

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

MICHIGAN

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

MICHIGAN

Prepared by:

Herschel P. Fink

HONIGMAN MILLER SCHWARTZ AND COHN LLP
2290 First National Building
Detroit, Michigan 48226
(313) 465-7400
(313) 465-7401 (FAX)
E-mail: hfink@honigman.com

Brian D. Wassom

HONIGMAN MILLER SCHWARTZ AND COHN LLP
38500 Woodward Ave.
Bloomfield Hills, MI 48304
(248) 566-8490
(248) 566-8491 (FAX)
E-mail: bwassom@honigman.com



Sixth Edition
2011

OPEN GOVERNMENT GUIDE

Access to Public Records and Meetings in

MICHIGAN

**SIXTH EDITION
2011**

Previously Titled
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press
Lucy A. Dalglish, Executive Director

EDITORS

Gregg Leslie, Legal Defense Director
Mark Caramanica, Freedom of Information Director

ASSISTANT EDITORS

Christine Beckett, Jack Nelson Legal Fellow
Aaron Mackey
Emily Peterson

Production of the sixth edition of this compendium was possible
due to the generous financial contributions of:
The Stanton Foundation

© 2011, 2006, 2001, 1997, 1993, 1989 by The Reporters Committee for Freedom of the Press.
All rights reserved. No part of this publication may be reproduced in any form or
by any means without the prior, written permission of the publisher.

ISBN: 1-58078-223-X

Contents

Introductory Note	iv	V. PROCEDURE FOR OBTAINING RECORDS	15
User’s Guide	v	A. How to start.	15
FOREWORD	1	B. How long to wait.	15
Open Records	2	C. Administrative appeal.	16
I. STATUTE -- BASIC APPLICATION.	2	D. Court action.	16
A. Who can request records?	2	E. Appealing initial court decisions.	19
B. Whose records are and are not subject to the act?	2	F. Addressing government suits against disclosure.	19
C. What records are and are not subject to the act?	3	Open Meetings	19
D. Fee provisions or practices.	4	I. STATUTE -- BASIC APPLICATION.	19
E. Who enforces the act?	5	A. Who may attend?	19
F. Are there sanctions for noncompliance?	5	B. What governments are subject to the law?	19
II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	6	C. What bodies are covered by the law?	19
A. Exemptions in the open records statute.	6	D. What constitutes a meeting subject to the law.	21
B. Other statutory exclusions.	11	E. Categories of meetings subject to the law.	22
C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.	11	F. Recording/broadcast of meetings.	24
D. Are segregable portions of records containing exempt material available?	11	G. Are there sanctions for noncompliance?	25
E. Homeland Security Measures.	12	II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	25
III. STATE LAW ON ELECTRONIC RECORDS	12	A. Exemptions in the open meetings statute.	25
A. Can the requester choose a format for receiving records?	12	B. Any other statutory requirements for closed or open meetings.	26
B. Can the requester obtain a customized search of computer databases to fit particular needs?	12	C. Court mandated opening, closing.	26
C. Does the existence of information in electronic format affect its openness?	12	III. MEETING CATEGORIES -- OPEN OR CLOSED.	26
D. How is e-mail treated?	12	A. Adjudications by administrative bodies.	26
E. How are text messages and instant messages treated?	12	B. Budget sessions.	27
F. How are social media postings and messages treated?	12	C. Business and industry relations.	27
G. How are online discussion board posts treated?	12	D. Federal programs.	27
H. Computer software.	13	E. Financial data of public bodies.	27
I. How are fees for electronic records assessed?	13	F. Financial data, trade secrets or proprietary data of private corporations and individuals.	27
J. Money-making schemes.	13	G. Gifts, trusts and honorary degrees.	27
K. On-line dissemination.	13	H. Grand jury testimony by public employees.	27
IV. RECORD CATEGORIES -- OPEN OR CLOSED.	13	I. Licensing examinations.	27
A. Autopsy reports.	13	J. Litigation; pending litigation or other attorney-client privileges.	27
B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)	13	K. Negotiations and collective bargaining of public employees.	27
C. Bank records.	13	L. Parole board meetings, or meetings involving parole board decisions.	27
D. Budgets.	13	M. Patients; discussions on individual patients.	27
E. Business records, financial data, trade secrets.	13	N. Personnel matters.	27
F. Contracts, proposals and bids.	13	O. Real estate negotiations.	27
G. Collective bargaining records.	13	P. Security, national and/or state, of buildings, personnel or other.	27
H. Coroners reports.	13	Q. Students; discussions on individual students.	27
I. Economic development records.	13	IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS	27
J. Election records.	13	A. When to challenge.	27
K. Gun permits.	13	B. How to start.	27
L. Hospital reports.	13	C. Court review of administrative decision.	28
M. Personnel records.	13	D. Appealing initial court decisions.	29
N. Police records.	14	V. ASSERTING A RIGHT TO COMMENT.	29
O. Prison, parole and probation reports.	14	Statute	30
P. Public utility records.	14		
Q. Real estate appraisals, negotiations.	14		
R. School and university records.	14		
S. Vital statistics.	15		

Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

Prepared by:

Herschel P. Fink
 HONIGMAN MILLER SCHWARTZ AND COHN LLP
 2290 First National Building
 Detroit, Michigan 48226
 (313) 465-7400
 (313) 465-7401 (FAX)
 E-mail: hfink@honigman.com

Brian D. Wassom
 HONIGMAN MILLER SCHWARTZ AND COHN LLP
 38500 Woodward Ave.
 Bloomfield Hills, MI 48304
 (248) 566-8490
 (248) 566-8491 (FAX)
 E-mail: bwassom@honigman.com

FOREWORD

The public policy behind passage of Michigan's Freedom of Information Act ("FOIA"), Mich. Comp. Laws Ann. ("Mich. Comp. Laws Ann.") §§ 15.231 -246, is set forth in its first section:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Mich. Comp. Laws Ann. § 15.231. This section was recently amended twice; it previously stated that FOIA's purpose was to provide all persons with information regarding "governmental decision making" and, before that, information regarding "the affairs of government and the official acts of those who represent them." It is unclear whether these changes in FOIA's purpose will affect how courts interpret it.

The state's tradition of giving the public the broadest possible access to its records did not begin with enactment of the FOIA in 1977. Michigan courts throughout the state's history have both expressed and implemented the fundamental principle that the records of government belong to the public and not to the government officials who are their custodians. The public's access and inspection are a matter of fundamental right. The public does not have the burden of justifying the requested inspection but, to the contrary, the custodian has the duty to facilitate inspections and the heavy burden of justifying any exemptions, restrictions, or delays he or she may attempt to impose. *Nowack v. Auditor Gen.*, 243 Mich. 200, 219 N.W. 749 (1928) (common law); *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889); *Booth Newspapers Inc. v. Muskegon Probate Judge*, 15 Mich. App. 203, 166 N.W.2d 546 (1968); *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 444 Mich. 211, 507 N.W.2d 422 (1993) (FOIA). *Nowack v. Auditor Gen.*, a leading case, both in Michigan and nationally, which enforced a newspaper's right of inspection by the extraordinary remedy of mandamus, contains one of the more noteworthy statements of this fundamental principle:

If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. . . . Undoubtedly, it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them access to their own books for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was either in this country or in England.

219 N.W. at 750.

The court then cites the 1889 case of *Burton v. Tuite*, *supra*, as an

example of Michigan's historical commitment to the principle of free access, concluding, "There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate." 219 N.W. at 750 (citing *Burton v. Tuite*, *supra*, at 374 ("I do not think that any common law ever obtained in this free government that would deny to the people thereof right of free access to, and public inspection of, public records.")). This principle was affirmed in *Muskegon Probate Judge*, *supra*, which enforced a newspaper's right of inspection by the extraordinary remedy of superintending control:

The fundamental rule in Michigan on the matter before us, first enunciated in the case of *Burton v. Tuite*, (1889), 78 Mich. 363, is that citizens have the general right of free access to, and public inspection of, public records. . . . The Nowack decision has "placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest possible effect."

166 N.W.2d at 547-48 (quoting 1961-62 Op. Att'y Gen. 581, 587).

More recently, in *Swickard v. Wayne County Medical Examiner*, 438 Mich. 536, 475 N.W.2d 304 (1991), the Michigan Supreme Court declared that these same policies apply to FOIA:

One of the reasons prompting the legislation was concern over abuses in the operation of government. A policy of full disclosure underlies the FOIA.

. . .

In construing the provisions of the act we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.

475 N.W.2d at 307.

As discussed below, Michigan's FOIA also provides a procedure and remedy for improper governmental refusal to disclose public records, including the award of reasonable attorney's fees and actual and punitive damages. Mich. Comp. Laws Ann. §§ 15.240 (6) and (7).

Since at least 1851 the policy of open access to public records also has been expressed and implemented by other Michigan statutes. For example, the Michigan Penal Code provides that: "[a]ll official books, papers or records created by or received in any office or agency of the state of Michigan or its political subdivisions, are declared to be public property, belonging to the people of the state of Michigan." Mich. Comp. Laws Ann. §§ 750.491. The next section enforces the policy:

Any officer having the custody of any county, city or township records in this state who shall when requested fail or neglect to furnish proper and reasonable facilities for the inspection and examination of the records and files in his office and for making memoranda of transcripts therefrom during the usual business hours, which shall not be less than 4 hours per day, to any person having an occasion to make examination of them for any lawful purpose shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by a fine of not more than \$500.00; Provided, that the custodian of said records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent interference with the regular discharge of the duties of such officer.

Mich. Comp. Laws Ann. §§ 750.492.

Open Meetings. Michigan's Open Meetings Act ("OMA"), Mich. Comp. Laws Ann. §§ 15.261, *et seq.*, discussed in detail, *infra*, also reinforces the state's policy of insuring open access to government operations by providing for open access to public meetings. In *Booth Newspapers Inc. v. University of Michigan Board of Regents*, *supra*, for ex-

ample, the Michigan Supreme Court stated:

Legislators hailed [the OMA] as “a major step forward in opening the political process to public scrutiny.” During this period, lawmakers perceived openness in government as a means of promoting responsible decision making. Moreover, it also provided a way to educate the general public about policy decisions and issues. It fostered belief in the efficacy of the system. . . . To further the OMA’s legislative purposes, the Court of Appeals has historically interpreted the statute broadly, while strictly construing its exemptions and imposing on public bodies the burden of proving that an exemption exists.

