by Dykema

Increased Transparency and Increased Burden? Michigan's New FOIA Amendments



Increased Transparency and Increased Burden? Michigan's New FOIA Amendments

On January 15, 2015, Governor Snyder signed into law Public Act 563 of 2014 (“Act 563”), which amended Michigan’s Freedom of Information Act (“FOIA”). Many have touted the amendments as changes to FOIA designed to increase transparency and reduce the cost of access to public records. While the amendments may certainly be designed to achieve such results, the means by which Act 563 aims to reach those goals will undoubtedly place increased burdens on public bodies, particularly small public bodies. Although the amendments place new requirements on public bodies, such entities will have the opportunity to reduce the time and money associated with FOIA requests by placing more information on their websites. The new amendments take effect on July 1, 2015.

Prior to Act 563, a public body could charge a fee for a public record search, the necessary copying of such records for inspection or for the actual copies. The fee was limited to actual mailing costs and actual cost of duplication or publication, including labor, the cost of the search, examination, review, and deletion or separation of exempt material. The fee could be waived under certain circumstances and the public body could require a good faith deposit if the fee exceeded \$50. FOIA provided that the cost of labor incurred as part of the fee that could be charged could not be more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request. It also directed public bodies to establish procedures and guidelines to implement the fee-related procedures.

Executive Summary

The FOIA amendments adopted through Act 563 are aimed at making access to public records easier and making public bodies more accountable for failing to follow the appropriate statutory procedures and requirements. Act 563 certainly achieves its latter goal by requiring public bodies to adopt certain procedures and guidelines related to responding to (and charging for responding to) public records requests and by significantly increasing the penalties associated with failing to comply with FOIA’s requirements. This brief summary identifies the major changes to FOIA under Act 563 that will be important for public bodies to understand as they adjust their FOIA procedures to comply with the new requirements prior to the July 1, 2015, effective date. Most importantly, all public bodies should be aware they will not be able to charge fees related to a records request or require a deposit if they are not in compliance with the new requirements under Act 563.

Discussion

New Procedures and Guidelines Documents

Under Act 563, a public body may still charge a fee related to FOIA requests, but it may only do so if it establishes, makes publicly available and follows procedures and guidelines to implement the new fee-related procedures. Thus, before a public body can charge a fee related to a FOIA request, it must do the following:

- Create or update procedures and guidelines that address how to submit written requests, how to understand a public body’s written response, the deposit requirements, fee calculations, and avenues for challenges and appeals as well as a standard form for detailed itemization of any amount in its response to written requests (or adopt a form that the Department of Technology, Management, and Budget is currently creating).
- Create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests, how to understand a public body’s written response, the deposit requirements, fee calculations, and avenues for challenges and appeals.
- If the public body has an official website, post and maintain the procedures and guidelines on its website as well as make those documents available for free at its office.

- Copies of, or reference to, the summary and the procedures and guidelines must accompany the public body's response to a written request.

Without fully complying with these requirements, a public body may not require deposits or charge fees otherwise permitted under FOIA. Doing so places the public body at risk for increased penalties as described below.

New Fee Calculations, Detailed Itemization Requirements, and Appeals Processes

While it is true that a public body cannot charge more than 10 cents per page for copies of public records under Act 563, the fee calculations that a public body must perform are more complex than simply multiplying the number of pages by 10 cents. Act 563 provides a detailed fee calculation formula that a public body must follow (see this chart for a comparison against pre-Act 563 FOIA and more detail on each of the following six categories). Unlike the prior FOIA requirements, there are now six categories of fees that may be charged by a public body (the total charge cannot be more than the sum of the charges for each category).

Allowed Fees Under Old FOIA

Actual mailing cost

Actual incremental cost of duplication or publication (including labor, cost of search, examination, review, and separation of exempt material)

Allowed Fees Under Act 563

Labor costs directly associated with searching for, locating, and examining public records in response to written request

Labor costs, including necessary review, directly associated with separating and deleting exempt information from nonexempt information

For public records provided in non-physical paper media, the actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media

For paper copies, the actual total incremental cost of necessary duplication, not including labor

The cost of labor directly associated with duplication or publication (including making paper or digital copies or transferring digital records).

Actual mailing cost

The public body may also add up to 50 percent to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used to account for benefits in a newly required detailed itemization form.

The detailed itemization form must clearly list and explain all allowable charges for each of the components listed above that compose the total fee used for estimating or charging purposes. According to Act 563, DTMB will publish a standard form to be used for the detailed itemization. A public body may use that form or create its own. DTMB's form has not yet been created, and, if it is not available before July 1, 2015, any public body wanting to charge a fee or require a deposit will need to create its own form.

Good faith deposits may still be required if the entire fee estimate or charge exceeds \$50, but the public body must include the detailed itemization as part of the good faith deposit request. The response must also contain a best efforts timeframe it will take to provide the records to the requestor, which is non-binding.

Act 563 provides for specific penalties against the public body if it does not respond to a written request within FOIA's time requirements. If a late response is either willful or intentional OR the written request contained clear references to FOIA within the first 250 words of the request (or on an envelope/email subject line or fax cover), the public body must reduce the charge for labor costs by 5 percent for each day the public body exceeds the time permitted for a response. The detailed itemization must reflect any charge reductions.

Compliance with these requirements is vital given the new challenge procedures and penalty provisions. Failing to require deposits or charge fees in accordance with these rules opens public bodies up to increased litigation and significant penalties for each offense.

