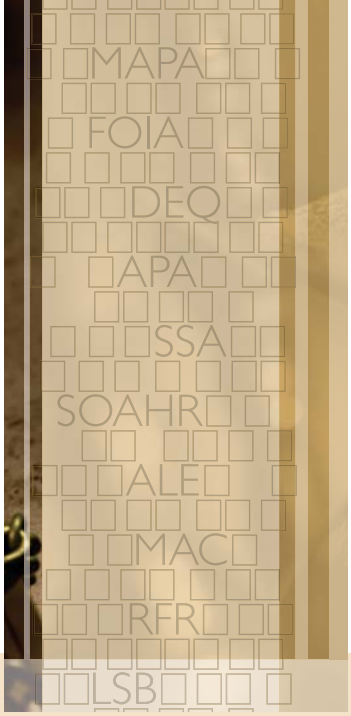
administrative law

Your Friendly Government Agency Has Promised You Confidentiality—Can It Deliver?

By Paul F. Novak

STEPS TO ASSURE THAT YOUR CLIENT'S CONFIDENTIAL DOCUMENTS REMAIN CONFIDENTIAL

- **Get promise first, disclose second.** Make sure that the promise that the documents will remain confidential is provided by the governmental agent before the documents are produced to the public body. It doesn't hurt to get the promise in writing.
- **Get the promise from "the head honcho."** Promises of confidentiality by a public body should be provided by an elected official or the chief administrative officer of the public body, or their delegates.
- **Make sure a general description of your confidential documents is publicly recorded.** Contemporaneous with your production of confidential documents to a public body, make sure that a general written description of those documents is recorded and filed for public review.



IMAGINE THE FOLLOWING SCENARIO: Your client is negotiating the resolution of some zoning and land use litigation over a proposed development deal with a municipal government. In the course of those negotiations, to determine whether your client has the development moxie to successfully implement the development that it says it is going to build, the city asks to see a variety of confidential records. The records they would like to see include your client's last three years of financial records as well as some proprietary information that discloses who your client's prospective commercial tenants will be. Your client is willing to provide the records—as long as the city "promises" to keep them confidential. No need, after all, to risk disclosing your client's financial laundry (dirty or otherwise) to the world.

The city thinks that your request to keep the information private is reasonable. Heck, they even send you a letter promising that the information will be kept confidential, signed by an assistant in the planning department who is negotiating the deal. Now that you have received the letter, should you hand over your client's sensitive financial records and get on with the substantive negotiations? Under Michigan's Freedom of Information Act (FOIA),[1] the answer is a resounding **NO,** or at the very least, not yet. Promises of confidentiality are not good enough unless the governmental agent making the promise follows the specific steps under FOIA to assure that the provisions governing "confidential" or "trade secret" information are followed. In short, *if the government makes a mistake and doesn't follow the law, it will be your client's tax records, financial net worth, and other sensitive information that may get disclosed to who knows where.*

Michigan's Freedom of Information Act was enacted in 1976 as part of a movement to assure good government through transparency. The premise behind such statutes is that increased public exposure of government's inner machinations leads to better, and more accountable, governmental decisions. To quote former Supreme Court Justice Louis Brandeis, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants."[2] FOIA embodies the Brandeis notion that government works best when the citizenry has access to the documents and information that make their government work.

