



THE CITIZEN ADVOCACY CENTER'S GUIDE TO THE MICHIGAN FREEDOM OF INFORMATION ACT AND OPEN MEETINGS ACT

Open government statutes are cornerstone laws that ensure the public's capacity to play an essential role in the democratic process. They provide the mechanism by which people can knowledgeably discuss public issues, make informed political judgments, and monitor public officials and government agencies to ensure that government is acting in the public interest. To that end, the following is a general guide to the Michigan Freedom of Information Act and Open Meetings Act statutes produced by the Citizen Advocacy Center.

FREEDOM OF INFORMATION ACT

In 1977, the Michigan General Assembly enacted the Michigan Freedom of Information Act ("FOIA"). The FOIA sets requirements for the disclosure of public records by all public bodies. Within specified limitations, the FOIA allows anyone to inspect and obtain copies of all public records prepared, possessed, used by, or in the control of any public office. This access to government information is fundamental to our system of open government, and to the rights of citizens to be informed about the actions of public offices on matters of public concern. Anyone (including individuals, groups, associations, corporations, firms, partnerships or organizations) may obtain access to government-held information.

WHAT INFORMATION IS AVAILABLE?

Examples of the records available under the FOIA are orders, rules, policy statements, planning policies and decisions, reports or studies, public contracts, the names, titles and salaries of public employees and the voting records of all public bodies. Michigan's FOIA also makes personnel records consisting solely of performance appraisals, disciplinary actions and complaints relating to accomplishments in public jobs available. Computer software is not required to be disclosed under FOIA. Additionally, e-mail communications are typically considered a public record for purposes of FOIA. Incarcerated prisoners are not allowed under the law to make requests for information.

WHO IS SUBJECT TO THE ACT?

Only public bodies are subject to the FOIA. Public bodies include any legislative, executive, administrative or advisory bodies of the State, state universities and colleges, counties and municipalities, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of the State and any subsidiary bodies (such as committees and subcommittees) that are supported by or expend tax revenue. Michigan courts have held that a body "primarily funded by or through state or local authority" is considered a

**182 N. York St.,
Elmhurst, IL 60126**

Phone: (630) 833-4080

Fax: (630) 833-4083

Website:
www.citizenadvocacycenter.org

E Mail:
cac@citizenadvocacycenter.org

“public body” if it receives more than half of its funding through state or local authority. Thus, even a private organization that receives more than half of its funding from several public sources is a “public body” subject to FOIA. The judiciary is not subject to this law, but court records and proceedings generally are open to the public.

HOW TO FIND INFORMATION

Under the FOIA, every public body must make their existing records available to the public. However, the FOIA does not require these bodies to answer specific questions, create new records or keep a central library or index of all government records.

Consequently, if one does not know which public body has the records that are sought, an informal, polite telephone call is the best place to start. Speaking with those public bodies who have the names or responsibilities related to a specific topic will help identify the appropriate body to which a FOIA request should be addressed.

HOW TO MAKE A REQUEST

- **Put it in writing**

An informal telephone call or visit may help identify the type of records desired and the public body in possession of said records, but, to be official, a request for a public record must be made in writing. A written request allows a person to take advantage of the time limits and appeal mechanisms provided under law. A public body has 5 days to respond to a request, with a possibility of 10 additional days for unusual circumstances. It is essential to date and keep a copy of the letter. Also, if sent by certified mail and request a return receipt, the requestor will be able to prove the date on which the request was received. The date on which the public body received the request triggers the time limits for the public body to respond.

Be sure to check with the public body from which you are seeking information to

determine if there are specific requirements for filing a FOIA request. Some public bodies require certain forms to submit a request or require that requests be delivered in person. Keep in mind that a public body may not require a person to identify themselves or list a reason for the request in either a written or in-person request.

- **Be specific**

The request must specifically specify the records sought. A specific request will avoid confusion and high copying costs. If a request for all records of a broad category is made, collecting the records might be unduly burdensome on the public body, which could justify a delay or refusal to release the records. Additionally, if information on a certain topic is desired, but there are some kinds of material the requestor does not want, (*e.g.*, newspaper clippings, or records created before or after a certain date), a requestor should ask that these be omitted. Lastly, a requestor should state his or her preferred format (*e.g.*, paper copy or computer disk).

- **Request a fee waiver or reduction**

If the disclosure request qualifies, ask for a waiver or reduction of fees. The FOIA gives public bodies the discretion to grant a fee waiver or reduction when disclosure is in the public interest, meaning disclosure would primarily benefit the general public.



