





TINKERING WITH FOIA


THE LEGISLATIVE 'FIX' THAT MAY COST MUNICIPALITIES

Presented by
Bill Reising
Chris Scott
Ellisse Thompson


Today's Presenters





H. William Reising
 (810) 342-7001
wreising@plunkettcooney.com



Christopher J. Scott
 (810) 342-7012
cscott@plunkettcooney.com





Ellisse S. Thompson
 (313) 983-4920
ethompson@plunkettcooney.com


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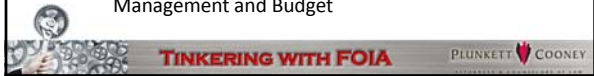
Agenda

- Procedures and guidelines are required
- Properly responding to requests
- Incentive for records on website
- Fees
- Fee waivers
- Deposits
- Appeals


TINKERING WITH FOIA


Mandated Procedures & Guidelines

- All public bodies are required to have FOIA procedures and guidelines.
- Summary of procedures and guidelines must be posted for the public.
- Standard form, including detailed itemization of any fee in response to written requests is required. Form must list and explain allowable charges for each of six fee components.
 - Form is available through Department of Technology, Management and Budget



Mandated Procedures & Guidelines

- Free copies of procedures and guidelines and its summary upon request at public office. Response can refer to website, but cannot be charged a fee.
- Procedures and guidelines are required to be on website (if website is maintained).
- Fees cannot be charged if required procedures, guidelines and summary are not publicly available.



Responses to Requests

- Responses must be timely.
- Failure to timely respond reduces labor costs that can be charged by five percent per day up to a maximum 50 percent reduction if:
 - Late response was willful and intentional; OR

Continued



Responses to Requests

- Request included language requesting information within first 250 words of body of correspondence or front of envelope or subject line of email, letter or fax included following words, characters or abbreviations, or recognizable misspellings:
 - "Freedom of Information," "Information," "FOIA," "Copy" or legal code reference to Act.



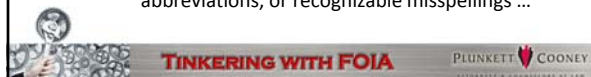
Notice

- Written request by fax, email or other electronic communication is still considered received one business day after transmission is made.
- If request by email goes to public body's spam or junk mail folder, request is not considered received until one business day after public body first becomes aware of request.
- Log is required regarding when request is delivered to junk mail folder and when public body becomes aware of it.



Failure to Respond

- **Before July 1, 2015**
 - Failure to respond constitutes a denial of request.
- **Now**
 - Failure to respond only constitutes a denial if:
 - Failure was willful and intentional; OR
 - Request included language requesting information within first 250 words of body of correspondence or front of envelope or subject line of email, letter or fax included following words, characters or abbreviations, or recognizable misspellings ...



Website Records – Production Requests

- Public body must separate requested public records that are available on its website from those that are not available on website and shall inform requestor of additional charge to receive copies of public records that are available on its website.
- If requestor subsequently requests documents in a different format, public body may charge for providing documents and may charge more than 50 percent fringe benefit multiplier (not to exceed actual cost).



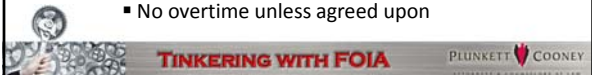
Verbal Requests

- If verbal request for information is for information that a public body believes is available on its website, public employee shall, to the best of public employee's knowledge, inform requestor about the website.



Fees: Six Components

- Amendments provide six fee components:
 - Labor costs: searching, locating and examining of records
 - Shall not exceed hourly wage of lowest paid capable employee
 - Charged in increments of 15 minutes or more, with partial time rounded down
 - May add up to 50 percent of applicable labor charge for fringe benefits. Itemization must note percentage multiplier used.
 - No overtime unless agreed upon



Labor Costs: Redacting Records

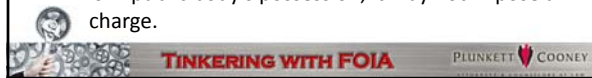
- If performed by public body employee, cost shall not exceed hourly wage of lowest paid employee.
- May charge for contracted labor if public body does not employ person capable of redacting records. Must list name of person or firm contracted. Contracted labor may not exceed six times state minimum wage

Continued



Labor Costs: Redacting Records

- Itemize wage and hours in 15-minute increments or more, with partial time rounded down
- May add up to 50 percent of applicable labor charge for fringe benefits. Itemization must note percentage multiplier used
- No overtime unless agreed to by requesting person
- If public body knows, or has reason to know, record has previously been redacted and redacted version is in public body's possession, it may not impose a charge.