507 N.W.2d at 427-28 (citations and footnote omitted).

Unlike Michigan’s Freedom of Information Act, which complements existing laws, the Open Meetings Act (“OMA”), Mich. Comp. Laws Ann. § 15.261, *et seq.*, was, in part, intended to resolve conflicting provisions of law and expressly provides that it “shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public.” Mich. Comp. Laws Ann. § 15.261(2).

The OMA also provides that public officials who intentionally violate the OMA have committed misdemeanors for which they can be fined and potentially imprisoned. Further, unlike FOIA, which provides for recovery of *reasonable* attorney’s fees to a prevailing plaintiff, OMA provides for the recovery of *actual* attorney’s fees. Mich. Comp. Laws Ann. § 15.271(4).

Open Records

I. STATUTE -- BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

The FOIA provides that “[e]xcept as expressly provided in [Mich. Comp. Laws Ann. § 15.243], upon providing a public body’s FOIA coordinator with a *written request* that describes a public record sufficiently to enable the public body to find the public record, a *person* has a right to inspect, copy, or receive copies of the requested public record of the public body.” Mich. Comp. Laws Ann. § 15.233(1) (emphasis added). Mich. Comp. Laws Ann. § 15.232 defines a “person” as an “individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity.” Mich. Comp. Laws Ann. § 15.232(c). However, “person” does not include “an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.” Mich. Comp. Laws Ann. § 15.232(c); *see Proctor v. White Lake Twp. Police Dep’t*, 248 Mich. App. 457, 639 N.W.2d 332 (2001) (FOIA prisoner exclusion not a constitutional deprivation). Before a 1996 amendment to the FOIA, oral requests were permissible.

2. Purpose of request.

The FOIA, in keeping with Michigan’s historical tradition, does not impose upon the public any obligation to “justify” access to public records. The FOIA does not require the requester to reveal why it needs or wants the information — purpose is irrelevant. *State Employees Ass’n v. Dep’t of Management and Budget*, 428 Mich. 104, 404 N.W.2d 606 (1987).

3. Use of records.

The particular use to which a person plans to put requested information is not restricted by the FOIA; “[t]he initial as well as future uses of the requested information are irrelevant.” *Id.* at 404 N.W.2d 616; *see also Mullin v. Detroit Police Dep’t*, 133 Mich. App. 46, 348 N.W.2d 708 (1984). Likewise, “[t]he future use of the information is irrelevant to determining whether the privacy exemption of Mich. Comp. Laws 15.243(1)(a) applies.” *Practical Political Consulting v. Secretary of State*, 287 Mich. App. 434, 789 N.W. 2d 178 (2010).

B. Whose records are and are not subject to the act?

“Public bodies” are the subjects regulated by the FOIA: “A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours.” Mich. Comp. Laws Ann. § 15.233(3) (emphasis added). Mich. Comp. Laws Ann. § 15.232 defines various public bodies as follows:

1. Executive branch.

The definition of a “public body” includes “[a] state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.” Mich. Comp. Laws Ann. § 15.232(d)(i). However, the act specifically “does not authorize the withholding of a public record in the possession of the executive officer of the governor or lieutenant governor, or an employee of either executive office, if the public record is transferred to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received by a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive bench of government subject to this

act” Mich. Comp. Laws Ann. § 15.243(4). The definition of a “public body” also includes “[a] county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.” Mich. Comp. Laws Ann. § 15.232(d)(iii). This includes corporations formed under The Summer Resort Owners Corporation Act. 1997 Op. Att’y Gen No. 6942 (1997). It does not include private, voluntary unincorporated associations of lake property owners. *Id.*

a. Records of the executives themselves.

Not specifically addressed.

b. Records of certain but not all functions.

Not specifically addressed.

2. Legislative bodies.

Agencies, boards, commissions, or councils in the legislative branch of the state government are included in the FOIA’s definition of “public body.” Mich. Comp. Laws Ann. § 15.232(d)(ii). State legislators themselves are exempted from its provisions. 1985-86 Op. Att’y Gen. No. 6390 (1986).

3. Courts.

“The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.” Mich. Comp. Laws Ann. § 15.232(d)(v).

4. Nongovernmental bodies.

The definition of “public body” includes “[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority.” Mich. Comp. Laws Ann. § 15.232(d)(iv); see *Detroit News v. Policemen and Firemen Retirement System*, 252 Mich. App. 59, 651 N.W.2d 127 (2002) (municipally chartered retirement system a public body subject to FOIA). One example of a body which has been held to be included in this definition is the President’s Council of State Colleges and Universities, which is wholly funded by state universities and colleges. 1979-80 Op. Att’y Gen. 255, 262 (1979); but see *Kubick v. Child and Family Services of Michigan Inc.*, 171 Mich. App. 304, 429 N.W. 2d 881 (1988) (government funding that amounts to less than half the total funding of a corporation does not amount to primary funding and such entity is not a public body for FOIA purposes). Also included is a state-funded university, such as the University of Michigan. *Booth Newspapers Inc. v. University of Michigan Board of Regents*, *supra*, 507 N.W.2d at 431. But see Mich. Comp. Laws Ann. § 15.243(x) (exemption for documents concerning certain universities’ presidential searches).

A public body under the FOIA also includes any body that is “primarily funded” by or through state or local authority. *Jackson v. Eastern Michigan University Foundation*, 215 Mich. App. 240, 544 N.W. 2d 737 (1996). This is true regardless of whether the funding comes from one source or several. *Scaffani v. Domestic Violence Escape*, 255 Mich. App. 683, 660 N.W.2d 97 (2003) (legislative use of the word “authority” in the statute embraces the plural form as well). The term “funded” has been held not to include public monies paid in exchange for goods provided or services rendered. *Breighner v. Michigan High School Athletic Ass’n*, 471 Mich. 217, 683 N.W.2d 639 (2004) (private, nonprofit association of state high schools financed in part by public monies in exchange for scheduling and event hosting services not a public body subject to FOIA); see also *State Defender Union Employees v. Legal Aid and Defender Ass’n of Detroit*, 230 Mich. App. 426, 584 N.W. 2d 359 (1998) (private, nonprofit corporation established to provide legal services to indigent persons not a public body subject to FOIA); *Howell Education Association v. Howell Board of Education*, 287 Mich. App. 228, 789 N.W. 2d 495 (2010) (teachers’ emails regarding their union activities had nothing to do with their official governmental capacity and therefore were not covered by FOIA).

a. Bodies receiving public funds or benefits.

See above paragraph.

b. Bodies whose members include governmental officials.

Not specifically addressed.

5. Multi-state or regional bodies.

The definition of “public body” includes “intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.” Mich. Comp. Laws Ann. § 15.232(d)(iii).

6. Advisory boards and commissions, quasi-governmental entities.

The definition of a “public body” includes “[a] state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.” Mich. Comp. Laws Ann. § 15.232(d)(i). The definition also includes “[a] county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.” Mich. Comp. Laws Ann. § 15.232(d)(iii).

7. Others.

N/A

C. What records are and are not subject to the act?

1. What kind of records are covered?

“Public records” which must be disclosed are defined in Mich. Comp. Laws Ann. § 15.232(e) as follows: “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.” The FOIA separates public records into two classes: (a) those which are exempt from disclosure under Mich. Comp. Laws Ann. § 15.243 and (b) “all public records not exempt from disclosure under [Mich. Comp. Laws Ann. § 15.243] and which are subject to disclosure . . .” *Id.*

State agencies are also required to create certain records: final orders or decisions in contested cases, promulgated rules, and “other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.” Mich. Comp. Laws Ann. § 15.241 (1).

2. What physical form of records are covered?

It should be noted that the definition of “public record” refers to “writings.” “Writing” is defined in Mich. Comp. Laws Ann. § 15.232(h) to include:

[H]andwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

Mich. Comp. Laws Ann. § 15.232(h).

Stenographer notes, tape recordings, or dictaphone records have been held to qualify as writings under this section, and therefore, such methods of recording municipal meetings are public records under FOIA. 1979-80 Op. Att’y Gen. 255, 264 (1979). See also *Payne v. Grand Rapids Police Chief*, 178 Mich. App. 193, 443 N.W.2d 481 (1989) (tape recording of emergency 911 call to police department was “public

record” under FOIA). The requester must be permitted to inspect the original document if he wishes; providing copies is insufficient. *Hubka v. Pennfield Twp.*, 443 Mich. 863, 504 N.W.2d 183 (1993); *but see Lapeer County Abstract & Title v. Lapeer County Register of Deeds*, 264 Mich. App. 167, 691 N.W.2d 11 (2004) (county register not required by FOIA to provide requester with microfilm copies rather than paper copies of the records at issue).

In addition, when a requester seeks a copy of computer records, a public body cannot satisfy the request by providing hard copies of the requested information. *Farrell v. City of Detroit*, 209 Mich. App. 7, 530 N.W.2d 105 (1995) (newspaper entitled to computer records used to generate lists of taxpayers and their properties; public body could not satisfy request by providing printout of information contained in computer records). The court in *Farrell* explicitly held that the computer records “constitute public records subject to disclosure under the FOIA.” *Id.*, 209 Mich. App. at 14.

However, computer software developed by and in the possession of a public body has been held *not* to be a record under the FOIA, since computer software is an instructional form which is an integral part of computer operation and not a writing used to record information or ideas. 1979-80 Op. Att’y Gen. 255, 264-65 (1979); *see also Farrell*, 209 Mich. App. at 17 (noting that the requested computer records did not require the public body’s software to be “utilized or released.”); *City of Warren v. City of Detroit*, 261 Mich. App. 165, 680 N.W.2d 57 (2004) (formula for calculating water rates kept by city on computer disk is not software and therefore is not exempt under FOIA). The recent amendments to FOIA have incorporated this interpretation into the statute. *See* Mich. Comp. Laws Ann. § 15.232(e), (f) (“Public record does not include computer software.”).

Photographs such as mug shots are also public records. *Patterson v. Allegan County Sheriff*, 199 Mich. App. 638, 502 N.W.2d 638 (1993). Telephone bills for calls to and from mayor’s home and office, even though prepared by a private company, are public records. *Detroit News Inc. v. City of Detroit*, 22 Med. L. Rptr., 2028 (Mich. App. 1994). Likewise, tapes containing tax information developed by a municipality and used in performing the government’s official function of property tax billing, are public records subject to FOIA disclosure, even though they are in the possession of a third-party contractor. *MacKenzie v. Wales Twp.*, 247 Mich. App. 124, 635 N.W.2d 335 (2001).