SAMPLE REQUEST LETTER

Date

*(If desired: Certified mail -- return receipt requested)
(name and title of official) (address of appropriate office of the public body)*

Dear *(name)*,

Pursuant to the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, this is a request for a copy of the following record(s): *(Describe the subject or the documents containing the information that you want).*

If any record or portion of a record responsive to this request is contained in a record or portion of a record deemed unresponsive to the request, I would like to inspect the entire document. Under the Freedom of Information Act, all non-exempt portions of any partially-exempt documents must be disclosed.

If any fee in excess of \$___ will be incurred in fulfilling this request, please obtain my approval before the fee is incurred. *(Or, if applicable, request a fee reduction or waiver: I request a waiver of any fees your office would ordinarily impose in responding to a request. I do not seek these records for commercial purposes and I intend to disseminate the information because disclosure is in the public interest in that it _____.)*

If any records or portions of records are withheld, please state the exemption on which you rely, the basis on which the exemption is invoked, and the address to which an appeal should be addressed. Thank you for your prompt consideration of my request. If you have any questions, or if I can be of assistance, please contact me at _____.

Sincerely,

(name)

WHAT IT MAY COST

A public body may charge actual duplication, mailing and clerical labor costs for producing public records. The first \$20 of work must be free for a person who is on welfare or presents facts showing inability to pay due to indigence. A public body may require a good faith deposit at the time of request, but the deposit may not exceed half of the total cost.

THE PUBLIC OFFICE RESPONSE

A public body must respond your FOIA request for a public record within five business days of receiving the request. The public body may, under unusual circumstances (defined below), notify the requestor in writing and extend the time limit by ten days. If a request for a record is denied, written notice of the denial must be provided within five days, or within fifteen days under unusual circumstances. Where a public body timely claims an additional ten business days for a response, the new response deadline is fifteen business days after the receipt of the request, regardless of when the notice of extension is issued. "Unusual circumstances" generally means there are voluminous records or the records are physically located in various locations.

HOW TO APPEAL

If the request is denied, a written appeal may be submitted to the head of the public body. The appeal should specifically state the word "appeal" and identify the reason why the request should not have been denied. Within ten days after receiving the appeal, the head of a public body may reverse the disclosure denial, issue a written notice upholding the disclosure denial or reverse the disclosure denial in part and issue a written notice upholding the disclosure denial in part.

If the head of the public body has issued a written notice denying any part of the FOIA request, the requestor may seek relief in state

circuit court. A lawsuit must be filed within 180 days after a public body's final determination to deny the request. If the request was made verbally, the requestor must confirm the request in writing not less than five days before commencing the action. For this reason, written FOIA requests are preferable.

DAMAGES, COSTS AND ATTORNEYS' FEES

Actual and compensatory damages are available if a plaintiff prevails in FOIA litigation. Moreover, if the circuit court finds that the public body has arbitrarily and capriciously violated the FOIA statute by refusing or delaying the disclosure of a public record to you, it may award you punitive damages of up to \$500.

In addition to granting access to the requested records, the court *must* award court costs and reasonable attorneys' fees when it is determined that a proper FOIA request was denied. If the plaintiff prevails only in part, the plaintiff may not be entitled to an award. Plaintiffs representing themselves (*i.e., pro se*) are generally not awarded attorneys' fees.

EXEMPTED INFORMATION

The Michigan FOIA exempts certain kinds of information from disclosure. Public bodies may, but are not required to, withhold from disclosure certain categories of public records. If a requested record contains some exempt and some non-exempt information, FOIA requires that the public body delete the exempt material and disclose the rest.

The categories of information that may be withheld in the public body's discretion are the following:

1. Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would do any of the following:

- interfere with law enforcement proceedings;
 - deprive a person of the right to a fair trial or impartial administrative adjudication;
 - constitute an unwarranted invasion of personal privacy;
 - disclose the identity of a confidential source or, if the record is compiled by a criminal law enforcement agency in the course of an investigation, disclose confidential information by a confidential source;
 - disclose law enforcement investigative techniques or procedures; or
 - endanger the life or physical safety of law enforcement personnel.
2. Information or records subject to the attorney-client privilege.
 3. Personal information, such as gun ownership records.
 4. Public records which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
 5. Records which if disclosed would violate the Federal (Buckley) Educational Rights and Privacy Act (primarily student records).
 6. An exempt public record or exempt information which is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the consideration originally giving rise to the exempt nature of the public record remains applicable.
 7. Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy.
 8. Information subject to attorney-client privilege.
 9. Information subject to other enunciated privileges such as counselor-client and those recognized by statute or court rule.
 10. Pending public bids to enter into contracts.
 11. Appraisals of real property to be acquired by a public body.
 12. Test questions and answers, scoring keys and other examination instruments.
 13. Medical counseling or psychological facts which would reveal an individual's identity.
 14. Internal communications and notes between and within public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.
 15. Law enforcement communication codes and deployment plans unless the public interest in disclosure outweighs the public interest in nondisclosure.
 16. Information that would reveal the location of archeological sites.
 17. Product testing data developed by agencies buying products where only one bidder meets the agency's specifications.
 18. A student's college academic transcript where the student is delinquent on university payments.
 19. Records of any campaign committee including any committee that receives moneys from a state campaign fund.
 20. Records and information pertaining to an investigation or a compliance conference under Article 15 of the Public Health Code, before a complaint is issued.

STRENGTHS OF THE LAW

Following are a summary of several strengths of the Michigan Freedom of Information Act:

- The broad coverage of Michigan’s FOIA is its greatest strength. In addition, FOIA exemptions are strictly defined and most courts rule in favor of disclosure of information.
- The FOIA sets firm deadlines for public bodies to respond to public records requests while allowing reasonable time for the public body to access and produce information. These deadlines ensure that a requesting party will receive the documents or a denial in a timely manner.
- The appeals provisions in FOIA provide an administrative option in addition to court access to resolve FOIA request denials. This allows individuals to potentially avoid expensive and time-consuming litigation in court.
- Individuals may subscribe to future issuances of public records that are created, issued or disseminated on a regular basis. This “standing request” provision of the law has significant practical benefits for regular FOIA users because it is convenient and effective for the requestors and the public body to streamline regular requests.
- The non-profit organization “Michigan Freedom of Information Committee” advances state open government law by providing comprehensive guidance on the FOIA.
- The Committee provides information and advice to Michigan residents regarding FOIA issues, holds seminars, workshops and provides speakers free of charge. The Committee also responds to FOIA developments and links citizens to attorneys who specialize in FOIA. Additionally, the Committee advocates stronger sunshine laws and opposes legislative initiatives that abridge the public’s ability to access information.

RECOMMENDATIONS FOR REFORM

Following are a summary of several weaknesses of the Michigan Freedom of Information Act and potential reforms:

- The FOIA excludes incarcerated prisoners from FOIA coverage. Access to public information is critically important to all individuals, and the refusal to extend FOIA rights to incarcerated prisoners unnecessarily discriminates against one segment of the population. This exclusion should be abandoned.
- Internal communications, notes and electronic mail communications between and within public bodies of an advisory nature may be withheld from FOIA disclosure under the intra-agency immunity exemption. Under this extremely broad exemption, a requestor would need to sue a public body in order to have a court determine whether a record is disclosable. The intra-agency immunity exemption should be clarified and limited.
- Michigan’s FOIA has a lack of sensitivity toward high costs for copies of certain records. Michigan permits a public body to charge not only for the actual cost of duplication and mailing for public records requests, but also for clerical labor. Only duplication and mailing costs should be permitted under FOIA.

OPEN MEETINGS ACT

In 1976, the Michigan General Assembly enacted the Michigan Open Meetings Act (OMA). The purpose of the OMA “is to promote openness and accountability in government; it is therefore to be interpreted broadly to accomplish this goal.” *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 192 Mich. App. 574, 481 N.W.2d 778, 782 (1992). All meetings of public bodies are presumed to be open and subject to the provisions of the OMA, unless the meeting topic falls within one of the few exceptions outlined in the law. In this case, the public body is allowed to meet in executive (*i.e.*, closed) session. Notably, the OMA is interpreted liberally in favor of openness, and closed-session exceptions are strictly construed to limit the situations that are not open to the public.

WHAT IS A MEETING?

A “meeting” means the convening of a public body at which a quorum (majority of the members of a public body) is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 40 of the Home Rule City Act. “Meeting” also applies to information-gathering and fact-finding sessions called by a public body where a quorum of members are present and the session relates to the body’s public business. However, the OMA specifically excludes a gathering that is a social or chance gathering or conference not designed to avoid the OMA.

THE OPEN MEETINGS ACT APPLIES TO PUBLIC BODIES

A “public body” means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance,

resolution or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function. Public bodies also include a lessee of such a body performing an essential public purpose and function pursuant to a lease agreement or the board of a nonprofit corporation formed by a city under section 40 of the Home Rule City Act.