Unreasonably High Costs

- Fee cannot be charged for costs to search, examine, review or redact, unless failure to charge a fee would result in unreasonably high costs to public body because of nature of request, and public body specifically identifies nature of these unreasonably high costs.
- What are unreasonably high costs?
Bloch v Davison Cmty Schools, No. 296003 (Mich.App. Apr. 26, 2011), 2011 WL 1564645



Non-Paper Physical Media

- For public records provided on non-paper physical media, actual and most reasonably economical cost of computer discs, computer tapes, other digital or similar media may be charged.
- Requestor may agree that records are to be provided on non-paper physical media, emailed or otherwise electronically provided.
- Only applies if public body has technological capability to provide records in requested electronic format



Paper Copies

- Not to exceed actual cost of duplication, not including labor
- May only charge 10 cents per sheet for 8 1/2-by-11 inch or 8 1/2-by-14 inch paper.
- May only charge actual cost of all other types of paper
- Must use most economical means available, including double sided printing
- Itemization must express both cost per sheet and number of sheets provided.



Duplication or Publication

- Cost of labor directly associated with making copies (paper or digital), transferring digital records to non-paper physical media or providing these documents electronically
- Shall not exceed hourly wage of lowest paid employee capable of performing task

Continued



Duplication or Publication

- Fee may be charged in any time increment established by public body, but all partial increments must be rounded down. Must itemize wages and hours.
- May add up to 50 percent of applicable labor charge for fringe benefits. Itemization must note percentage multiplier used.
- Overtime wages may only be included if agreed by requestor.



Mailings

- Actual reasonable cost of mailing
- May only charge for expedited shipping or insurance if agreed to by requestor
- May charge for least expensive form of postal delivery confirmation





Fee Waivers: Indigence or Nonprofit

- Fees may be waived for Indigence or specific nonprofit organizations.
- **Before July 1, 2015**
 - Shall furnish record without charging for first \$20 of fee, if individual submits affidavit stating:
 - individual is receiving public assistance, or
 - facts that show inability to pay due to indigency



**Fee Waivers:
Indigence or Nonprofit**



- **After July 1, 2015**
 - Shall furnish record without charging for first \$20 of fee, if individual submits affidavit stating:
 - Individual is indigent and receiving specific public assistance, or facts showing inability to pay due to indigency.
 - Must notify requestor if ineligible. Ineligible if:
 - Previously received discounted records from public body twice in same calendar year, or
 - Requests information in conjunction with outside parties who are offering remuneration

Fee Waivers: Indigence Only


- **Before July 1, 2015**
 - Fee waived for indigence only

Continued

Fee Waivers: Indigence Only



- **After July 1**
 - Nonprofit organization formally designated by state to carry out activities under subtitle C of Developmental Disabilities Assistance and Bill of Rights Act of 2000 and Protection and Advocacy for Individuals with Mental Illness Act shall receive records without charge for the first \$20 of fee for each request if request:
 - is made directly on behalf of organization or its clients;
 - is made for a reason wholly consistent with mission and provisions of Sec. 931 of the Mental Health Code; and
 - is accompanied by documentation of its designation by state, if requested by public body.




Good Faith Deposits



- **FOIA statute before July 1, 2015**
 - If authorized fee exceeds \$50, public entity may require deposit not to exceed half total fee.
- **Now**
 - If entire fee estimate or authorized charge, based on a good-faith calculation, exceeds \$50, public entity may require deposit not to exceed half the total estimated fee.
 - Request for deposit shall include detailed itemization.

Continued



Good Faith Deposits



- Request must also include “non-binding” “best efforts estimate” regarding time frame it will take public body to provide public records to requestor.
- Deposit required by public body under act is a fee.



Deposits

- Public body may require deposit of 100 percent from individual who has not paid previous FOIA fees in full to public body, before it begins another search for that individual.

Continued



Deposits

- May only require this deposit if:
 - Prior final fee was not more than 105 percent of estimated fee.
 - Records made available contained information being sought in prior request and are still in public body's possession.
 - Public records were made available to individual subject to payment within time frame estimate.