Increased Recordkeeping Requirements

Act 563 added language that makes it clear that a written request sent by e-mail and delivered to the public body's spam or junk mail folder is not received until one day after the public body first becomes aware of the written request. The public body must note in its records both the time the written request is delivered to the spam or junk mail folder and the time the public body first becomes aware of the request.

Beyond Act 563's explicit requirement to keep records on requests sent to spam or junk mail folders, there are two other areas in which it would be prudent for a public body to keep additional records under the new amendments. First, a public record search must be furnished without charge for the first \$20 of the fee for each request for individuals who are indigent and receiving specific public assistance (or state facts showing inability to pay because of indigency).¹ An individual is ineligible for a fee reduction, however, if that individual has previously received discounted copies of public records from the same public body twice during that calendar year.²

Second, if a public body is not paid in full the total amount for the copies of requested public records, the public body may require a deposit of up to 100 percent of the estimated fee before it begins a full public record search for any subsequent written request from an individual under certain circumstances. Because some circumstances include the frequency of requests and non-payment by requesters, keeping detailed and accurate records in these two areas could potentially reduce costs related to repeat requestors.

Increased Penalties

Prior to Act 563, a public body's failure to respond within the time permitted constituted a public body's final determination to deny a request from which a requestor could bring a court action to compel disclosure. Act 563 slightly modified these provisions and now provides that failure to respond within the time permitted constitutes a final determination only if either (1) the failure is willful and intentional; or (2) the request clearly referenced FOIA within the first 250 words of the request (or an envelope/email subject line or fax cover).

Act 563 has increased the penalties associated with FOIA violations. If a court finds that a public body arbitrarily and capriciously violated FOIA, the court must now order the public body to pay a civil fine of \$1,000. The court must also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000 (previously \$500) to the requestor. In addition, Act 563 provides that, if a public body requires a fee that exceeds the amount permitted under its own procedures and guidelines or under Section 4 of FOIA, then the requestor may: (1) file an appeal to the public body in accordance with that body's procedures and guidelines, if they so provide; or (2) commence a civil action against the public body for a fee reduction if the public body's procedures and guidelines do not provide for appeals, which will be expedited in every way. If a court determines that a public body required a fee that exceeds the amount permitted, the court shall reduce the fee to a permissible amount. If the requestor prevails by receiving a reduction of 50 percent or more of the total fee, then the court may award all or an appropriate portion of reasonable attorneys' fees, costs and disbursements. In addition, if the court determines that the public body acted arbitrarily and capriciously and violated FOIA, then court must fine the public body \$500 and may also award punitive damages in the amount of \$500 to the requestor.

Finally, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court must order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500 or more than \$7,500 for each occurrence. This is a new provision under Act 563.

Benefits of Publishing More Records Online

Although Act 563 dramatically changes the way in which public bodies must approach FOIA requests, particularly with respect to calculating and charging fees, it also allows public bodies to avoid some of FOIA's burden by making access to documents online advantageous to public bodies. The more records available on a public body's website, particularly commonly requested

¹ A nonprofit organization formally designated by the State to carry out activities under subtitle C of the developmental disabilities assistance and bill of rights act of 2000 and the protection and advocacy for individuals with mental illness act is also eligible for a fee reduction if certain criteria are satisfied.

² An individual is also ineligible for a fee reduction if that individual requests information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual making the request. A public body may require a statement by the requestor in the affidavit that the request is not being made in exchange for payment or other remuneration by an outside party.

records, the less time (and money) expended locating, repeatedly redacting, and duplicating such records. If all of the requested documents are available online, a written response would only need to include the specific webpage address where the requested information is available (rather than sending copies) and the detailed itemization form. The itemization form must separate the requested records that are available online and those that are not and must inform the requestor of the additional charge to receive copies of public records available online (if so requested, the public body may use a fringe benefit multiplier greater than the otherwise 50 percent limitation). So, although the public body must still calculate the additional charge (and itemize it) to receive copies of the online documents, there is very little additional work that needs to be done.

Act 563 also makes it clear that if a public body receives a verbal request for information that the public body believes is available on its website that the public body must, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

From a practical perspective, the more information a public body places on its website, the less likely the public body is to receive requests for that information. Although certainly no public body can place every email, document, and memorandum online, Act 563 creates an incentive to do so in order to save the public body time and money.

Conclusion

Although there has been a rather simplistic portrayal of Act 563 in the general media, Act 563, in fact, significantly alters FOIA and its procedures. A public body not only must adopt and follow a set of procedures and guidelines, but also must prepare detailed itemizations for each written request. The potential risks associated with non-compliance have increased under the new amendments, which only accentuate the need for diligent compliance. In fact, if a public body does not implement the appropriate documents and procedures prior to July 1, 2015, it will not be able to charge fees or require a deposit until it fully complies with Act 563's requirements. Doing so will place the public body at risk of litigation and steep fines.

We would be happy to address any questions or concerns you may have with respect to Act 563 and your compliance. Please do not hesitate to contact us as you navigate these new FOIA waters.



Courtney F. Kissel
Associate
517-374-9144
ckissel@dykema.com



Leonard C. Wolfe
Member
517-374-9178
lwolfe@dykema.com



Jason T. Hanselman
Member
517-374-9181
jhanselman@dykema.com



Robert A. Boonin
Member
313-568-6707
rboonin@dykema.com