WHAT DOES IT MEAN TO BE OPEN?

Public Notice

Public bodies are required to give notice of their regularly scheduled meetings within ten days of the first meeting in each calendar or fiscal year. The required notice must contain the dates, times, and places of the public body’s regular meetings, as well as the name of the public body, its telephone number and its address. Public bodies must post this notice at their principal office and any other location deemed appropriate. Public bodies may also hold “special” meetings for meetings not on the regular schedule so long as the public body posts its notice at least 18 hours prior to the meeting.

Agendas

No public agenda items are specifically required under the OMA. Therefore, the required notice need not include the subjects to be discussed at a public meeting.

CONVENIENCE

All meetings of a public body must be open to the public and held in a place that is accessible by the general public. Importantly, the OMA explicitly provides the right to any member of the public to speak or comment during a meeting, subject to rules established by the public body for maintaining order. The OMA also specifically provides that a person may not be required to register or otherwise provide his or her name or other information or fulfill any other condition to attend a meeting.

RECORDING PUBLIC MEETINGS

Any person may record the proceedings at open meetings. However, the public body holding the meeting may prescribe reasonable rules to govern the recording. The proceedings may be recorded by tape, film, or other means.

RECORDING CLOSED MEETINGS

A separate set of minutes must be taken by the clerk or the designated secretary at any closed session. These minutes must be retained by the clerk, are not available to the public, and may only be disclosed if required by an appropriate civil action. Closed session minutes may be destroyed one year and one day after approval of the minutes of the regular meeting at which the closed session was approved.

WRITTEN MINUTES

All public bodies must also keep written minutes of their meetings, whether open or closed. Meeting minutes must state the date, time, place, members present or absent, any decisions made, the purpose for which a closed session is held and all roll call votes taken at the meeting.

The OMA establishes a set deadline for the publication of minutes. Proposed minutes must be made available for public inspection within eight business days after the meeting to which the minutes refer, and approved minutes must be available for public inspection within five business days after the meeting at which the minutes are approved by the public body. Additionally, the public body must make any corrections in the minutes at the next meeting after the meeting to which the minutes refer, and make corrected minutes available at or before the next subsequent meeting after correction.

WHEN MAY A PUBLIC BODY CLOSE A MEETING OR HOLD AN EXECUTIVE SESSION?

A two-thirds roll call vote of public body members is required to call a closed session, with limited exceptions which require no vote.¹ The roll call vote and the purpose for calling the closed session must be entered into the minutes of the meeting at which the vote is taken.

Public bodies may, but are not required, to hold closed meetings in the following circumstances:

- 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.
- To consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student

¹ These exceptions include the following: (a) 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; (b) to consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student's parent or guardian requests a closed hearing; (c) for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing; (g) partisan caucuses of members of the state legislature; and (i) for a compliance conference conducted by the Department of commerce under section 16231 of the Public Health Code, Act No. 368 of the Public Acts of 1978, or Section 333.16231 of the Michigan Compiled Laws, before a complaint is issued

or the student's parent or guardian requests a closed hearing.

- For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.
- To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.
- To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.
- To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act.
- Partisan caucuses of members of the state legislature.
- To consider material exempt from discussion or disclosure by state or federal statute.
- For a compliance conference conducted by the Department of Commerce under section 16231 of the Public Health Code, Act No. 368 of the Public Acts of 1978, or Section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.
- In the process of searching for and selecting a president of an institution of higher education.

In addition, the Michigan OMA has an “exempt-material” exemption. The exemption states that when a document is exempt from disclosure under FOIA, the meeting or

correspondence producing the document is also not subject to the OMA. Therefore, closed sessions are authorized for the discussion of matters that are exempt from disclosure or discussion (*i.e.*, exempt from FOIA).

WHAT SHOULD YOU DO IF YOU SUSPECT A VIOLATION OF THE OPEN MEETINGS ACT?

There are no administrative channels for contesting a violation under the OMA. Therefore, if a violation is suspected, only the courts can provide relief. Civil and criminal penalties are available for OMA violations, however only the state can bring criminal penalties in an OMA matter. The Attorney General, the prosecuting attorney of the county in which the public body and individuals all have the authority to enforce the OMA by filing a civil action in the circuit court to compel compliance or to enjoin further noncompliance. If neither the Attorney General nor the prosecuting attorney is willing to bring an OMA action, a suit must be filed for injunctive relief within 180 days of the alleged violation. In the alternative, a suit may be filed for mandamus against the public body in the court of appeals. A successful mandamus action results in a court order that requires another court, government official, public body, corporation or individual to perform a certain act.

