



Recent Developments in What's Public Under Michigan's FOIA

By Caroline B. Giordano and Steven D. Mann

Michigan's executive, legislative, and judicial branches have paid a good deal of attention to the state's Freedom of Information Act (FOIA) in the past several years.¹ Consistent with her administration's policy of greater transparency in state government, Governor Gretchen Whitmer issued an executive directive aimed at ensuring a more user-friendly process for seeking executive branch records subject to FOIA. In response to public concerns that Michigan's FOIA is more narrowly interpreted than similar laws in other states, the House of Representatives has passed a package of bills that would at least partially expand the scope of records that the governor's office and legislature would be required to disclose. And on the judicial side, the Michigan Court of Appeals and Supreme Court have recently reviewed several cases asking the appellate courts to reconsider the nature of what constitutes a "public record" or a "public body" under FOIA.

Although these developments suggest a significant statewide investment in broadening the definition of what is "public" under FOIA, the statute still has its limits. To name a few:

Michigan's governor and lieutenant governor remain exempt from FOIA; the state Senate has not shown a lot of enthusiasm for the House's proposed FOIA expansion; and the Court of Appeals has (so far) upheld numerous recent trial court decisions dismissing FOIA claims aimed at increasing the range of public records subject to disclosure. This article provides a brief overview of FOIA and summarizes recent executive, legislative, and judicial activity addressing the scope of what is "public" under the statute.

Overview of Michigan's Freedom of Information Act

Along with the Open Meetings Act,² FOIA operates as one of Michigan's most crucial, pro-disclosure "sunshine laws." The statute emphasizes that "it is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the

At a Glance

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official acts of those who represent them as public officials and public employees, consistent with this act.”³ FOIA’s public policy of providing full and complete information to the public regarding government affairs supports the public’s ability to “be informed so that they may fully participate in the democratic process.”⁴

FOIA specifically requires public bodies to allow persons to inspect, copy, or receive copies of public records upon written request.⁵ FOIA’s definition of “public body” includes any of the following:

- (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government [...]
- (ii) An agency, board, commission, or council in the legislative branch of the state government.
- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.⁶

Notably, FOIA’s definition of “public body” excludes “the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof” as well as state legislators.⁷ While the statute expressly includes state officers and employees in the executive branch within its reach, local governmental officers and employees, by contrast, do not qualify as public bodies.⁸

Under FOIA, a “public record” is “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,” not including computer software.⁹ All public records are subject to full disclosure under FOIA unless the material requested falls under one of FOIA’s express exemptions.¹⁰ The statute contains a number of exemptions, the most

common of which include records containing information of a personal nature that, if released, would constitute a clearly unwarranted invasion of an individual’s privacy; records related to law enforcement investigations; and records subject to the attorney-client privilege.¹¹ FOIA’s exemptions are narrowly construed, and the public body seeking to invoke an exemption must be able to prove that the nondisclosure is in accord with the legislature’s intent.¹²

FOIA has a robust enforcement mechanism. If a public body denies all or part of a FOIA request, the statute provides procedures for the requester not only to appeal the denial directly to the public body, but also to file an expedited action in the circuit court or the court of claims (where appropriate) to compel the public body’s disclosure of the requested records.¹³ If the person asserting the right to inspect public records under FOIA prevails in their judicial action, the statute directs the reviewing court to award reasonable attorney fees, costs, and disbursements to the prevailing party.¹⁴ If the reviewing court determines that the public body has “arbitrarily and capriciously violated [FOIA] by refusal or delay in disclosing” public records, the court will award the records requester with both actual and compensatory damages and \$1,000 in punitive damages.¹⁵

Recent FOIA-related activity in the executive and legislative branches

Despite FOIA’s pro-disclosure policy, Michigan’s statute is still narrower than similar statutes in many other states. Michigan is one of very few states whose FOIA statute exempts the governor, lieutenant governor, and legislature from public disclosure requirements.¹⁶ These exemptions have contributed to public watchdog groups awarding Michigan with failing transparency and ethics rankings and a perception among some members of the public that “Michigan residents haven’t been given the full picture about who represents them.”¹⁷

In the past few years, however, Michigan’s executive and legislative branches have taken steps toward increasing access to public records under FOIA. On February 1, 2019, Governor Whitmer issued an executive directive titled “Ensuring Transparency in State Government,” which states that “Michigan-ers deserve a government that is more open, transparent, and accountable.”¹⁸ The directive requires that “[a]ccess to public records [under FOIA] must be given the broadest possible effect” among the executive branch and encourages the branch to make requesting public records under FOIA a quicker and more user-friendly process.¹⁹ Among other things, the executive directive requires departments or autonomous agencies subject to supervision by the governor to recognize financial and accounting records as public records; substantively respond to requests within the minimum timeframe of five business days required under FOIA if possible (and not automatically invoke statutory extension periods); and designate

a “transparency liaison” charged with assisting members of the public in navigating FOIA's requirements.²⁰ The governor and lieutenant governor remain exempt from FOIA under the executive directive.

