

## **FREEDOM OF INFORMATION ACT (FOIA)**

### **What is FOIA?**

The Freedom of Information Act (FOIA), known as a “Sunshine Law,” is a statute that allows the public the right to gain access to information regarding the affairs of government so they may fully participate in the democratic process.

### **How does FOIA Work?**

Each “public body” must have an individual designated to accept and process requests for records made pursuant to the FOIA. This person is called the FOIA Coordinator. The Chief Administrative Officer of the public body is its FOIA Coordinator; however, that individual may designate another to act on his or her behalf.

On January 15, 2015, Governor Snyder signed PA 563 of 2014, an Act that significantly amended FOIA. The amendments went into effect on July 1, 2015. The Act significantly overhauled the way a public body may charge, and recoup costs expended in responding to FOIA requests. There are also updates for on-line records, increased penalties for violations, and required forms and publications.

### **FOIA Request**

A FOIA request is a written request (letter, facsimile or e- mail) to inspect, copy or receive copies of public records. The request must sufficiently describe the public records to enable the public body to find the records. Additionally, a request may include a six-month subscription to receive public records that are created, issued or disseminated on a regular basis (such as regular meeting minutes, etc.).

### **Time to Respond to a FOIA Request**

A public body has 5 business days to respond to a FOIA request. A public body may issue a 10-business day extension. If a public body does not respond or does not respond timely (within 5 business days, 15 days with extension), it is treated as a final decision to deny the request. The costs a public body is entitled to charge are reduced by 5% per day the response is late, up to a 50% reduction.

A FOIA request may be sent by e-mail. A request, even by e-mail, is not considered to have been received until the next business day. Further, e-mails sent to a junk mail folder will not be considered received until the day after it is “discovered”.

### **Responding to a FOIA Request**

A FOIA request should be immediately forwarded to the FOIA Coordinator. Upon receipt, the FOIA Coordinator must: (a) furnish a reasonable facility for a requesting person to inspect or examine public records during normal business hours (**if the person requests this**);

(b) provide copies of non-exempt public records, accompanied by a written response, indicating which records are being produced; and/or (c) provide a written response indicating the request is denied, in whole or in part, and the basis for the denial.

**Remember: FOIA does not require you to create a new public record or a compilation, summary or list in order to respond to a FOIA request.**

### **Proper Response to a FOIA Request**

All FOIA requests should be responded to in writing. The public body may grant the request in its entirety. If the request is granted in its entirety, it is good practice to itemize in a written response exactly which information is being provided so that the public body has a record of it. The Act requires that a record be kept of the requests for one year.

If a FOIA request is denied in whole or in part, the response should note the reason(s) for the denial. For example:

**Non-Existence of Record.** If the record does not exist, then the notice should contain a certificate or statement that the public record does not exist.

**Exemption.** If the public record is exempt in its entirety or if information is redacted or deleted, the explanation should refer to the section of FOIA or any other statute that provides the basis for nondisclosure of the records sought.

If a request is denied in whole or in part, the requester is entitled to a full explanation of his or her rights (**in the writing explaining the reasons for the denial**):

- They may submit to the head of the public body a written appeal that specifically states the word “APPEAL” and identifies the reason or reasons for reversal of the denial by the FOIA Coordinator.
- They may seek judicial review of the denial. Venue for the appeal will be in the circuit court for the county where the public body is located.
- They may receive attorney fees and damages, if a circuit court determines the public body has not complied with the Act.

### **Payment of Costs for Responding to a FOIA Request**

The public body may request a deposit from the person requesting the record. However, if the amount of the fee is estimated to be over \$50.00, the public body cannot require a deposit for more than half the total amount. The public body may require payment prior to providing the requested records. If the requestor does not pay for the completed FOIA request, and total cost does not exceed 105% of estimate, the public body may require 100% deposit for subsequent requests made by the requestor over the next year.

## Calculating the Cost of the Response to a FOIA Request

The fee is limited to:

- actual mailing costs.
- actual duplication costs, but not to exceed \$0.10/page for regular copies; also must use most economical means for making digital media copies.
- Labor costs for making copies, including digital media copies.
- However, a public body may not charge for copies of records available on public body's website, unless requesting party agrees to receive copies of those records.
- Labor for search, examination, review, deletion and separation of exempt materials. Like before, these labor costs are only to be charged if failure to do so would result in unreasonably high costs to the public body. Labor costs are calculated based upon the hourly wage of your lowest paid employee capable of retrieving the information times the actual amount of time spent.
- Labor costs for separating and deleting exempt from non-exempt materials may include labor charged to the public body by an outside individual or firm (i.e., corporate or general counsel). However, the hourly rate may not exceed 6 times the state minimum wage.
- When calculating labor costs, a public body must consider the following:
  1. Most labor costs must be calculated by the quarter of the hour and must be rounded down.
  2. However, labor costs for making copies may be calculated in any increment the public body chooses.