3. Are certain records available for inspection but not copying?

“The custodian of a public record shall, upon written request, furnish a requesting person a certified copy of a public record.” Mich. Comp. Laws Ann. § 15.233(6). No section of the FOIA limits the availability of these records any further and a public body may not impose a more restrictive schedule for access to its public records for certain persons than it does for the public generally, based solely on the purpose for which the records are sought. 2001 Op. Att’y Gen. No. 7095 (2001). Moreover, the fact that public records being sought under this section are voluminous does not excuse the public body from permitting inspection of the public record or from providing copies thereof upon payment of a reasonable fee as provided in Mich. Comp. Laws Ann. § 15.234. 1979-80 Op. Att’y Gen. 255, 267 (1979).

D. Fee provisions or practices.

1. Levels or limitations on fees.

The FOIA allows public bodies to charge fees for a public record search, the necessary copying of a public record for inspection, or for providing copies of public records. These fees are to be limited to actual costs of mailing and the actual incremental cost of duplication or publication, “including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information.” Mich. Comp. Laws Ann. § 15.234(1). This is so even when the labor is performed by a public employee during business hours and

does not add extra costs to the public body’s normal budget. 2001 Op. Att’y Gen. No. 7083 (2001).

But a court must first determine whether the person retrieving the information is an employee or independent contractor since §15.234(1) does not mention independent contractors. *Coblentz v. City of Novi*, 475 Mich. 588, 719 N.W. 2d 73 (2006): The FOIA also provides that “[a] fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . . unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs.” Mich. Comp. Laws Ann. § 15.234(3).

The fee limitation, however, does not apply to the costs incurred in the necessary copying or publication of a public record for inspection, or for providing a copy of a public record and mailing the copy. 2001 Op. Att’y Gen. No. 7083 (2001). The phrase “unreasonably high” prohibits a public body from charging a fee for the costs of a search unless the costs incurred by a public body for those activities in the particular instance would be excessive and beyond the normal or usual amount for those services. *Id.* The Court of Appeals has held that the “key factor in determining whether the costs are unreasonably high is the extent to which the particular request differs from the usual request.” *Bloch v. Davison Community Schools*, 2011 Mich. App. LEXIS 771, at *6. (Apr. 26, 2011). Also, “nothing in the language of Mich. Comp. Laws 15.243(2) suggests that the determination of whether costs incurred are unreasonably high is to be determined according to the public body’s operating budget.” *Id.* Public bodies are charged to “establish and publish procedures and guidelines” regulating the levying of fees under the FOIA. Mich. Comp. Laws Ann. § 15.234(3). Further, “[f]ees shall be uniform and not dependent upon the identity of the requesting person.” *Id.*

2. Particular fee specifications or provisions.

Labor costs incurred in duplication, mailing, separation of material, etc., are to be calculated at no more than “the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request . . .” Mich. Comp. Laws Ann. § 15.234(3). This 1996 amendment is a change from the previous version of the FOIA. Despite this seemingly clear language, the Michigan Attorney General has opined that in calculating these labor costs a public body may include fringe benefits paid to its employees. 1999 Op. Att’y Gen. No. 7017 (1999) (Attorney General opinions are not binding on the courts).

Further, public bodies are charged to “utilize the most economical means available for providing copies.” *Id.*; *see also Tallman v. Cheyboygan Area Schools*, 183 Mich. App. 123, 454 N.W.2d 171, 174-75 (1990) (school district not permitted to employ its own method of computing copying charges, even if reasonable, to save money because a public body may not on its own deviate from computation method set forth in FOIA).

If there is an act or statute specifically authorizing the sale of public records, including the amount of the fee for providing a copy of the public record, the FOIA fee provisions do not apply. *Title Office Inc. v. Van Buren County Treasurer*, 496 Mich. 516, 676 N.W.2d 207 (2004) (The fees for copies of property tax records requested from a county treasurer are to be computed according to the fee schedule provided in the Transcripts and Abstracts of Records Act [TARA]). “A public body shall utilize the most economical means available for providing copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs.” *See Tallman, supra.*

a. Search.

See above paragraph.

b. Duplication.

See above paragraph. “For an indigent, a copy of a public record is to be furnished without charge for the first \$ 20 of the fee for each request upon receipt of an affidavit showing inability to pay because of indigence.” *Kearney v. Department of Mental Health*, 168 Mich. App. 406, 425 N.W. 2d 161 (1988).

c. Other.

N/A.

3. Provisions for fee waivers.

The FOIA provides for fee waivers for both searches and copies in at least two circumstances:

a. Where the public body “determines that a waiver or reduction of the fee is in the public interest because furnishing copies of the public record can be considered as primarily benefiting the general public.” Mich. Comp. Laws Ann. § 15.234(l); *see also Kearney v. Dep’t of Mental Health*, 168 Mich. App. 406, 425 N.W.2d 161, 162 (1988) (mental health patient not entitled to receive copy of his 800-page treatment record without charge because such disclosure not a matter of public interest); and

b. Where an individual submits an affidavit stating that he or she is receiving public assistance or otherwise shows inability to pay the cost because of indigency. In such cases, the statute provides that a copy of the public record shall be furnished without charge for the first \$20.00 of the fee for each request. Mich. Comp. Laws Ann. § 15.234(l); *but see Kearney, supra*, 425 N.W.2d at 162-63 (because patient failed to attach indigency affidavit to his request, charging \$80 copying fee was not improper. At best, patient was entitled to a \$20 waiver).

The FOIA provides that the fee structure set forth in Mich. Comp. Laws Ann. § 15.234 does not apply “to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.” Mich. Comp. Laws Ann. § 15.234(4). In *Grebner v. Clinton Charter Township*, 216 Mich. App. 736, 550 N.W.2d 265 (1996), the Michigan Court of Appeals ruled that the Michigan Election Law, Mich. Comp. Laws Ann. § 16.522(1), did not specifically authorize the sale of voter registration rolls, and therefore held that the usual FOIA fee structure applied to requests for voter registration rolls.

4. Requirements or prohibitions regarding advance payment.

A public body may request a “good faith deposit” from the person requesting a record if the fee will exceed \$50.00, so long as the deposit does not exceed half of the total fee. Mich. Comp. Laws Ann. § 15.234(2). A public body may refuse to process a FOIA request if the requester fails to pay such good faith deposit properly requested by the public body. 1998 Op. Att’y Gen. No. 6977 (1998). Moreover, a public body may require that its fees be paid in full prior to actual deliveries of copies. *Id.* However, a public body may not refuse to process a subsequent FOIA request on the ground that the requester failed to pay fees charged for a prior FOIA request. *Id.*

5. Have agencies imposed prohibitive fees to discourage requesters?

Some public bodies have attempted to impose prohibitive fees to discourage requesters. These attempts can take the form of a high copying fee or a high labor rate, among other means. Although Michigan courts have not definitely resolved what rate for copying is ac-

ceptable, requesters are advised to take the position that any charge in excess of 10-15 cents per page is unreasonable, as this is comparable to the charges that would be incurred through a commercial copying source where a labor charge is also being paid.

In one case, where the requester sought a computer tape of driving license records, the public body asserted that the requester would have to pay a transaction fee for each record under an allegedly applicable state statute. The fee would have totaled almost \$50 million. A Circuit Court held that the statute was not applicable, and that the requester would have to pay only for the required computer tape and programming needed to provide non-exempt information — a fee totaling a few thousand dollars. *Gilmore v. Secretary of State*, Oakland County Circuit Court Case No. 92-432519 CZ, affirmed in an unpublished decision May 16, 1997, Michigan Court of Appeals, No. 188313.

However, it should be noted that the 1996 amendment to Mich. Comp. Laws Ann. § 15.234(3), which permits a public body to charge no more than the hourly wage of the “lowest paid public body employee capable of retrieving the information necessary to comply with a request” may give public bodies the authority to charge a higher search fee than would have been permitted under the previous version of Mich. Comp. Laws Ann. § 15.234(3). Courts have interpreted this provision to allow a city attorney to conduct the FOIA review. *Coblentz v. City of Novi*, 264 Mich. App. 450, 691 N.W.2d 22 (2004) (city attorney was lowest paid employee capable of retrieving the information when it was necessary to determine whether requested material is exempt under the law). Additionally, “public employee” has been extended to include independent contractors hired by a public body. *Id.*

To combat excessive fees which discourage requesters, FOIA explicitly provides that “[a] fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . . unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs.” Mich. Comp. Laws Ann. § 15.234(3). Notwithstanding that provision, many public bodies have been routinely assessing search fees for every request, ignoring the “unreasonably high costs” language. The Michigan Attorney General has opined that such routine labor charges are illegal. The opinion is binding on state government departments. 2001 Op. Att’y Gen. No. 7083 (2001).

E. Who enforces the act?

The requesting person is the only party which may bring an action under the FOIA. See Mich. Comp. Laws Ann. § 15.240(1)(b) (the requesting party may commence an action in the circuit court to compel the public body’s disclosure of the public records within 180 days after a public body’s final determination to deny a request).

1. Attorney General’s role.

The Attorney General plays no role in the enforcement of the FOIA.

2. Availability of an ombudsman.

The FOIA does not provide for an ombudsman.

3. Commission or agency enforcement.

There is no commission or agency enforcement of the FOIA.

F. Are there sanctions for noncompliance?

“The court shall award reasonable attorney’s fees, costs, and disbursements” to a requesting person that prevails under the FOIA. Mich. Comp. Laws Ann. § 15.240(6). If the requesting person only prevails in part, “the court may, in its discretion, award all or an appropriate portion of reasonable attorney’s fees, costs, and disbursements.” *Id.*

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

The exemptions are specific. Items exempt from disclosure are listed in Mich. Comp. Laws Ann. § 15.243. Beyond the listed exemptions, the FOIA provides that a public body may “make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of [its] functions.” Mich. Comp. Laws Ann. § 15.233(3). Further, the 1996 amendments to the FOIA specifically direct public bodies to “protect public records from loss, unauthorized alteration, mutilation or destruction.” *Id.* For example, where an individual sought to examine extremely large quantities of documents, a rule limiting her free use of the university’s viewing and copying equipment, personnel, and office space to a period of two weeks, thereafter requiring her to cover her own expenses, was upheld as a reasonable means of limiting undue interference with the day-to-day operations of the university. *Cashel v. Regents of the University of Michigan*, 141 Mich. App. 541, 367 N.W.2d 841 (1985). This general rule making authority does not, however, allow public bodies to create new exemptions under the Act. *Cashel v. Smith*, 117 Mich. App. 405, 324 N.W.2d 336, 338 (1982) (rule allegedly promulgated by the University of Michigan which stated that “[t]he idly or maliciously curious need not be accommodated” under the FOIA was invalid because it purported to create an exemption under the FOIA which the legislature had not chosen to include).

b. Mandatory or discretionary?