Michigan's House of Representatives has also recently made a push to broaden FOIA's reach by unanimously passing a package of bills that would at least partially expose the governor's office and the legislature to FOIA.²¹ The bills would also create a new Legislative Open Records Act to allow for some records requests from state lawmakers.²² Although similar bills have been introduced in every legislative session for several years and died in the Senate, sponsors of the latest set of bills hope they might gain new support for their cause given the current administration's encouragement of increased public transparency.²³

Recent caselaw: Public records and public bodies under FOIA

The Michigan Supreme Court recently granted leave to appeal in a case considering the limits of FOIA's definitions of “public record” and “public body.”²⁴ In *Bisio v City of Village of Clarkston*, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's claim alleging that a city attorney's correspondence with third parties that had not been shared with, used, or retained by the city was nonetheless subject to FOIA.²⁵ Relying on agency principles, the plaintiff argued that the city attorney's documents pertaining to city business—here, a development project—belonged to the city because the attorney stood in the city's shoes as the city's agent.²⁶ The city maintained that the attorney's records were not public records under FOIA because they were not “prepared, owned, used, in the possession of, or retained by a public body [i.e., the city] in the performance of an official function” under MCL 15.232(e).²⁷

The Court of Appeals agreed with the city, holding that the requested records were not public under FOIA's plain statutory language. The Court reasoned that because FOIA's definition of public body does not include officers or employees acting on behalf of cities, townships, and villages where, by contrast, it *does* include officers and employees acting on behalf of the executive branch, the legislature's intent not to consider municipal agents like Clarkston's city attorney as public bodies was clear.²⁸ Because the city attorney's records were not prepared, used, possessed, or retained by the city itself, they were not public records subject to FOIA's disclosure requirements.²⁹ Although the Court of Appeals found the plaintiff's argument under agency principles “seductive,” it declined to “[expand] the definition of ‘public body’ and of ‘public record’” without any support for plaintiff's interpretation in the statute itself.³⁰

The Supreme Court granted the plaintiff's application for leave to appeal the Court of Appeals' decision on September 25,

2019, and specifically asked the parties to address (1) whether the Court of Appeals erred in holding that the documents the plaintiff sought were not within FOIA's definition of public record and (2) whether the city's charter-appointed attorney “was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records” under FOIA.³¹ The Supreme Court's interest in these particular issues suggests that it might be willing to consider a broader interpretation of FOIA drawing on agency principles in the analysis of whether municipal records are subject to disclosure.³²

Haney v Michigan Townships Association is another recent FOIA case testing the limits of what constitutes a public body under FOIA.³³ In *Haney*, the plaintiff sued the Michigan Townships Association (MTA) after it denied his FOIA request seeking correspondence between the MTA and Fraser Township. The plaintiff's lawsuit alleged that because the MTA primarily received funding from governmental entities (i.e., its township members), the MTA was a public body under MCL 15.232(h)(iv) (which defines “public body” as “[a]ny other body that is... primarily funded by or through state or local authority”).³⁴ The MTA countered that it was not “primarily funded by state or local authority” under controlling precedent interpreting MCL 15.232(h)(iv) because the money it received from its township members was paid in exchange for providing goods and services such as on-call assistance to members, legislative representation of interests affecting townships, and educational programming.³⁵ The trial court agreed with the MTA, holding that because the association was a private corporation funded through payment of dues in exchange for goods and ongoing services, it was not a public body for purposes of FOIA.

On appeal, the Court of Appeals agreed with the MTA and affirmed the trial court's ruling that the association was not a public body subject to FOIA under MCL 15.232(h)(iv). The Court's decision focused on its previous interpretation of the word “funded” in *State Defender Union v Legal Aid*. In *State Defender*, the Court held that the Legal Aid and Defender Association of Detroit—a provider of legal services to indigent persons—was not “primarily funded” by a public body despite receiving more than 50 percent of its funds from public sources because, under FOIA, “funding” was “the receipt of a governmental grant or subsidy” and not “the exchange of services or goods for money.”³⁶ Likewise, in *Haney*, the MTA was not a public body because “[a]lthough the majority of MTA's revenue is derived from its members, most of which are governmental entities, those members pay dues to be associated with MTA in exchange for the services it provides.” The Court's decision suggests that it is not willing to sweep private, government-related associations under FOIA's umbrella simply because they receive the majority of their funding from public sources. The key question is whether the organization provides goods and services in exchange for money paid by governmental entities; if it does, FOIA likely doesn't apply.

