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FOIA Fee Rules and OMA Email Violations

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Let's talk about two open government issues of importance to the media. First, changes to our FOIA statute went into effect in 2015 that have still not been implemented by some public bodies. (Likewise, you will be stunned to learn that there is gambling in Casablanca). Below is a quick recap on some of those changes for you to use in dealing with fee issues. Second, many people have had issues with public officials using email as an improper method of deliberating in violation of the Open Meetings Act. A recent Michigan Court of Appeals case addresses the issue and concluded that the OMA was violated.

Know the FOIA Fee Rules and Insist on Compliance

First, to FOIA. As of July 1, 2015, Public bodies must:

- Establish a written summary of its FOIA rules
- Post these on its website, if it has one
- Provide copies or the website link to them in response to a FOIA request
- Have a standard fee itemization form

Importantly, Public bodies must itemize **all costs** that are factored into the total fee. And there are some additional "caps" on costs:

Employee Wage: Hourly wage of lowest paid capable employee, plus actual cost of fringe benefits up to 50% of the total labor fee

Contractor Wage: If no employee is capable, may hire an outside contractor, but must (a) clearly note the person/firm in the fee itemization; (b) cannot charge a rate higher than 6x the state minimum hourly wage (2015: \$51/hr); and (c) cannot charge for fringe benefits.

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In addition, a public body:

- May not charge for overtime, unless you agree to it.
- May not charge for redaction if knows it previously redacted and still has the redacted document.
- Must inform you of any records available for free on website before charging you a fee to duplicate and produce those records

Finally, a public body may only charge the actual and most reasonably economical cost for non-paper physical media (e.g., CDs), can only charge 0.10¢ per sheet for paper for standard paper sizes; and must provide double sided copies if available.

Please use the above information in dealing with fee issues, and remember we are always here at the hotline to help you with any questions.

Email Deliberations Violate the Open Meetings Act

For some time now, we have been discovering that members of a public body communicate via email in advance of public meetings to the point where deliberations take place electronically, rather than at a meeting pursuant to the Open Meetings Act (OMA). On November 1, 2016, the Michigan Court of Appeals issued a decision that makes clear that such email communications can violate the OMA.

In *Markel v Mackley*, No 327617, the plaintiffs alleged that defendants used email communications to discuss and decide how to address matters, and would then carry out those decisions at the public meetings as a united front. The Court of Appeals agreed. The court found that there were: (a) emails that included a quorum of the public body; and (b) the emails include some level of discourse (i.e. deliberation) on the issue of public policy presented, but that discourse need not include every quorum member.

The *Markel* decision should serve notice to public bodies that they violate the OMA when a quorum is engaged in discourse on public policy issues via email. One possible indicator that this is going on is when, at a public meeting, there is no “deliberation” on an issue that you think would generate discussion or be the subject of due diligence by the public body. If you have concerns that this is occurring, a first step is to issue an appropriately tailored FOIA request for emails. As always, we encourage you to contact us to answer questions or provide guidance.

Robin Luce Herrmann

248.593.3044

luce-herrmann@butzel.com