The exemptions in Mich. Comp. Laws Ann. § 15.243 do not render confidential the types of information listed, but only authorize a public body to decline disclosure of exempt material. 1979-80 Op. Att’y Gen. 468, 469 (1979). The Michigan Supreme Court has held that the FOIA authorizes, but does not require, nondisclosure of public records which fall within the enumerated exemptions. *Tobin v. Michigan Civil Service Comm’n*, 98 Mich. App. 604, 296 N.W.2d 320 (1980), *aff’d*, 416 Mich. 661, 331 N.W.2d 184 (1982). In cases where public bodies do, in their discretion, choose to claim exemption from disclosure, the Michigan Supreme Court has established the following guidelines for use in analyzing such claims:

- (1) The burden of proof is on the public body claiming exemption from disclosure;
- (2) Exemptions must be interpreted narrowly;
- (3) The public body must separate the exempt and nonexempt material and make the nonexempt material available for inspection and copying;
- (4) Detailed affidavits describing the matter withheld must be supplied by the public body;
- (5) Justification for a claimed exemption must be more than conclusory, i.e., more than a simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings; and
- (6) The mere showing of a direct relationship between records sought and an investigation is inadequate.

The same guidelines apply to other exemptions. *Evening News Ass’n v. City of Troy*, 417 Mich. 481, 339 N.W.2d 421, 431-432 (1983).

The *Evening News* Court also established a three-step procedure to be used to determine whether a sufficient justification for exemption exists:

- (1) The court should receive a complete particularized justification as set forth in the six above rules; or

- (2) The court should conduct a hearing *in camera* based on *de novo* review to determine whether a complete particularized justification pursuant to the six rules exists; or

- (3) The court can consider allowing plaintiff’s counsel to have access to the contested documents in camera under *special* agreement whenever possible. *Id.*, 339 N.W.2d at 432; *see also Post-Newsweek Stations, Michigan Inc. v. City of Detroit*, 179 Mich. App. 331, 445 N.W.2d 529, 532 (1989) (remanding case to trial court because its order permitting city to redact material rather than making full disclosure of requested police report “clearly falls far short of the standards given in *Evening News*. . . . The order is wholly conclusory.”); *Grand Rapids Police Chief, supra* (trial court should have appointed master at plaintiff’s expense to review requested tape recordings to protect them and to prevent interference with police department’s functions); and *Nicita v. City of Detroit*, 194 Mich. App. 657, 487 N.W.2d 814 (1992) (*Evening News* does not require court to proceed to *in camera* review and the dispute should usually be resolved under step one). *But see Detroit News v. Policemen and Firemen Retirement System*, 252 Mich. App. 59, 651 N.W. 2d 127 (2002) (court remanded to the trial court so that it could determine *in camera* whether the exemption applied).

When ruling that an exemption under the FOIA prevents disclosure of particular documents, a trial court must make particularized findings of fact indicating why the claimed exemption is appropriate. *Messenger v. Michigan Dep’t of Consumer & Industry Services*, 238 Mich. App. 524, 606 N.W. 2d 35 (1999).

c. Patterned after federal Freedom of Information Act?

The exemptions in Michigan’s FOIA generally mirror the exemptions found in the federal FOIA, and Michigan courts have analogized to federal cases interpreting the federal act in interpreting the Michigan statute. *Evening News Ass’n, supra*, 339 N.W.2d at 428; *see also Kestenbaum v. Michigan State University*, 97 Mich. App. 5, 294 N.W.2d 228, 235 (1980), *aff’d*, 414 Mich. 510, 327 N.W.2d 783 (1982). However, in some circumstances, courts have noted that the exemptions in the Michigan FOIA differ from those in the federal FOIA. *See, e.g., Michigan Federation of Teachers and School Related Personnel v. University of Michigan*, 481 Mich. 753 N.W. 2d 28 (2008) (court noting that a federal exemption covers personnel and medical files, whereas the corresponding Michigan exemption covers information of a personal nature).

2. Discussion of each exemption.

- a. The FOIA exempts “[i]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” Mich. Comp. Laws Ann. § 15.243(1)(a). Michigan courts have tended to interpret the privacy exemption as requiring a weighing process between the harm to the individual and the public policy served by disclosure. For example, the Michigan Court of Appeals has held that, although one seeking information under the Act is not generally required to divulge the reasons for the request, where an invasion of privacy may occur, the person seeking disclosure must show that the benefit to the public interest in releasing the information outweighs the possibility of harm to the people involved. *Kestenbaum, supra*, 294 N.W. 2d at 235. *See also Tobin v. Michigan Civil Service Comm’n, supra* (agency should weigh interests of those whose privacy is affected against public purpose to be served by releasing the information).

The Michigan Supreme Court remained divided on the issue for a number of years. In *International Union, United Plant Guard Workers of America (UPGWA) v. Dep’t of State Police*, 422 Mich. 432, 373 N.W.2d 713 (1985), the Court declined to determine whether the FOIA requires courts to balance the benefits of disclosure against the intrusion of privacy, or to simply measure the nature and extent of the asserted privacy invasion, because the information requested in that case did

not constitute a clearly unwarranted invasion of privacy under either approach. 373 N.W.2d at 715.

However, an evenly divided Court considered the question in *State Employees Ass'n v. Dep't of Management and Budget*, 428 Mich. 104, 404 N.W.2d 606 (1987). In an opinion by Justice Cavanagh with two justices concurring, the Court held that the legislature did not intend a balancing of interests to occur in judicial evaluations of the privacy exemption. They reasoned that the legislature specifically indicated five exemptions where it intended a balancing of interests to occur (Mich. Comp. Laws Ann. § 15.243(c), (l), (n), (o), and (t)) and the privacy exemption is not among those exemptions. 404 N.W.2d at 613. The Court held that, in determining whether to withhold information under the privacy exemption, the agency should not consider the requester's identity or evaluate the purpose for which the information would be used. 404 N.W.2d at 614. The sole issue in the case was whether disclosure of the home addresses of various public employees would constitute a clearly unwarranted invasion of privacy. That inquiry was guided by common law and constitutional principles:

The legislature made no attempt to define the right of privacy. We are left to apply the principles of privacy developed under the common law and our constitution. The contours and limits are thus to be determined by the court, as the trier of fact, on a case-by-case basis in the tradition of the common law. Such an approach permits, and indeed requires, scrutiny of the particular facts of each case, to identify those in which ordinarily impersonal information takes on "an intensely personal character" justifying nondisclosure under the privacy exemption.

404 N.W.2d at 614-15 (footnotes omitted).

The court concluded that disclosure in that case would **not** constitute a clearly unwarranted invasion of privacy. 404 N.W.2d at 616.

The judicial balancing test advocated by three other justices in *State Employees* is the one proposed by Justice Ryan in *Kestenbaum*, *supra*, and has two parts. First, it must be determined whether the requested information is "of a personal nature" which thereby gives rise to a cognizable privacy interest. If the information is of a personal nature, then the public's interest in disclosure is balanced against the privacy interest to determine whether disclosure would amount to a "clearly unwarranted invasion of an individual's privacy" within the meaning of the privacy exemption. When applying this test the court must balance the public interest against the privacy interest with a tilt in favor of disclosure. The court is obligated to remember that the alleged invasion of privacy must be clearly unwarranted. 404 N.W.2d at 606.

Analyses of the privacy exemption have evolved into a two part inquiry: (1) whether the information is of a "personal nature" and (2) whether the disclosure of such information would be a "clearly unwarranted invasion of privacy." *Bradley v. Saranac Community Schools*, 455 Mich. 285, 565 N.W. 2d 650 (1997). If the information is not of a "personal nature," the inquiry ends. *Id.* In cases interpreting the privacy exemption, the Michigan Supreme Court has fleshed out what courts should look at in determining whether information is of a "personal nature." In *Swickard v. Wayne County Medical Examiner*, *supra*, the Supreme Court held that in determining whether information withheld is of a "personal nature," "the customs, mores, or ordinary views of the community" must be taken into account. 438 Mich. at 547. Applying this standard, courts have held that autopsy reports and toxicology test results of a deceased judge, travel expense reports of a public body, business documents submitted to a public body in connection with a redevelopment proposal, and the names of elected officials and public employees for whom the city was paying attorney's fees related to a grand jury investigation were not records of a "personal nature." See *Swickard*; *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 444 Mich. 211, 507 N.W. 2d 422 (1993); *Nicita (After Remand)*, 216 Mich. App. 746, 550 N.W.2d 269 (1996); *Detroit Free Press v. City of Warren*, 250 Mich. App. 164, (2002).

In *Bradley*, *supra*, the Michigan Supreme Court succinctly stated

the test: "[W]e conclude that information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. We evaluate this standard in terms of the customs, mores, or ordinary views of the community." 455 Mich. at 294 (internal quotations omitted). A mere "deleterious effect" for the individual who is the focus of the requested record is not equivalent to the disclosure of "intimate or embarrassing details." *Detroit Free Press v. City of Warren*, *supra*, 250 Mich. App. at 170. Further, the fact that the disclosure of information "could conceivably lead to the revelation of personal information is not sufficient to satisfy the "personal nature" exemption. *Booth Newspapers Inc. v. University of Michigan Board of Regents*, *supra*, 444 Mich. at 233; *Nicita*, *supra*, 550 N.W.2d at 273.

Analogizing to the federal FOIA, the Supreme Court in *Booth Newspapers Inc. v. University of Michigan Board of Regents* held that Mich. Comp. Laws Ann. § 15.243(1)(a) is "directed at threats to privacy interests more palpable than mere possibilities." *supra*, 444 Mich. at 233 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 380 n. 19 (1976)). The Michigan Supreme Court recently held that "private or confidential information, including embarrassing or intimate details, is information of a personal nature." *Michigan Federation of Teachers v. University of Michigan*, 481 Mich. 657, 753 N.W.2d 28 (2008).