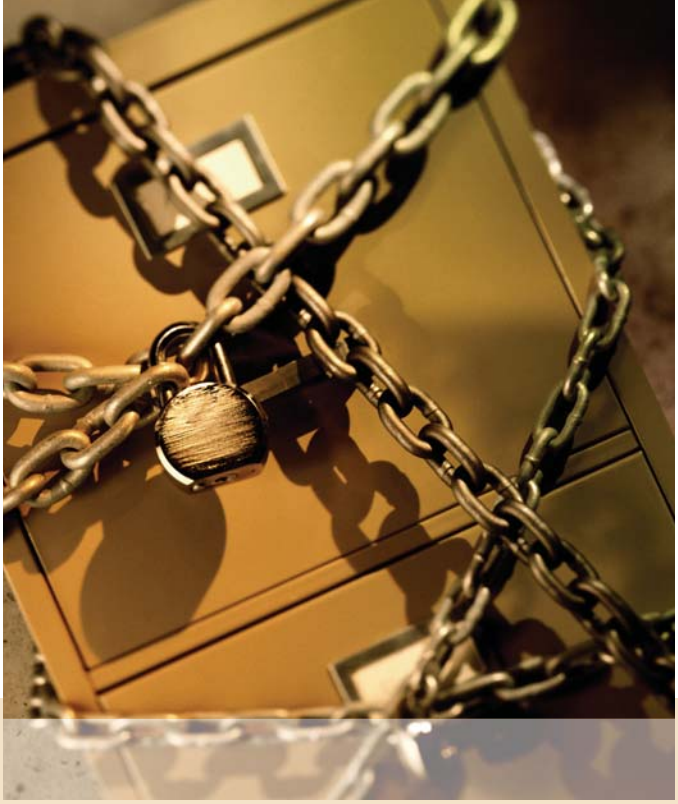
Of course, there are exceptions to this notion. Few dispute the idea, for example, that certain information, such as the identity of confidential sources in an ongoing criminal investigation, should be hidden from public view. And FOIA appropriately exempts such information from disclosure.[3] Although there are many exceptions to FOIA strewn throughout Michigan's compiled statutes, the primary location of exceptions is contained within FOIA itself, at Section 13 of the act. The exception governing confidential financial and "trade secret"[4] information is specifically set forth at Section 13(1)(f). That section exempts from disclosure as a public record:

> (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> (i) The information is submitted upon a promise of confidentiality by the public body.
>
> (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

As set forth in the statute, three conditions must be met for a public entity, like a city planning department, to withhold documents from disclosure under FOIA.[5] First, the information must be submitted under the promise that its confidentiality will be maintained. Second, the promise must be made by the chief administrative officer or elected official of the public body to whom the information was submitted. (In the scenario that introduced this article, the promise of confidentiality was provided by an assistant in the planning department. This doesn't cut it.) And third, a description of the information submitted must be filed and made available to the public upon request "within a reasonable time" after the confidential information was submitted.

This third requirement for maintaining confidentiality was the subject of a recent Michigan Supreme Court decision that will radically change the manner in which public bodies at the state and local governmental level will comply, or fail to comply, with FOIA. In *Ann Coblentz et al v City of Novi*,[6] the Court addressed confidential documents provided to the city of Novi under a promise of confidentiality where the city had failed to immediately record and

If the government makes a mistake and doesn't follow the law, it will be your client's tax records, financial net worth, and other sensitive information that may get disclosed to who knows where.



maintain a description of the confidential material at a central place within the city for public viewing. Approximately 4½ months later, a FOIA request was submitted to the city, requesting the confidential documents. *At that time,* the city generated a general description of the materials for which confidentiality had been promised and invoked the confidential information/trade secret exemption under FOIA to deny production of the requested documents. The FOIA requester brought suit, challenging the assertion of the exemption and argued, among other things, that the city had failed to produce a written summary of the materials for which confidentiality had been asserted within a reasonable time as required by FOIA.

In a majority opinion authored by Justice Kelly, the Court discussed what constituted a "reasonable time" to generate the description of confidential materials and stated:

> MCL 15.243(1)(f)(iii) requires a public body to record a description of material claimed to be exempt within a reasonable time after its submission to the body. If it fails to comply with this requirement, the material is not exempt. MCL 15.243 (1)(f). Whether the time the public body takes to record a description of the material is reasonable is measured from the date the material is submitted. It is not measured from the date the parties designate it as confidential.[7]

Having confirmed that the "reasonable time" for producing a written description of the confidential materials would be measured from the time that the materials were first provided to the public body, the Court proceeded to evaluate whether a four- to five-month interval was "reasonable."

> ***"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants."***

The city of Novi argued that the four- to five-month interval was reasonable because there were ongoing negotiations with the source of the confidential materials, including discussions as to whether some of the materials could be publicly released. But the Court rejected this argument as irrelevant:

> Defendant's proffered reason cannot justify any delay in meeting the filing requirement. However inconvenient the recording requirement may have been to defendant . . . , defendant was still required to comply with the provisions of MCL 15.243(1)(f). This exemption is intended to provide notice to the public that a public body possesses trade secrets, commercial information, or financial information submitted to it for use in developing governmental policy.[8]

The Court's ruling was clear: governmental agencies that promise to hold documents as confidential, and exempt from production under FOIA, must be diligent in recording a general description of such documents within a reasonable time of their submission.