Conclusion

The recent FOIA cases in Michigan's appellate courts illustrate the public's continued interest in maintaining access to the activities of elected officials that might otherwise escape public notice. Although the Supreme Court's decision to take up a FOIA case with implications for the scope of public records and the recent push for increased public transparency in the legislative and executive branches all register this interest, it remains to be seen whether practical changes to the way that FOIA currently operates will emerge. ■



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ENDNOTES

1. MCL 15.231 *et seq.*
2. MCL 15.261 *et seq.*
3. MCL 15.231.
4. *Id.*
5. MCL 15.233(1). Although FOIA contains provisions governing fees that public bodies may charge in exchange for searching and providing for public records in MCL 15.234, the permitted fee structure is complex and arduous to interpret. In practice, many of Michigan's public bodies recover only a fraction of the costs they incur in responding to FOIA requests.
6. MCL 15.232(h). See also *Michigan governor, legislators exempt from FOIA requests*, Michigan Radio npr (September 22, 2014) <<https://www.michiganradio.org/post/michigan-governor-legislators-exempt-foia-requests>>. All websites cited in this article were accessed May 27, 2020.
7. MCL 15.232(h)(i) and MCL 15.232(h)(ii) (providing that "public body" includes only "an agency, board, commission, or council in the legislative branch of the state government," and thus not identifying state legislators as a "public body" within this subsection).
8. MCL 15.232(h)(iii).
9. MCL 15.232(i).
10. *Swickard v Wayne Cty Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991).
11. MCL 15.243(1)(a), (1)(b), and (1)(g), respectively.
12. *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006).
13. MCL 15.240.
14. MCL 15.240(6).
15. MCL 15.240(7). Under MCL 15.240(6), courts finding arbitrary and capricious violations of FOIA will also issue a separate civil fine of \$1,000 to the public body.
16. Gray, *House votes to make governor, legislature subject to FOIA—but with exemptions*, Detroit Free Press (March 19, 2019) <<https://www.freep.com/story/news/politics/2019/03/19/michigan-foia-bills-exemptions/3213646002/>> [<https://perma.cc/N23G-S7AG>].
17. Benson, *How to raise Michigan's failing grade in government transparency*, Detroit Free Press (March 10, 2019) <<https://www.freep.com/story/opinion/2019/03/10/michigan-government-transparency/3108309002/>> [<https://perma.cc/UJP9-533W>].
18. Executive Directive No. 2019-11, available at <https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-488654-,00.html> [<https://perma.cc/3TTP-SLZR>].
19. *Id.* at 2.
20. *Id.* at 2, 4.
21. HB 4007–4013 and HB 4015–4016. See also Roth, *State House passes bills to open up legislature, governor's office to records requests*, Michigan Radio npr (March 19, 2019) <<https://www.michiganradio.org/post/state-house-passes-bills-open-legislature-governors-office-records-requests>> [<https://perma.cc/2CVW-FLE8>].
22. *Id.*
23. LeBlanc, *Lawmakers try again to expand open records laws to legislature, governor*, The Detroit News (March 5, 2019) <<https://www.detroitnews.com/story/news/local/michigan/2019/03/05/michigan-freedom-information-act-governor-legislature/3059224002/>> [<https://perma.cc/DHZ4-8GSD>].
24. *Bisio v City of Village of Clarkston*, 504 Mich 966 (2019).
25. *Bisio v City of Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335442), p. 1.
26. *Id.* at 2.
27. *Id.*
28. *Id.* at 4, citing MCL 15.232(d)(iii) and MCL 15.232(d)(i).
29. *Id.* at 4.
30. *Id.* at 3.
31. *Bisio*, 504 Mich 966.
32. The Michigan Supreme Court also recently granted leave to appeal and heard oral argument in another FOIA-related case, *Progress Michigan v Attorney General*, 503 Mich 982; 923 NW2d 886 (2019), which considers a different set of issues from the line of FOIA cases analyzing the scope of "public records" and the related definition of "public body" under FOIA. A primary issue in *Progress Michigan* is whether a sovereign or governmental immunity defense exists for the failure to disclose records under FOIA and, if so, whether that immunity is waived by FOIA. The case also considers (1) whether the plaintiff's failure to follow statutory verification requirements in the Court of Claims Act, MCL 600.6431(1), rendered his initial FOIA complaint "invalid from its inception" and incapable of amendment; and (2) whether the Court of Appeals erred when it held that the plaintiff's verified amended complaint could not "relate back" to the date of the original (unverified) complaint for purposes of compliance with FOIA's 180-day limitations period.
33. *Haney v Mich Twps Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2019 (Docket No. 348163).
34. *Id.* at 1.
35. *Id.*
36. *Id.* at 3, citing *State Defender Union v Legal Aid*, 230 Mich App 426, 432–433; 584 NW2d 359 (1998).