As to the second prong, whether disclosure would be a "clearly unwarranted invasion of privacy," the Michigan Supreme Court stated in *Bradley*, *supra* that "[p]rinciples of common-law privacy do come into play when the court is determining whether information of a personal nature constitutes a clearly unwarranted invasion of an individual's privacy." 455 Mich. at 302. Further, in *Mager v. Dep't of State Police*, 460 Mich. 134, 595 N.W. 2d 142 (1999), the court looked to federal decisions concerning the federal FOIA and found that "a court must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." 460 Mich. at 140-145 (quoting *United States Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994)). The court further held that the relevant "public interest" to be weighed in this balance "is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." 460 Mich. at 145 (quoting *United States Dep't of Defense*, *supra*, 510 U.S. at 495). The court held that fulfilling a request for personal information concerning private citizens, where the request was "entirely unrelated to any inquiry regarding the inner workings of government," would constitute a clearly unwarranted invasion of privacy. 460 Mich. at 146.

Previously, Michigan decisions had rejected the "core purpose" requirement in applying the privacy exception. But the *Michigan Federation* Court affirmatively held that the *Mager* core purpose test should be applied under the second prong (and *Bradley* should be applied under the first prong). 481 Mich. at 675. Moreover, in *Practical Political Consulting v. Secretary of State*, the Michigan Supreme Court held that the test articulated in *Michigan Federation* must be applied consistently with the overarching principles found in common and constitutional law. 287 Mich. 434, 789 N.W. 2d 178 (2010).

Information which has been held to be exempt under the privacy exemption includes salaries paid to university employees, *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 287 N.W.2d 304 (1979); retirement and pension information of retired employees, 1979-80 Op. Att'y Gen. 255, 273 (1979); disciplinary memos in an employee's personnel file, 1979-80 Op. Att'y Gen. at 272-73; a crime victim's past sexual history, address, and telephone number, *Pennington v. Washtenaw County Sheriff*, 125 Mich. App. 556, 336 N.W.2d 828 (1983); identity of a teacher charged with allegations of sexual misconduct, but not documents related to the charges, with the teacher's name redacted, *Booth Newspapers Inc. v. Kalamazoo School District*, 181 Mich. App. 752, 450 N.W.2d 286, 289 (1989); addresses of donors to university, *Clerical-Technical Union of Michigan State University*, 190 Mich. App. 300, 475 N.W.2d 373, 375 (1991); names and addresses of persons who owned registered handguns, *Mager*, *supra*; addresses of persons who had unclaimed property, *Kocher v. Dep't of Treasury*, 241

Mich. App. 378, 615 N.W.2d 767 (2000); municipal information regarding the death of private citizens by traffic accident, *Larry S. Baker, P.C. v. City of Westland*, 245 Mich. App. 90, 627 N.W.2d 27 (2001); and names and addresses of people who receive lottery winnings over \$10,000 by assignment, *Stone Street Capital Inc. v. Michigan Bureau of State Lottery*, 263 Mich. App. 683, 689 N.W.2d 541 (2004).

Information held not to qualify under this exemption, and therefore required to be disclosed under the FOIA, includes home addresses of various public employees, *State Employees Ass'n, supra*, 404 N.W.2d at 607 and *Tobin, supra*, 331 N.W.2d at 327; the arrest records of someone eventually convicted of the crime in question, 1979-80 Op. Att'y. Gen. at 203; mug shots of persons charged with bank robbery, *Detroit Free Press v. Oakland County Sheriff*, 164 Mich. App. 656, 418 N.W.2d 124 (1987); the names and addresses of persons who leased suites at Pontiac Stadium, *Oakland Press v. Pontiac Stadium Building Authority*, 173 Mich. App. 41, 433 N.W.2d 317, 319 (1988); business records submitted to a public body in connection with a redevelopment proposal, *Nicita, supra*, 487 N.W.2d at 819; records regarding taxes paid by hotels and motels in Kent County, *Booth Newspapers Inc. v. Kent County Treasurer*, 175 Mich. App. 523, 438 N.W.2d 317, 320 (1989); school file of minor student requested by his mother, *Lepp v. Cheboygan Area Schools*, 190 Mich. App. 726, 476 N.W.2d 506, 509-510 (1991); autopsy reports and toxicology test results regarding a deceased district court judge, *Swickard, supra*, 475 N.W.2d at 313, travel expense records of public bodies, *Booth Newspapers Inc. v. University of Michigan Regents, supra*; names, current employment, age and residence of candidates for fire chief, *Herald Company Inc. v. Bay City*, 463 Mich. 111, 614 N.W.2d 873 (2000); consumer complaints filed with a state agency against property insurers, *Detroit Free Press v. Dep't of Consumer & Industry*, 246 Mich. App. 311, 631 N.W.2d 769 (2001) (names and addresses of private individuals required to be redacted); information concerning a police deputy's psychological counseling and treatment, *Herald Company Inc. v. Kent County Sheriff's Dep't*, 261 Mich. App. 32, 680 N.W.2d 529 (2004); personnel records of public employees, other than law enforcement agencies, including disciplinary records, are public records subject to FOIA, *Bradley, supra*; *Herald Company Inc. v. Ann Arbor Public Schools*, 224 Mich. App. 266, 568 N.W.2d 411 (1997).

Pension benefits of retired police officers and firemen were not of personal nature despite the fact that they were drawn from private assets; these amounts reflected the government's decision-making and hence were more comparable to public salaries, *Detroit Free Press v. City of Southfield*, 269 Mich. App. 275, 713 N.W.2d 28 (2005).

b. Mich. Comp. Laws Ann. § 15.243(l)(b) exempts "[i]nvestigating records compiled for law enforcement purposes" where disclosure would do any of the following:

- (i) Interfere with law enforcement proceedings;
- (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication;
- (iii) Constitute an unwarranted invasion of personal privacy;
- (iv) Disclose the identity of a confidential source or, if the record is compiled by a criminal law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source;
- (v) Disclose law enforcement investigative techniques or procedures; or
- (vi) Endanger the life or physical safety of law enforcement personnel.

The Michigan Court of Appeals has held that these exemptions for investigative records are to be construed narrowly and "must be supported by substantial justification and explanation, not merely by conclusory assertions." *Pennington v. Washtenaw County Sheriff*, 125 Mich. App. 556, 336 N.W.2d 828 (1983) (quoting *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 658-59, 287 N.W.2d 304,

308 (1979)). The Court of Appeals reaffirmed this principle recently: "the justification of an exemption must be more than mere conclusory, i.e. simple repetition of statutory language, specifically a bill of particulars is in order. *State News v. Michigan State University*, 274 Mich. App. 578, 735 N.W.2d 649 (2007), *rev'd in part on other grounds*. The Michigan Supreme Court has likewise interpreted the law enforcement exemptions strictly. *Evening News Ass'n v. City of Troy*, 417 Mich. 481, 339 N.W.2d 421 (1983) (error to use "generic determination" standard that release of police reports along with the information contained in them would "interfere with law enforcement proceedings" and would have a "chilling effect on the investigation, without a showing by defendants of particular risk); *Payne, supra*, 443 N.W.2d at 481 (error to deny request to review tape recording of 911 emergency calls made to police department on grounds that, unless names, addresses and telephone numbers of the callers were deleted, disclosure could interfere with law enforcement procedures or disclose the identity of confidential sources because trial court failed to find with sufficient particularity that defendant had justified its claimed exemption); *Herald Company Inc. v. City of Kalamazoo*, 229 Mich. App. 376, 581 N.W.2d 295 (1998) (an open investigation cannot be construed to continue until the expiration of the applicable period of limitation for criminal prosecution without actual, ongoing law enforcement investigation); *Herald Company Inc. v. Kent County Sheriff's Dep't*, 261 Mich. App. 32, 680 N.W.2d 529 (2004) (internal affairs investigation records not exempt because not compiled for law enforcement purposes and disclosure would not interfere with an ongoing investigation). However, this exemption is not limited in application to police investigations of criminal matters, and can apply to investigations of sexual harassment. *Yarborough v. Dep't of Corrections*, 199 Mich. App. 180, 501 N.W.2d 207 (1993).

c. Public bodies are not required to disclose records where disclosure "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 . . . outweighs the public interest in nondisclosure." Mich. Comp. Laws Ann. § 15.243(1)(c). The Michigan Court of Appeals has held that, because of the public policy of disclosure of complete information concerning the affairs of government, this exemption must be given a narrow construction, balancing the public interests in institutional security and freedom of information on a case-by-case basis. *Ballard v. Dep't of Corrections*, 122 Mich. App. 123, 332 N.W.2d 435 (1982); *but see, Walen v. Dep't of Corrections*, 443 Mich. 240, 505 N.W.2d 519 (1992) (holding that FOIA applied to disciplinary hearings and that final orders and decisions of such hearings should be made available to the public); *see also Mithrandir v. Dep't of Corrections*, 164 Mich. App. 143, 416 N.W.2d 352 (1987) (maximum security prisoner who had made previous escape attempt must either accept copies of requested files or appoint a representative to inspect the original files because files were located outside the maximum security area); and *Lee v. Assistant Records Supervisor of Marquette Branch Prison*, No. 105932 (Mich. Ct. App. July 12, 1989) (per curiam) (upholding denial of prisoner's request for information about other inmates because defendant's affidavit adequately explained why release of the information would jeopardize prison security). The 1996 amendments to FOIA narrowed the definition of "persons" who may request records under the act by excluding "an individual serving a sentence of imprisonment." Moreover, "from a policy standpoint, a blanket exemption should apply for requests by inmates for information about other inmates under the prison security exemption . . . That approach is consistent with the high public interest in maintaining security of penal institutions and the relatively low interest in disclosure when the requested documents do not pertain to the inmate making the request, but rather to other inmates." *Mackey v. Dep't of Correction*, 205 Mich. App. 330, 517 N.W.2d 303 (1994).