Why does the Court's ruling radically change how state and local governments will comply with FOIA? Before *Coblentz,* many governmental agencies complied with the provision requiring the maintenance of a written description of confidential materials *only after* someone had requested the confidential materials under FOIA. The recording of this general description might be done shortly after the confidential documents are submitted to the public body, but more frequently it would be done months, or even years, after the documents were submitted to the public body when someone asked for the documents under FOIA. The Court has clearly indicated that this latter method of recording a general description of confidential documents is not good enough. "Were we to accept defendant's rationale," the Court noted, "a public body could knowingly possess such confidential information for extended periods of time without providing any notice to the public that the information exists."[9] The Michigan Supreme Court has clearly declared that descriptions of confidential materials must be maintained, as the statute says, within a reasonable time of their receipt and, most likely, *before* the materials are ever requested under FOIA.

The Court's opinion in *Coblentz* will further the prodisclosure policies under FOIA. It will also increase the burden on state and local governments to comply more stringently with the recording requirements set forth under the act or risk giving up documents that they promised would be kept confidential.

So how does a private entity that is asked by a state or local government for the production of confidential information cooperate with such a request and still protect its own interests in making sure that the documents remain confidential? As section 15.243(1)(f) of FOIA indicates, there are three requirements.

First, the producing party should obtain a written assurance that the documents will be maintained as confidential and exempt under FOIA *before* disclosing the documents. Although FOIA does not require a written promise, obtaining the promise in writing will address any evidentiary issues that may arise later as to when the promise of confidentiality was delivered.

Second, the statute requires that the assurance of confidentiality should be obtained from an elected official or the chief administrative officer of the public body. Although there appears to be no FOIA case law on the subject, many governmental entities execute letters of delegation that delegate the responsibility of making a confidentiality assurance to subordinates of the chief administrative officer or elected official. The practice of delegating such authority seems reasonable, but should be confirmed in writing before an assurance of confidentiality is provided by the delegated subordinate.

Third, in light of the Supreme Court's ruling in *Coblentz,* the private entity must make sure that the governmental authority records and files a general description of the confidential materials that the private entity is producing. The most efficient means of accomplishing this may be to (1) draft the description of the materials in conjunction with producing the documents in the first place and (2) make sure that they get filed by the public body. Remember, if the governmental body fails to record and publicly file the general description of the confidential materials within a reasonable time, then the confidentiality exemption of FOIA may not be relied on to protect your client's documents. ◆

Paul F. Novak practices antitrust, public utility, municipal, and general commercial litigation law as senior counsel at Clark Hill PLC. Before joining Clark Hill, Mr. Novak served as the city attorney of the City of Lansing. He also served as an assistant attorney general in the Michigan Department of Attorney General for 15 years and headed the Special Litigation Division of the Attorney General's office.

Footnotes

1. MCL 15.231 *et seq.*
2. L. Brandeis, Other People's Money 62 (1933).
3. MCL 15.243(1)(b)(iv).
4. Some courts have limited the trade secret confidential information exemption set forth in MCL 15.243(1)(f) by applying the exemption only after determining that the documents over which it is asserted are held in strict confidence or meet the definition of a "trade secret." See, e.g., *Blue Cross and Blue Shield of Michigan v Insurance Bureau,* 104 Mich App 113; 304 NW2d 499 (1981). See also LeDuc, Michigan Administrative Law, § 11:52, p 916.
5. The Michigan Court of Appeals has relied on the last sentence of MCL 15.243(1)(f)(iii) to rule that the trade secret exemption is inapplicable when the documents requested are submitted "as required by law or as a condition of receiving a governmental contract, license, or other benefit." *Blue Cross and Blue Shield of Michigan v Insurance Bureau,* 104 Mich App 113, 132; 304 NW2d 499, 506 (1981).
6. *Ann Coblentz, Lee Coblentz, John Lewandowski and Deborah Lewandowski v City of Novi,* 475 Mich 558; 719 NW 2d 73(2006).
7. *Id.,* p. 574–5.
8. *Id.,* p. 575–6.
9. *Id.*