Continued



Deposits

- 90 days have passed since written notification to individual that records were available.
- Individual is unable to show proof of prior payment to public body.
- Public body calculates detailed itemization of current request.



Ceasing Increased Deposits

- Public Body shall no longer require an increased deposit due to failure to pay if:
 - Individual can show proof of prior payment in full;
 - Public body is subsequently paid in full; OR
 - 365 days have passed since individual made written request for which full payment was not remitted.



Appeals to Head of Public Body

- **Before July 1, 2015**
 - Head of public body has 10 days to respond
- **Now**
 - Head of public body has 10 business days to respond



Appeals to Court

- **Before July 1, 2015**
 - Commence action in a circuit court
 - Circuit court for the county in which complainant resides or has his or her principal place of business, or circuit court for county in which public record or an office of public body is located

Continued



Appeals to Court


- **Now**
 - Commence a civil action in the circuit court OR if decision by state public body in the court of claims.
 - Circuit court for county in which public record or an office of public body is located.



**Fines & Damages:
Arbitrary & Capricious**

- **Before July 1**
 - If court determines public body arbitrarily and capriciously violated FOIA by refusal or delay in disclosing or providing records, court shall award:
 - Actual or compensatory damages
 - Punitive damages of \$500 to requesting person


Continued



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**Fines & Damages:
Arbitrary & Capricious**


- **Now**
 - If court determines public body arbitrarily and capriciously violated FOIA by refusal or delay in disclosing or providing records, court shall order public body to pay:
 - Civil fine of \$1,000 to be deposited in state general fund
 - Actual or compensatory damages
 - Punitive damages of \$1,000 to requesting person



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**Fines & Damages:
Excessive Fee**

- **Before July 1**
 - Does not expressly provide for appeal of excessive fee.
- **Now**
 - Excessive fees exceeding amount permitted under procedures and guidelines or Section 4 of Act may be appealed (if provided for in procedures) to head of public body or in a civil action.





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Excessive Fee



- If written appeal contains word appeal and identifies how required fee exceeds amount permitted:
 - Head of public body shall, within 10 business days, respond as follows:
 - Waive fee;
 - Reduce fee;
 - Uphold fee; OR
 - Extension- issue notice extending response time for up to 10 business days and detailing reason(s) why extension is necessary.

Continued





Excessive Fee

- Head of public body must provide written determination indicating basis that supports fee amount and shall certify that statements therein are accurate and that fee amount complies with procedures, guidelines and FOIA.



Appeals: Civil Action

- Must be filed within 45 days after receiving notice of fee or after determination of appeal to head of public body is received, but only if:
 - Public body does not provide for appeals to head of public body, or
 - Head of public body failed to respond to written appeal, or
 - Head of public body issued a determination to a written appeal



Appeals: Civil Action

- If civil action is commenced, public body does not need to complete request until it is resolved.
- Court shall determine matter *de novo*.
- Burden is on public body to establish that fee complies with procedures, guidelines and FOIA.
- Court shall assign for hearing and trial or for argument at earliest practicable date and shall expedite case in every way.

Continued



Appeals: Civil Action

- If court finds fee exceeded amount permitted under public body's procedures, guidelines or FOIA, court shall reduce fee to permissible amount.
- If court reduces fee by 50 percent or more of total fee, court may in its discretion, award all or an appropriate portion of reasonable attorney's fees, costs and disbursements.



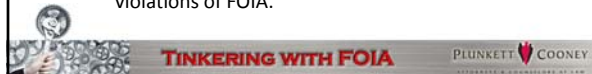
Penalties

- If court determines public body arbitrarily and capriciously violated FOIA by charging excessive fees, court shall order public body to pay a civil fine of \$500, which shall be deposited in state treasury's general fund.
- Court may also order public body to pay actual or compensatory damages, and punitive damages of \$500 to person seeking fee reduction.



Penalties

- If court determines public body willfully and intentionally failed to comply with FOIA or acted in bad faith, public body shall be ordered to pay (in addition to other sanctions and awards):
 - Civil fine of \$2,500-\$7,500 for each occurrence, which shall be deposited in state treasury's general fund.
 - In determining civil fine, court shall consider budget of public body and whether public body has previously been assessed penalties for violations of FOIA.



Questions?



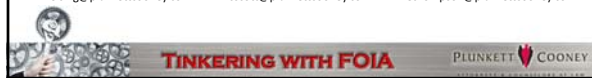
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Post-Webinar Survey



We want to hear from you!