d. Public bodies need not disclose "[r]ecords or information specifically described and exempted from disclosure by statute." Mich. Comp. Laws Ann. § 15.243(1)(d). For example, Mich. Comp. Laws 38.104 allows Teacher Tenure Commission to hold private hearings

at the request of the affected teacher only at the administrative level. However, beyond that, there is no basis for statutory exemption. *Hagen v. Dep't of Education*, 431 Mich. 118, 427 N.W. 2d 879, (1988). Similarly, since Mich. Comp. Laws Ann. § 207.511(a) exempts affidavits stating the value of real estate from disclosure to any person except for county fund auditing purposes, such affidavits need not be disclosed under the FOIA. 1981-82 Op. Att'y Gen. 518 (1982). This exemption was found not to apply in *Oakland County Prosecutor v. Dep't of Corrections*, 222 Mich. App. 654, 564 N.W. 2d 922 (1997) (prosecutor's request for parolee's psychological records granted under statute that states disclosure allowed when "necessary to comport with other provisions of the law."); voter registration records were exempt from Mich. Comp. Laws 168.495(a)(2), but the "separate records" in this case did not meet the definition and were not exempt from disclosure, *Practical Political Consulting*, supra, 287 Mich. App. at 450; *Messenger v. Consumer & Industry Services*, 238 Mich. App. 524, 606 N.W.2d 38 (1999) (passive collection of data does not qualify as "investigation" under the public health code). *But see Anzaldua v. Neogen Corp.*, 2011 LEXIS App. 887 (May 17, 2011) ("investigation" under the Whistleblower's Protection Act is defined differently from "investigation" under the Public Health Code); voting ballots were not exempt from FOIA because there is no statute that explicitly exempts them. 2010 Op. Att'y Gen. LEXIS 7, 7247 (May 13, 2010).

e. Where a public record fitting the description of exempt information under Mich. Comp. Laws Ann. § 15.243 is furnished by the public body which originally compiled, prepared, or received the information to another public officer or body in connection with the duties of that officer or body, such information remains exempt from disclosure, so long as "the considerations originally giving rise to the exempt nature of the public record remain applicable." Mich. Comp. Laws Ann. § 15.243(1)(e) (formerly Mich. Comp. Laws Ann. § 15.243(1)(f)).

f. "Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy" are exempt from disclosure when:

(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. Mich. Comp. Laws Ann. § 15.243(1)(f) (formerly Mich. Comp. Laws Ann. § 15.243(1)(g)). The Michigan Supreme Court recently interpreted 15.243(1)(f)(iii) : "Whether the time it 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. Reasonableness is a discretionary determination." *Coblentz v. City of Novi*, 475 Mich. 588, 719 N.W. 2d 73 (2006).

The trade secrets exemption does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit. *Blue Cross & Blue Shield v. Insurance Bureau Hearing Officer*, 104 Mich. App. 113, 304 N.W. 2d 499 (1981). Information submitted to the insurance bureau in support of a request for a rate hike is not subject to exemption from public disclosure under FOIA as a trade secret where competitors of the party seeking nondisclosure can acquire the information sought to be exempted "without substantial difficulty by direct contact" with the individual subscriber groups covered by policies issued by the party seeking nondisclosure. *Id.*

g. "Information or records subject to the attorney-client privilege." Mich. Comp. Laws Ann. § 15.243(1)(g) (formerly Mich. Comp. Laws

Ann. § 15.243(1)(h)). Thus, for example, when the Attorney General or State Public Administrator acting in his or her capacity as Assistant Attorney General is representing the state, his or her files and work-product are subject to the attorney-client privilege and may be exempt from disclosure. This exemption continues regardless of whether the files and work-product are retained by the Attorney General or delivered to the agency for preservation and safe keeping. 1979-80 Op. Att'y Gen. 255, 291-92 (1979). *See also McCartney v. Attorney General*, 231 Mich. App. 722, 587 N.W. 2d 824 (1998) (letters received from third parties forwarded by Governor's office to Attorney General were exempt from disclosure). *But see Herald Company Inc. v. Ann Arbor Public Schools*, 224 Mich. App. 266, 568 N.W. 2d 411 (1997) (tape recording of interview between school district teacher and school district's attorney not exempt because the interview was adversarial and was not about how school was going to defend itself in legal action).

h. Likewise, information or records subject to "other privilege recognized by statute or court rule," including confidential communications between physicians or psychologists and their patients, and between ministers, priests, or Christian Science practitioners and those they counsel, are also exempt from disclosure. Mich. Comp. Laws Ann. § 15.243(1)(h) (formerly Mich. Comp. Laws Ann. § 15.243(1)(i)) *See Herald Company Inc.*, supra, 224 Mich. App. 266 (medical records submitted by teacher to schools were protected by physician-patient privilege).

i. A public body need not disclose a bid or proposal to enter into a contract or agreement "until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the time for the receipt of bids or proposals has expired." Mich. Comp. Laws Ann. § 15.243(1)(i) (formerly Mich. Comp. Laws Ann. § 15.243(1)(j)); *see also Nicita*, supra, 487 N.W.2d at 819 (1992) (exemption applies only to a competitive bidding process where bids are solicited but not to unsolicited bids).

j. Appraisals of real property to be acquired by a public body need not be disclosed until "(i) an agreement is entered into or (ii) three years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated." Mich. Comp. Laws Ann. § 15.243(1)(j) (formerly Mich. Comp. Laws Ann. § 15.243(1)(k)).

k. "Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination" need not be disclosed "unless the public interest in disclosure outweighs the public interest in nondisclosure." Mich. Comp. Laws Ann. § 15.243(1)(k) (formerly Mich. Comp. Laws Ann. § 15.243(1)(l)). *See Schroeder v. City of Detroit*, 221 Mich. App. 364, 561 N.W. 2d 497 (1997) (the public interest in disclosure of psychological evaluation used by city to determine applicants' fitness for police officer position was outweighed by strong public interest in preserving integrity of hiring process through nondisclosure).

l. The Act exempts from disclosure "[m]edical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation." Mich. Comp. Laws Ann. § 15.243(1)(l) (formerly Mich. Comp. Laws Ann. § 15.243(1)(m)). In *Bradley*, supra, the Michigan Supreme Court found that performance evaluations of teachers are not "counseling" evaluations and that the exemption was not applicable when the requester asked for records of a particular individual; in that case, the patient's identity would not be revealed because it was already known. 455 Mich at 297-298.

m. "[C]ommunications and notes within a public body or between 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" are also exempt from disclosure. However, in order for this exemption to apply, the public body must show that "in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure." Mich. Comp. Laws Ann. § 15.243(1)(m) (formerly Mich. Comp. Laws Ann.

§ 15.243(1)(n)). Thus, portions of preliminary drafts of documents which do not exist as final drafts may be exempt from disclosure unless they contain purely factual material. “The phrase ‘preliminary to a final agency action or determination’ modifies ‘communications and notes.’ The inclusion of this limiting phrase signifies Michigan Legislature’s intent to exclude from the ambit of the frank communication exemption those communications and notes that were not preliminary to a final agency determination of policy or action when they were created.” *Bulowski v. City of Detroit*, 478 Mich. 268, 732 N.W. 2d 75 (2007). Preliminary and advisory communications between and within public bodies are also exempt. 1979-80 Op. Att’y Gen. 255, 297-98 (1979). However, the mere showing that a document falls within this exemption is not adequate where the public body does not prove specifically that the need for nondisclosure clearly outweighs the public interest in disclosure. *Nicita v. City of Detroit (After Remand)*, 216 Mich. App. 746 (1996) (documents ordered produced where city failed to make such showing with regard to each document). In *Bradley, supra*, the Michigan Supreme Court held that only a public body had standing to assert this exemption and that the person whose records were sought could not raise this exemption in a “reverse FOIA” action. 455 Mich. at 296.

Further, this section specifically states that it does not constitute an exemption under state law for purposes of section 8(h) of Michigan’s Open Meetings Act (Mich. Comp. Laws Ann. § 15.268(h)), which allows public bodies to meet in closed session “[t]o consider material exempt from discussion or disclosure by state or federal statute.” Thus, information which is exempt from disclosure under Mich. Comp. Laws Ann. § 15.243(1)(m) may not for that reason be discussed in closed session under Mich. Comp. Laws Ann. § 15.268(h). Also, the phrase “determination of policy or action” includes determinations relating to collective bargaining, “unless the public record is otherwise required to be made available under [Mich. Comp. Laws Ann. § 423.201-.216, which labor regulations governing public employees].” Mich. Comp. Laws Ann. § 15.243(1)(m); see also *McCartney v. Attorney General*, 231 Mich. App. 722, 587 N.W. 2d 824 (1998) (internal memoranda written by Assistant Attorney General exempt from disclosure); *Herald Company Inc. v. Ann Arbor Public Schools*, 224 Mich. App. 266, 568 N.W.2d 411 (1997) (significant public interest in disclosing a memorandum that contains public observations of a teacher who has been convicted of carrying a concealed weapon not outweighed by public interest in encouraging frank communications within a public body); *Michigan Professional Employees Society v. Dep’t of Natural Resources*, 192 Mich. App. 483, 482 N.W.2d 460 (1991) (request by employee who was unsuccessful candidate for promotion for all screening and interview documents, including handwritten interview notes and evaluations, regarding him properly denied because any personal benefit to plaintiff through disclosure was greatly outweighed by the public interest in protection of the discretionary employment decision-making process and encouraging frank communications regarding employment of public officers); *Favors v. Dep’t of Corrections*, 192 Mich. App. 131, 480 N.W.2d 604 (1991) (request by prisoner for copy of worksheet used by disciplinary credit committee to determine whether to recommend good-time credits properly denied because release of document could discourage frank appraisals by the committee and thus inhibit accurate assessment of inmate’s merits); 1979 Op. Att’y Gen. 5500, 275-276, 287-288 (1979) (observation sheets used by state police that contained review board members’ candid impressions of candidates for promotion exempt from disclosure); and *Traverse City Record Eagle v. Traverse City Area Public Schools*, 184 Mich. App. 609, 459 N.W.2d 28 (1990) (tentative collective bargaining agreement between school district and unions exempt from disclosure because it was message from school board and union representatives to their respective bodies, advisory in nature, and because premature disclosure would have negative impact on negotiation process); *Herald Co. Inc. v. Eastern Mich. University Board of Regents*, 265 Mich. App. 185, 204, 693 N.W.2d 850 (2005) (letter from university VP to a Regent regarding expenditures at the university president’s home exempt because disclosure “would likely hurt, not advance, the public interest”).

