

# Open Meetings Act and Freedom of Information Act Update

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*2010 MTA Legal Institute for Township Attorneys  
January 26, 2010*

# Freedom of Information Act Update

## Recent Decisions

# Freedom of Information Act Update

*Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v University of Michigan*, 481 Mich 657; 753 NW2d 28 (2008)

- The privacy exemption, MCL 15.243(1)(a), has two prongs: (1) the information must be “of a personal nature” and (2) public disclosure of that information “would constitute a clearly unwarranted invasion of an individual's privacy.”
- Information “of a personal nature” includes intimate, embarrassing, private, *or* confidential information about an individual.
- Employees’ home addresses and telephone numbers constitute private information about individuals, even though the information may be available to the public in some other form.

# Freedom of Information Act Update

*Schellenberg v Bingham Township*, unpublished, issued May 29, 2008 (COA Docket No. 274403)

- A township's failure to cite an exemption in its written notice denying a FOIA request does not preclude the township from raising the exemption before the trial court.
- Similarly, a township's failure to specifically list the exemption as an affirmative defense in its answer to the plaintiff's complaint does not preclude the township from raising the exemption before the trial court. But be careful-- FOIA exemptions *are* affirmative defenses to a request for disclosure that *can* be waived.

# Freedom of Information Act Update

*Detroit Free Press Inc v City of Detroit*, 480 Mich 1079; 744 NW2d 667 (2008)

- There is no FOIA exemption for settlement agreements.
- A public body may not contract away its obligations under the FOIA.

# Freedom of Information Act Update

*State News v Michigan State University*, 481 Mich 692; 753 NW2d 20 (2008)

- Unless the FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.
- A public body is generally not required to continue to monitor FOIA requests once they have been denied. (But see MCL 15.233(1), which grants a person the right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis).
- FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure.

# Freedom of Information Act Update

*Lawrence v City of Troy*, unpublished, issued June 23, 2009 (COA Docket No. 289509)

- Discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions. MCR 2.302(A)(3).
- A public body may exempt from disclosure “[r]ecords or information relating to a civil action in which the requesting party and the public body are parties.” MCL 15.243(1)(v).
- The court declined to address whether a civil infraction action constitutes a “civil action” within the meaning of MCL 15.243(1)(v).
- However, it concluded that “even though MCR 2.302(A)(3) precludes discovery in civil infraction actions, a party may nevertheless seek information related to such actions under the FOIA unless the FOIA specifically exempts the information sought from disclosure.”

# Freedom of Information Act Update

## ■ Attorney Fees

### – MCL 15.240(6)

- If the prevailing party is the person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record, the court *shall* award reasonable attorneys fees, costs, and disbursements.
- If the person or public body prevails in part, the court *may*, in its discretion, award all or an appropriate portion of reasonable attorney fees, costs, and disbursements.

# Freedom of Information Act Update

- Attorney Fees
- *Coblentz v City of Novi*, 774 NW2d 526 (November 13, 2009)
  - MCL 15.240(6) requires a court to award reasonable attorney fees, costs and disbursements to prevailing FOIA plaintiffs.
  - The court may not apply a “due process” analysis in awarding attorney fees, costs, and disbursements under MCL 15.240(6).
    - The trial court erred in considering whether the city’s conduct was “corrupt enough” to justify a sanction that “amounts to a severe criminal penalty,” and whether the requested attorney fees would bankrupt the city or whether a sanction would “burden...the public welfare.”
    - “Nothing in MCL 15.240(6), or decisions of this Court, authorizes consideration of such factors in determining a reasonable attorney fee award.”
  - Reasonable attorney fees shall be determined pursuant to the factors set forth in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

# Freedom of Information Act Update

Reminders

# Freedom of Information Act Update

Why should the township require a formal FOIA request for routine matters?

- Uniformity
- Paper Trail
- Ability to recover costs

# Freedom of Information Act Update

What costs can the township recover under FOIA?

- Copies
- Labor/Search/Inspection
- Inspection
- Accommodation/oversight

# Freedom of Information Act Update

The five business days within which a public body must respond to a FOIA request under MCL 15.235 means five consecutive weekdays, other than Saturdays, Sundays, or legal holidays—not five consecutive days on which the particular public body receiving the request is open for public business. (Attorney General Op. 7172, March 17, 2005).

