

Recent Rulings

Butzel Long Media Team

FREEDOM OF INFORMATION ACT

***Howell Education Association v. Howell Board of Education*, Case No. 288977 (Mich. App. 2010)**
[note: Case currently on appeal]

School teachers' personal emails were not rendered public records solely because they were captured in the email system's digital memory. In addition, the mere violation of an acceptable use policy barring personal use of the email system—at least one that does not expressly provide that emails are subject to FOIA—does not render personal emails public records subject to FOIA.

***State News v. Michigan State University*, 481 Mich. 692 (2008)**

Whether a FOIA exemption applies is measured when the public body asserts the exemption. "The passage of time and the course of events after the assertion of a FOIA exception do not affect whether a public record was initially exempt from disclosure."

***State News v. Michigan State University*, 274 Mich. App. 558 (2007), reversed in part on other grounds, 481 Mich. 692 (2008)**

Under the law enforcement purpose exemption, the public body must show that the particular information *would* interfere with law enforcement proceedings, deprive a person of the right to a fair trial, or constitute an unwarranted invasion of personal privacy; not merely that it could possibly or potentially interfere with or jeopardize the investigation.

***Michigan Federation of Teachers v University of Michigan*, 481 Mich. 657 (2008) (modifying *Bradley v. Saranac*, 455 Mich. 285 (1997))**

In this case, the Michigan Supreme Court determined that the home addresses and telephone numbers of university employees are exempt from disclosure under FOIA's privacy exemption. The Court held that: (1) private or confidential information relating to a person, in addition to embarrassing or intimate details, is "information of a personal nature"; and (2) disclosure of employee home addresses and telephone numbers did not further a core purpose of FOIA. Thus, the Court concluded that public disclosure would constitute a clearly unwarranted invasion of personal privacy.

***Bukowski v. City of Detroit*, 478 Mich. 268 (2007)**

Determination of whether the "frank communication" exemption applies is made at the time the communications were made. "[I]t is only pertinent whether those communications and notes were preliminary to a final agency determination at the time they were created, not whether they were preliminary at the time the FOIA request was made.

***Coblentz v City of Novi*, 475 Mich. 558 (2006)**

FOIA's trade secret exemption 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. A public body cannot knowingly possess such confidential information for extended periods without providing any notice to the public that the information exists. This would defeat the purpose of the recording requirements.

FOIA allows public bodies to charge a requesting party only for employees' labor. Because the attorney who examined and separated the information was not an employee, public body could not charge for the attorney's work.

Taylor v. Lansing Board of Water and Light, 272 Mich. App. 200 (2006)

Initial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within exemption, as is the identity of the person seeking the information.

Herald Co., Inc. v. Eastern Michigan University, 475 Mich. 463 (2005)

A document is a "frank communication" if it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action. If the document fails any one of these threshold qualifications, the exemption does not apply.

Detroit Free Press v City of Southfield, 269 Mich. App. 275 (2005)

The names of police officers and their corresponding pension incomes are subject to disclosure under FOIA. "[A] public official has no reasonable expectation of privacy in an expense the public bears to pay for income or any other benefit."

OPEN MEETINGS ACT

Leemreis v. Sherman Township, 273 Mich. App. 691 (2007)

In this case, the Michigan Court of Appeals clarified the attorney fees/cost recovery provisions of the OMA and how they work:

MCL 15.270(1) permits a person to "commence a civil action in the circuit court to challenge the validity of a decision of a public body made in

violation of this act." Under this section, a person can seek invalidation of the decision and there is no provision for costs or attorney fees.

MCL 15.271(1) permits a person to "commence a civil action to compel compliance or to enjoin further noncompliance with this act." Under this section, a person who commences "a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act" and obtains "relief in the action" shall recover costs and attorney fees for the action. MCL 15.271(4).

MCL 15.273 permits a person to bring a claim against a public official for an intentional violation of the OMA and, if the public official did intentionally violate the OMA, he or she is liable for actual and exemplary damages of not more than \$500 total "plus court costs and actual attorney fees to a person or group of persons bringing the action." MCL 15.273(1).

The Court also held that a public official who intentionally violates OMA is personally liable for damages and actual attorney fees and these penalties cannot be avoided by reenacting a meeting.

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