n. “Records of law enforcement communication codes, or plans for deployment of law enforcement personnel” need not be disclosed if disclosure “would prejudice a public body’s ability to protect the public safety unless the public interest in disclosure . . . outweighs the public interest in nondisclosure in the particular instance.” Mich. Comp. Laws Ann. § 15.243(1)(n) (formerly Mich. Comp. Laws Ann. § 15.243(1)(o)).

o. Mich. Comp. Laws Ann. § 15.243(1)(o) exempts “[i]nformation that would reveal the exact location of archeological sites.” However, the section allows the secretary of state to promulgate rules to provide for the disclosure of the location of such sites “for purposes relating to the preservation or scientific examination of sites.” Mich. Comp. Laws Ann. § 15.243(1)(o) (formerly Mich. Comp. Laws Ann. § 15.243(1)(p)).

p. “Testing data developed by a public body in determining whether bidders’ products meet the specifications for purchase of those products by the public body” are exempt from disclosure if it would reveal that only one bidder has met the specifications. However, this exemption applies only until one year has elapsed from the time the public body completes the testing. Mich. Comp. Laws Ann. § 15.243(1)(p) (formerly Mich. Comp. Laws Ann. § 15.243(1)(q)).

q. Academic transcripts of state colleges and universities are exempt from disclosure “if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.” Mich. Comp. Laws Ann. § 15.243(1)(q) (formerly Mich. Comp. Laws Ann. § 15.243(1)(r)).

r. Disclosure of campaign committee records, including those of committees that receive money from a state campaign fund, is not required. Mich. Comp. Laws Ann. § 15.243(1)(r) (formerly Mich. Comp. Laws Ann. § 15.243(1)(s)).

s. Mich. Comp. Laws Ann. § 15.243(1)(s) (formerly Mich. Comp. Laws Ann. § 15.243(1)(t)), the section regulating police records, explicitly requires use of a balancing process: “[u]nless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency” are exempt from disclosure where the release of such records would do any of the following:

- (i) Identify or provide a means of identifying an informer;
- (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent;
- (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills that they may have;
- (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents;
- (v) Disclose operational instructions for law enforcement officers or agents;
- (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents;
- (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies;
- (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer;

(ix) Disclose personnel records of law enforcement agencies; *Kent County Deputy Sheriff’s Ass’n v. Kent County Sheriff*, 463 Mich. 353 (2000) (union’s request for copies of reports on which sheriff based disciplinary decisions properly denied because the public interest in meaningful arbitration of grievances did not outweigh public interest in nondisclosure to preserve sheriff’s department’s ability to effectively

conduct such investigations); see *Landry v. City of Dearborn*, 259 Mich. App. 416, 674 N.W.2d 697 (2003) (employment applications for all individuals applying for the position of police officer are exempt); *Sutton v. City of Oak Park*, 251 Mich. App. 345, 650 N.W.2d 404 (2002) (internal investigation records of a police officer constitute personnel records and are exempt where public interest favors nondisclosure); but see *Herald Co. Inc. v. Kent County Sheriff's Dep't*, 261 Mich. App. 32, 680 N.W.2d 259 (2004) (internal affairs investigation report not exempt as personnel record when the document “shed[s] light on the official acts and workings of the government”); or,

(x) Identify or provide a means of identifying residences which law enforcement agencies are requested to check in the absence of their owners or tenants. See *Haskins v. Oronoko Township Supervisor*, 172 Mich. App. 73, 431 N.W.2d 210 (1988) (prisoner's request for all police reports regarding his case properly denied as to documents protected by various subsections of this exemption).

The Michigan Court of Appeals held that a plaintiff, under Mich. Comp. Laws 15.243(1)(s)(ix), should have been given an opportunity to show at the trial level that public interest in disclosure outweighed the public interest in nondisclosure. *Liddell v. Wayne County Records*, 2009 Lexis App 1561 (July 21, 2009). The Supreme Court held that “in light of [this] language, public records reviewed under the FOIA balancing test must be organized within specific categories that enable the circuit court to weigh similar competing aspects of public interest.” *Federated Publications v. City of Lansing*, 467 Mich. 98, 649 N.W.2d 383 (2002)

t. Records and information pertaining to an investigation or a compliance conference conducted by the department of consumer and industry services under Mich. Comp. Laws § 333.16101-333.18838 are exempt from disclosure as a public record “before a complaint is issued” except for the following information:

(i) the fact that an allegation has been received, the date the allegation was received, and the fact that an investigation is being conducted;

(ii) the fact that an allegation was received by the department of consumer and industry services, the fact that the department did not issue a complaint for the allegation, and the fact that the allegation was dismissed. Mich. Comp. Laws Ann. § 15.243(1)(t) (formerly Mich. Comp. Laws Ann. § 15.243(1)(u)).

u. Records of a public body's security measures “to the extent that the records relate to the ongoing security of the public body.” Mich. Comp. Laws Ann. § 15.243(1)(u) (formerly Mich. Comp. Laws Ann. § 15.243(1)(v)).

v. Records of information relating to a civil action in which the requesting party and the public body are parties. Mich. Comp. Laws Ann. § 15.243(1)(v) (formerly Mich. Comp. Laws Ann. § 15.243(1)(w)). The Michigan Court of Appeals held that “the plain language . . . applies to only to information relating to a civil action in which both the requesting party and the public body are parties.” *Taylor v. Lansing Board of Water and Light*, 272 Mich. App. 200, 725 N.W.2d 84 (2006). It does not apply to a person acting on behalf of a “party.” Id. For the definition of “parties,” the Court relied on the Black Law's Dictionary : “those by or against whom a legal suit is brought.” Id. Proceeding in State Tax Tribunal is an “administrative proceeding,” and “not the equivalent of a civil action.” *Federal-Mogul Corp v. Department of Treasury*, 161 Mich. App. 346, 368 (1987). Similarly, exception does not apply to an arbitration. *Kent County Deputy Sherriff's Ass'n v. Kent County Sheriff*, 463 Mich. 353, 364 n. 18 (2002).

w. Information or records that would disclose the Social Security number of any individual. Mich. Comp. Laws Ann. § 15.243(1)(w) (formerly Mich. Comp. Laws Ann. § 15.243(1)(x)).

x. An application for the position of president of an institution of higher education established under section 4, 5 or 6 of Article VIII of the Michigan Constitution, the materials submitted with the applica-

tion, letters of recommendation or references concerning the applicant, and records or information relating to the process of searching for and selecting an individual for such a position, “if the records or information could be used to identify a candidate for the position.” However, after one or more individuals have been identified as finalists, this exemption does not apply to a public record described in this exemption, “except a letter of recommendation or reference, to the extent that the public record relates to an individual identified as a finalist for the position.” Mich. Comp. Laws Ann. § 15.243(1)(x) (formerly Mich. Comp. Laws Ann. § 15.243(1)(y)). The effect of this 1996 provision is to override, in part, the Michigan Supreme Court's decision in *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 444 Mich. 211, 507 N.W.2d 422 (1993).

y. “A public body shall be exempt from disclosure of information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the General Education Provisions Act, Title IV of Public Law 90-247, 20 U.S.C. 1232(g), commonly referred to as the Family Educational Rights and Privacy Act of 1974.” Mich. Comp. Laws Ann. § 15.243(2) (formerly Mich. Comp. Laws Ann. § 15.243(1)(e)). Under that act, “an educational institution may not disclose the education records or any personally identifiable information contained in the record other than directory information to any third parties without the written consent of the student's parents, . . . or the written consent of the student when the student attends an institution of post-secondary education . . .” *Connoisseur Communications of Flint v. University of Michigan*, 230 Mich. App. 732, 735, 584 N.W.2d 647 (1998).

z. Another 1996 amendment to the FOIA makes it clear that an employee or public body subject to the FOIA cannot withhold a public record that would not otherwise be exempt by transferring the public record “to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received” by the employee or public body. Mich. Comp. Laws Ann. § 15.243(4).

B. Other statutory exclusions.

The FOIA creates a broad right of access to all public records “except as expressly provided in [Mich. Comp. Laws Ann. § 15.243].” Mich. Comp. Laws Ann. § 15.233(1). Mich. Comp. Laws Ann. § 15.243 includes in its list of exemptions a broad “catch-all” exemption that incorporates by reference other statutes which expressly exempt records or information from disclosure. Mich. Comp. Laws Ann. § 15.243(1)(d).

There is a pending bill that adds an eighth exemption to Mich. Comp. Laws 15.243: “disclos[ure] of any of the following in the case of a record pertaining to a crime of child abuse, criminal sexual conduct, sexual assault or molestation, or similar crime in which one or more victims are less than 18 years of age: (a) the name and address of any victim; (b) the names and addresses of the victim's immediate family members of the victim's relatives who have the same surname as that victim, other than the name and address of the accused; (c) any other information that would reveal the identity of the victim, including any reference to a victim's familial or other relationship to the accused.” H.B. 4261, 96th Leg., 1st Sess. (Mich. 2011).

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

Mich. Comp. Laws Ann. §§ 15.243(l)(g) and (1)(h) also exempt records subject to the attorney-client privilege, physician-patient privilege, and other privileges “recognized by statute or court rule.” See *Swickard*, 438 Mich. at 547 (regarding physician-patient privilege).

D. Are segregable portions of records containing exempt material available?

The FOIA expressly provides for the availability of segregable portions of records containing exempt material: “[i]f a public record contains material which is not exempt under section 13, [Mich. Comp.

Laws Ann. § 15.243], as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” Mich. Comp. Laws Ann. § 15.244(l). The Michigan Supreme Court has strictly enforced this provision, forbidding public bodies from withholding documents without separating exempt from nonexempt material. *Evening News Ass’n v. City of Troy*, supra, 339 N.W.2d at 436 (1983). Moreover, the FOIA orders public bodies to facilitate the separation of exempt from nonexempt information, “to the extent practicable,” when designing public records and, if the separation will be “readily apparent to a person requesting to inspect or receive copies of a form, public bodies are required to “generally describe the material exempted unless that description would reveal the contents of the exempt information and thus, defeat the purpose of the exemption.” Mich. Comp. Laws Ann. § 15.244(2). The public body may not charge a fee for the cost of separating exempt from non-exempt information, unless failure to do so would result in unreasonably high costs. 2001 Att’y Gen. Op. No. 7083 (2001). See also *Ritzer v. St. Lockport-Fabius-Park Township*, 2005 Mich. App. LEXIS 302 (Feb 8, 2005) (public body may have to create a new disc in order to separate nonexempt material from exempt material)

E. Homeland Security Measures.

In the wake of September 11, 2001, the legislature amended the FOIA to address certain concerns regarding homeland security. A public body may exempt from disclosure “[r]ecords or information of measures designed to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act . . . emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies.” Mich. Comp. Laws Ann. § 15.243(1)(y).