The public body must adopt and publish its procedures and guidelines regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for appeal, before it may charge to respond to a FOIA request. If the public body has not adopted and published the new procedures and guidelines pursuant to the Act, it can not charge for responding to a FOIA request. The public body must publish the procedures and guidelines on its website, if it maintains one. The public body must provide copies of the procedures and guidelines for free and include a copy in all FOIA responses. Inserting a link to the published procedures on the website is sufficient (and cheaper!). The public body must create a uniform and detailed fee statement that breaks down all chargeable costs.

### *Exemptions from Paying the Fee*

An individual may submit an affidavit stating that he/she is receiving public assistance or otherwise stating facts showing inability to pay due to indigence. This may be used by the individual twice each year. A nonprofit organization designated by the state to assist with developmental disability or the protection and advocacy for individuals with mental illness is exempt from paying the fee. **This still only exempts them from the first \$20.00 of the fee.**

### *Documents Required to be Produced*

Generally, the public body must provide all public records responsive to the request, which are 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. However, numerous exemptions exist under the FOIA. A “writing” can be just about anything: hand-written notes, prints, photographs, photocopies and any other means of recording letters, words, pictures, sounds or symbols or any combination of these.

### *Exemptions*

1. Personal information about an individual that is a clearly unwarranted invasion of privacy. Sec 13(1)(a).
  - Information is of a “personal nature” if it involves intimate, embarrassing, private, or confidential details of a person's life.
  - Courts have held that death scene photographs of non-public individuals are exempt.
  - This does not include salary and wage information, nor defined-benefit pension information for retirees
2. Investigation records compiled for law enforcement purposes, which would interfere with current law enforcement investigations, deprive the right to a fair trial, disclose confidential sources or endanger the life or safety of law enforcement personnel. Sec 13(1)(b).
3. Trade secret or financial information voluntarily submitted to the public body if it was submitted pursuant to a promise of confidentiality. Sec 13(1)(f).
4. Documents regarding pending litigation if requested by a party to that litigation. Sec 13(1)(v). This is a narrow exception. The request must be from the actual party in the litigation. For example, the Court of Appeals has held that this exemption does not apply to the brother of a party in litigation with the public body.
5. Information exempt for disclosure under other statutes. Sec 13(1)(d).

- Example: Social Security Numbers; Information or depictions of the victim of a crime.
6. Information subject to the attorney-client privilege. Sec 13(1)(g).
    - The attorney-client privilege extends to communications between the attorney and all agents or employees of the public body that are authorized to speak or act on behalf of the public body regarding that information.
  7. Information subject to other statutory privileges. Sec 13(1)(h).
    - This includes Attorney-Work Product, which are records and information prepared by the public body's attorney that may not otherwise be subject to the attorney-client privilege.
  8. Pending bid proposals. Sec 13(1)(i).
  9. Test questions and answers, scoring keys and other examination instruments used for public employment, licenses or academics. Sec 13(1)(k).
  10. Communications within a public body or between public bodies that are advisory in nature and are preliminary to a final agency determination, such as draft agreements and proposals. Sec 13(1)(n).

### **Court Actions and Penalties**

FOIA now authorizes two types of circuit court actions:

- An action challenging a public body's denial of a FOIA request (same as before).
- An action challenging the fees a public body charged.

If the requestor files suit in circuit court, the following may apply:

- If the Court orders disclosure of the records, or the records are disclosed as a result of the lawsuit, the requesting party will likely be awarded costs and attorney fees.
- If the Court finds the public body's actions were arbitrary and capricious, the court shall award \$1,000 punitive damages to the requester, and \$1,000 civil fine to the state treasury.
- If the Court finds the public body willfully and intentionally failed to comply with the act, or otherwise acted in bad faith, the public body shall be ordered to pay a civil fine to the state treasury of between \$2,500 and \$7,500 for each occurrence.

If the requester wants to file a civil action challenging the costs a public body has charged, the requester must:

- first file an appeal to the head of the public body.
- file the court action within 45 days of receiving the appeal response.

If the requester prevails by receiving a 50% or better reduction, the court may award attorney fees. If the court finds the public body's actions were arbitrary and capricious, the public body must pay \$500 civil fine to the state treasury. The court may also award \$500 punitive damages to the requester.