

PROMOTING PRESS FREEDOM SINCE 1868

The Bulletin



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"The truth is never as dangerous as a lie in the long run."
—Ben Bradlee

FOIA EXEMPTION 1A

by Joe Richotte, MPA Deputy General Counsel

*This is the first in a continuing series in 2019 on anticipating and responding to FOIA exemptions asserted by public bodies under the Michigan Freedom of Information Act

Newspapers and journalists frequently encounter resistance to FOIA requests. Although FOIA permits public bodies to withhold certain information as exempt, the statutory exemptions are permissible, not mandatory, with the exception of education records under FERPA. Michigan policy is to encourage disclosure of public records whenever possible. Exemptions are interpreted narrowly, and the burden of proving that an exemption applies rests with the public body, not you.

FOIA coordinators have either forgotten these ground rules, or they have not been trained on them. Consider meeting with the heads of public bodies that regularly deny your requests to ensure their FOIA coordinators understand that exemptions are supposed to be the exception, not the rule. And consider reminding them of those four starting points in your FOIA request. Public bodies should be regularly encouraged to refrain from invoking exemptions unless truly necessary to achieve the purposes behind them. Until public bodies become more selective when invoking exemptions, you will need to push back with administrative appeals—and, when appropriate, lawsuits—to stop rote, flimsy denials.

In 2019, we are offering this series to MPA members on how to best position yourself to avoid denials under each of the exemptions listed in the statute, and how to frame an appeal when met with an exemption.

The first exemption is one of the most commonly invoked. Under MCL 15.243(1)(a) ("Exemption 1A), a public body may exempt from disclosure "information of a personal nature, if public disclosure would constitute a clearly unwarranted invasion of an individual's privacy." This is a two-step test; the exemption does not apply unless: (1) the information is of a personal nature; **and** (2) public disclosure that information would be a clearly unwarranted invasion of a person's privacy. Exemption 1A is **not** a catch-all privacy exemption that prohibits disclosure of information simply because it could conceivably lead to personal information being revealed.

Personal Information

Information is of a personal nature only if it constitutes intimate, embarrassing, private, or confidential details about an individual, based on the customs, mores, and ordinary views of the community.

Information that **has** qualified as "personal" under the

first step of the test includes:

- home addresses and telephone numbers;
- information about the existence and value of specific assets owned by a person;
- addresses of donors to state universities;
- travel destinations of university regents visiting potential candidates for university president, because disclosure would reveal the candidates' identities;
- information about nursing home patients;
- the identities of those who receive lottery winnings by assignment or judgment;
- the fact of gun ownership;

Information that has **not** qualified as personal includes:

- absent special circumstances, a person's name;
- mugshots;
- parolees' psychological records;
- information about public employees who were called before a federal grand jury or who had met with federal agents;
- names of police officers involved in alleged assaults of arrestees;
- the names of student-athletes identified as suspects in university incident reports;
- autopsy reports;
- the names, current job titles, cities of residence (i.e., not the full address), and ages of final candidates for appointed office;
- personnel records (although there are special considerations when it comes to police personnel files, which we will discuss in our article on Exemption 1S);
- names and home addresses of private security guards maintained by the state police;
- names and addresses of people who leased suites at a stadium; and

information identifying which party's primary election a person voted in.

If a public body tries to invoke Exemption 1A for anything other than personal contact information or the special classes of identities listed above, argue on appeal why

the information is not "private" under the test articulated by the Michigan Supreme Court—i.e., why it is **not** intimate, embarrassing, private, or confidential details about an individual, based on the customs, mores, and ordinary views of the community. Remember, they have the burden of articulating why the exemption applies. Public bodies can't just claim that something is private; they have to explain why it is.

Clearly Unwarranted Invasion of Personal Privacy

Even if the information is deemed private, "determining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires balanc[ing] the public interest in disclosure against the [privacy] interest the Legislature intended the exemption to protect." Although the reason you want the records is technically irrelevant (because you shouldn't be denied access to information you have a right to access just because someone may disapprove of how you will use that information), as a practical matter, the reason you—the press—want the information is the public interest. This is where you need to make the best case you can about: (1) why the information you seek sheds light on the workings of government; and (2) why the public's interest in knowing about that information outweighs concerns about shielding intimate, embarrassing, private, or confidential details about a person's private life.

Of course, when you do, remember that your appeal letter is itself subject to FOIA—depending on how important the information is to you, you may want to strategically omit certain information that you wouldn't want your competition to know about.

As always, if you have a particularly thorny issue and want guidance on how to frame your appeal, contact the Hotline Team: hotline@michiganpress.org or (800) 334-5390.

We're also happy to draft your administrative appeals. Although this is not a benefit that comes with the Hotline, we offer discounted rates to MPA members, and the overall financial investment is more reasonable than you might think. And we've had some success in helping several newspapers shake loose information important to their stories.

If you think you might want to file a lawsuit to have a judge force the public body to disclose the information, please contact us immediately after the denial. You only have 180 days to file a lawsuit from the date of denial.

Importance of Community Journalism

The mission of the MPA Foundation is to advance community journalism by fostering learning, sponsoring research and promoting public awareness of the importance of a free press in Michigan.

The Richard Milliman Journalist of the Year Award has been an example of that

Press won the award for her in depth coverage of the lack of transparency in Michigan's charter schools.

In 2015 Curt Guyette was the winner for his breaking coverage of the Flint Water Crisis on behalf of the ACLU.

In 2017 Garrett Ellison of MLive produced stories that symbolize the importance of watchdog journalism, he has exposed some big environmental stories in Michigan and raised awareness of what our government officials are (or aren't) doing.

Stay tuned to see who this year's winner is. It's safe to say that the work done by this honoree was a service to their community.

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