Violation of the OMA is a criminal offense, punishable by a fine and imprisonment. Upon finding a violation of the OMA, a court may prescribe various remedies. For example, the court may, as fairness and justice require:

- Open the closed meeting to the public;
- Issue an injunction to prevent future violations;
- Order a public official who intentionally violates the OMA to pay exemplary damages of up to \$500; or
- Void any final action taken during a wrongfully closed session.

Litigation which seeks to invalidate a decision of a public body must be started within 60 days of the approved minutes, or within 30 days for decisions involving property, money, contracts or bond issuance. However, where the decision of a public body is challenged on the ground that it was not made in compliance with the requirements of the OMA, the public body may, without being deemed to make any admission contrary to its interest, re-adopt the decision in compliance with the OMA.

Decisions re-adopted in such a manner are effective from the date of re-enactment and may not be declared invalid by reason of the initial fault.

STRENGTHS OF LAW

Following are a summary of several strengths of the Michigan Open Meetings Act:

- The Michigan OMA benefits from a strong presumption of coverage. The OMA is interpreted liberally in favor of openness, and closed-session exceptions are strictly construed to limit the situations that are not open to the public.
- The OMA provides comprehensive access to courts to enforce violations. Individuals, along with the Attorney General and state prosecuting attorneys, have standing to file complaints in the circuit court to compel compliance or to enjoin further noncompliance.
- Violations of the OMA subject a public body official to both civil and criminal penalties. The risk of money damages, criminal charges and potential jail time surely serve as a deterrent to potential violations of the OMA.
- Attorneys' fees are mandatory for a prevailing plaintiff in an OMA lawsuit. Mandatory attorneys' fees encourage individuals to file suit when an actionable violation of OMA has taken place and makes the courts more

economically accessible.

- Michigan's closed session exemption list is limited and does not include most employment or personnel matters. Instead, the OMA requires that public bodies must meet openly to discuss nearly all in-house issues concerning employees. This approach increases transparency tremendously in an area that is often important to the public.
- The non-profit organization "Michigan Freedom of Information Committee" advances state open government law by providing comprehensive guidance on the OMA.
- The Committee provides information and advice to Michigan residents regarding FOIA issues, holds seminars, workshops and provides speakers free of charge. The Committee also responds to FOIA developments and links citizens to attorneys who specialize in FOIA. Additionally, the Committee advocates stronger sunshine laws and opposes legislative initiatives that abridge the public's ability to access information.

RECOMMENDATIONS FOR REFORM

Following are a summary of several weaknesses of the Michigan Open Meetings Act and potential reforms:

- The Michigan OMA provides no remedies short of litigation to address OMA violations. Residents seeking recourse regarding typical OMA violations (*e.g.*, final actions taken despite improper notice or executive sessions not based on a closed-meeting exception) only have the option of filing a suit against the public body to obtain a remedy. Lawsuits are a cumbersome and expensive proposition that most members of the public are reluctant to undertake.

- The OMA suffers from lack of effective enforcement. Prosecuting attorneys throughout Michigan fail to pursue criminal actions for violations and the courts never assess criminal penalties. Public bodies are less likely to comply with the OMA if the criminal penalties are never actually enforced.
- Illegal final actions can be re-adopted far too easily. Where the decision of a public body is challenged on the grounds that it was not made in compliance with the requirements of the OMA, the public body may, without being deemed to make any admission contrary to its interest, re-adopt the decision in compliance with the OMA. Decisions re-adopted in such a manner are effective from the date of re-enactment and may not be declared invalid by reason of the initial fault. Thus, there are no real penalties or significant drawbacks to public bodies taking illegal final action.

FOR MORE INFORMATION

This contains a general description of the Michigan Freedom of Information Act and Open Meetings Act as well as suggestions for how to use it effectively. For specific language, consult the Act itself, MCL 15.231 *et seq.* For access to federal records, consult the federal Freedom of Information Act, 5 U.S.C. § 552. For the OMA, consult the Act itself, MCL 15.261 *et seq.*

DISCLAIMER

This guide is not intended to be legal advice, but only an overview of open government laws. You are advised to consult an attorney before taking any legal action. References to procedures and laws are only summaries and are not meant to be complete or all encompassing. If you have questions or desire further information, call (630) 833-4080.

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