# Open Meetings Act Update

Recent Decisions

# Open Meetings Act Update

*Myerscough v Chippewa Co Bd of Comm'rs*, unpublished, October 20, 2009 (COA Docket No. 288076)

A person does not have standing to bring an OMA action unless the person can satisfy the standing requirements articulated in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001):

- (1) The plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;
- (2) There must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and
- (3) It must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

# Open Meetings Act Update

*Charter Twp of Ypsilanti v Washtenaw Co*, unpublished, February 10, 2009 (COA Docket Nos. 281498, 282354)

- A good review of the OMA provisions regarding costs and attorney fees.
  - The reenactment section of the OMA, MCL 15.270, does not provide for an award of costs and attorney fees.
  - Compare MCL 15.271(4), which permits the imposition of attorney fees and costs:

“If a public body is not complying with this act, and a person commences a civil action *against the public body for injunctive relief* to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.” (emphasis added)
  - MCL 15.273, which allows for a cause of action *against a public official who intentionally violates the act*, also provides for an award of court costs and actual attorney fees.

# Open Meetings Act Update

*Lewis v St Joseph Co Medical Control Auth*, unpublished, December 1, 2009 (COA Docket No. 283741)

- A public body may meet in a closed session:

“To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing....” [MCL 15.268(a).]

- MCL 15.268(a) only applies if the named person requests a closed hearing.
- A person who has requested a closed hearing under MCL 15.268(a) may rescind the request “at any time, in which case the matter at issue shall be considered after the recession only in open sessions.”
- With regard to meetings convened to hear charges against a public officer or employee, the Legislature intended for the named officer or employee, rather than the public body, to control whether a meeting will be open or closed.

# Open Meetings Act Update

*Hoff v Spoelstra*, unpublished, July 8, 2008 (COA Docket No. 272898)

- An OMA violation can be found when subquorum groups are intentionally created to deliberate on public policy and avoid the OMA, thereby constituting constructive quorums.
- There is a distinction between prearranged meetings and social or chance gatherings.
- It is not mandatory that an actual decision be made at the allegedly violative meeting. "The primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors."

*Williams v Michigan Pub Sch Employees Retirement Bd*, unpublished, September 29, 2009 (COA Docket No. 282543)

- The Retirement Board's steering committee was not subject to the OMA because it did not exercise governmental or proprietary authority or otherwise perform a government or proprietary function.

*Schwab v Standish-Sterling Community School Dist Bd of Ed*, unpublished, November 25, 2008 (COA Docket No. 279257)

- The superintendent and the hiring committee were public bodies subject to the OMA.

# Open Meetings Act Update

Recent Attorney General Opinions

# Open Meetings Act Update

Opinion No. 7235 (October 9, 2009)

- The OMA does not apply to committees and subcommittees composed of less than a quorum of the full public body if they "are merely advisory or only capable of making recommendations concerning the exercise of governmental authority."
- Where, however, a committee or subcommittee is empowered to act on matters in such a fashion as to deprive the full body of the opportunity to vote on the matter, the committee's decision "is an exercise of governmental authority which effectuates public policy" and the committee proceedings are subject to the OMA. See also *Schmiedicke v Clare School Bd*, 228 Mich App 259; 577 NW2d 706 (1998) (the school board's referral to the Personnel and Policy Committee for a recommendation regarding how administrators were evaluated and the length of administrator contracts was a delegation of authority to perform a governmental function).
- A city council "committee of the whole" may listen to testimony from the public and city administrative staff (and may ask questions or make comments) when it properly notices a meeting under the OMA but lacks a quorum when it actually convenes.
- The city council's committee of the whole may not, however, render any decision in the absence of a quorum.

# Open Meetings Act Update

Opinion No. 7227 (March 19, 2009)

- A provision in the bylaws of a city's downtown development authority that allows board members to vote by proxy violates the OMA.
- The voting process must take place in a session open to the public.
- Proxy voting fails to make the important deliberative aspects of the absent board member's decision-making process open to the public when rendering a decision that effectuates public policy.
- Without explicit statutory authority, the practice of proxy voting is not allowed.

# Open Meetings Act Update

- **Legislative Alert: HB 4612** (introduced March 18, 2009)

- Current law:

A public official who *intentionally violates the OMA*:

- is guilty of a misdemeanor punishable by a fine of not more than \$1,000. A public official who is convicted of intentionally violating a provision of the OMA for a second time within the same term is guilty of a misdemeanor and shall be fined not more than \$2,000, or imprisoned for up to 1 year, or both. MCL 15.272.
- shall be personally liable in a civil action for actual and exemplary damages of not more than \$500, plus court costs and actual attorney fees. MCL 15.273(1).

- HB 4612:

- Would increase penalties and eliminate the intent requirement
- No requirement that the violation be intentional
- Up to a \$5,000 fine for a second or subsequent violation
- Personal liability in a civil action of up to \$2,500

# Questions?



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