However, an exception exists that requires an examination of the disclosure’s effect. If the disclosure of the information “would not impair a public body’s ability to protect the security or safety of persons or property,” such information is not exempt from the FOIA’s disclosure requirements. *Id.* Likewise, the information is not exempt from disclosure if “the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.” *Id.*

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

Where a computer record exists, a requester generally has the right to the record in that form. See, *Farrell v. City of Detroit*, 209 Mich. App. 7, 530 N.W.2d 105 (1995) (“In Michigan, computer records constitute public records subject to disclosure under the FOIA”); *Payne v. Grand Rapids Police Chief*, 178 Mich. App. 193, 443 N.W.2d 481 (1989) (plaintiff entitled to copy of tape recording of 911 emergency calls, even where city offered to provide transcript of tape); but see, *Lapeer County Abstract & Title v. Lapeer County Register of Deeds*, 264 Mich. App. 167, 691 N.W.2d 11 (2004) (public bodies are not required by the FOIA to provide microfilm copies rather than paper copies of the records at issue, even when the public body keeps the records on microfilm). See also Mich. Comp. Laws Ann. § 15.232(f) (software — which is not a public record — excludes “computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.”)

B. Can the requester obtain a customized search of computer databases to fit particular needs?

There are no decisions regarding whether a requester can obtain a customized search of computer databases to fit its particular needs.

C. Does the existence of information in electronic format affect its openness?

Information in electronic format is subject to disclosure under the FOIA. See *Farrell*, supra. See also Mich. Comp. Laws Ann. § 15.232(f) (definition of software, which is not a public record, excludes “computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.”); *City of Warren v. City of Detroit*, 261 Mich. App. 165, 680 N.W.2d 57 (2004) (formula for calculating water rates kept on computer disk is not software and is therefore not exempt from disclosure).

D. How is e-mail treated?

There is no specific case law on the issue of electronic mail. A recent amendment to the FOIA recognizes that written requests can be transmitted by electronic mail. See Mich. Comp. Laws Ann. § 15.232(i). A strong argument can be made that, under *Farrell* and *Payne*, electronic mail is subject to disclosure under the FOIA.

1. Does e-mail constitute a record?

Not specifically addressed.

2. Public matter on government e-mail or government hardware

Not specifically addressed.

3. Private matter on government e-mail or government hardware

Personal emails are not public record merely because the emails are retained by the public body computer system. *Howell Education Association v. Howell Board of Education*, 287 Mich. App. 228, 789 N.W.2d 495 (2010).

4. Public matter on private e-mail

Not specifically addressed.

5. Private matter on private e-mail

Not specifically addressed.

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

Yes. Although there is no published case law on the subject, the Wayne County Circuit Court issued an order in a FOIA case requiring a third-party service provider to produce the text messages that eventually caused the resignation and conviction of Detroit Mayor Kwame Kilpatrick. *Detroit Free Press, Inc. v. City of Detroit*, No. 08-100214-CZ (June 26, 2008).

2. Public matter message on government hardware.

See previous paragraph.

3. Private matter message on government hardware.

Not specifically addressed.

4. Public matter message on private hardware.

Not specifically addressed.

5. Private matter message on private hardware.

Not specifically addressed.

F. How are social media postings and messages treated?

Not specifically addressed.

G. How are online discussion board posts treated?

Not specifically addressed.

H. Computer software**1. Is software public?**

Computer software is exempt from the definition of public record under Mich. Comp. Laws 15.232(e).

2. Is software and/or file metadata public?

Metadata is not specifically addressed.

I. How are fees for electronic records assessed?

Not specifically addressed.

J. Money-making schemes.**1. Revenues.**

Not specifically addressed.

2. Geographic Information Systems.

Not specifically addressed.

K. On-line dissemination.

Not specifically addressed.

IV. RECORD CATEGORIES -- OPEN OR CLOSED**A. Autopsy reports.**

Open. *See, Swickard v. Wayne County Medical Examiner*, 438 Mich. 536, 475 N.W.2d 304 (1991). There is no physician patient relationship at the time a physician performs an autopsy.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

See 15.243(1)(m).

1. Rules for active investigations.

Not specifically addressed.

2. Rules for closed investigations.

Not specifically addressed.

C. Bank records.

By virtue of the interaction of section 29 of the Banking Code, Mich. Comp. Laws Ann. § 487.329, with exemption (d), the FOIA's "catch-all" exemption, Mich. Comp. Laws Ann. § 15.243(l)(d), the Financial Institutions Bureau commissioner may refuse to release information obtained pursuant to the former statute but may, in his or her discretion, disclose the information when he or she believes it to be in the public interest to do so. 1979-80 Op. Att'y Gen. 255, 286 (1979). Certain records of stock associations are required to be open for examination under the Savings and Loan Act of 1980. Mich. Comp. Laws Ann. § 491.428. Bank examiners' manuals and minutes of the Financial Institutions Bureau supervisory examiners meetings are subject to disclosure under the FOIA, because Mich. Comp. Laws Ann. § 15.241(1)(c) requires state agencies to publish and make available to the public "written statements which implement or interpret laws, rules or policy," although the Bureau may delete exempt material when making such disclosures. 1979-80 Op. Att'y Gen. at 289-90.

D. Budgets.

Not specifically addressed.

E. Business records, financial data, trade secrets.

Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy" are exempt from disclosure when under certain conditions. Mich. Comp. Laws Ann. § 15.243(1)(f). *See also Booth Newspapers Inc. v. University of Michigan Board of Regents*, 444 Mich. 211, 507 N.W.2d 422 (1993); *see City of Novi* for interpretation and application of 15.243(1)(f).

F. Contracts, proposals and bids.

A public body need not disclose a bid or proposal to enter into a contract or agreement "until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the time for the receipt of bids or proposals has expired." Mich. Comp. Laws Ann. § 15.243(1)(i); *see also Nicita v. City of Detroit*, 194 Mich. App. 657, 487 N.W.2d 814, 819 (1992) (exemption applies only to a competitive bidding process where bids are solicited but not to unsolicited bids).

G. Collective bargaining records.

Presumably open; *but see, Traverse City Record Eagle*, 184 Mich. App. 609, 459 N.W.2d 28 (1990) (tentative collective bargaining agreement between school district and unions exempt from disclosure because it was message from school board and union representatives to their respective bodies, advisory in nature, and because premature disclosure would have negative impact on negotiation process).

H. Coroners reports.

Open. *See Swickard*, 438 Mich. 536, 475 N.W.2d 304 (1991).

I. Economic development records.

Not specifically addressed.

J. Election records.**1. Voter registration records.**

Voter registration records were exempt from disclosure under Mich. Comp. Laws 168.495a(2). *Practical Political Consulting, supra*.

2. Voting results.

Not specifically addressed.

K. Gun permits.

Not specifically addressed.

L. Hospital reports.

See generally, Mich. Comp. Laws Ann. § 15.243(1)(a) (privacy exemption).

M. Personnel records.

See generally Mich. Comp. Laws Ann. § 15.243(1)(s)(ix) (law enforcement personnel record). The term "personnel" includes "all aspects of the employment process . . . so the phrase "personnel records" presumably encompasses a retiree's individualized records." *Detroit Free Press v. City of Southfield*, 269 Mich. App. 275, 286-7. 713 N.W. 2d 28 (2005).

1. Salary.

The Court of Appeals held that employees' names and salary information were not "intimate details" of a highly "personal nature" and even if the disclosure was an invasion of privacy, the invasion was not "clearly unwarranted." *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 287 N.W. 2d 304 (1979).

2. Disciplinary records.

The Supreme Court in *Bradley* held that the disclosure of the disciplinary record of a public school teacher was permissible under FOIA.

3. Applications.

See Landry v. City of Dearborn, 259 Mich. App. 416, 674 N.W. 2d 697 (2003) for analysis of whether the disclosure of employment applications is in the public interest.

4. Personally identifying information.

Not specifically addressed.

5. Expense reports.

Travel expense reports did not meet an exemption because the reports could lead to discovery of personal information. *Booth Newspapers*, supra.

N. Police records.

1. Accident reports.

“The disclosure of accident reports merely for the identification of potentially injured individuals is an unwarranted invasion of privacy, so government entities are not required to make reports public.” *Michigan Rehabilitation Clinic v. City of Detroit*, 2006 Mich. App. LEXIS 25, at *4 (Jan. 10, 2006).

2. Police blotter.

Not specifically addressed.

3. 911 tapes.

The Court of Appeals held that the City acted whimsically in denying the plaintiff immediate access to the 911 tapes. *Meredith Corporation v. City of Flint*, 256 Mich. App. 703 671 N.W. 2d 101 (2003).

4. Investigatory records.

Internal investigations were exempt from disclosure because otherwise, “employees are reluctant to give statements about the actions of other employees.” *Kent County Deputy Sheriffs Association v. Kent County Sheriff*, 463 Mich. 353 616 N.W.2d 677 (2000). Internal affairs investigatory records fall within the meaning of the term “personnel record of law enforcement” as used in the FOIA. *Newark Morning Ledger Company v. Saginaw County Sheriff*, 204 Mich. App. 215, 514 N.W. 2d 213 (1994). To show that disclosure of investigation record would interfere with the enforcement proceedings, “the government must show, by more than a conclusory statement, how the particular kinds of records would interfere with a pending enforcement investigation.” *Evening News*, supra 417 Mich. at 497. See Mich. Comp. Laws § 15.231.

a. Rules for active investigations.

(Distinction between active and closed investigations not specifically addressed.)

5. Arrest records.

Not specifically addressed.

6. Compilations of criminal histories.

While there “is undoubtedly some public interest in anyone’s **criminal history** [or autopsy report and toxicology test results], especially if the history is in some way related to” a public official, “the FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government” be disclosed. *Swickard*, supra at 575 (quoting Reporters Committee).

7. Victims.

Not specifically addressed.

8. Confessions.

Not specifically addressed.

9. Confidential informants.

In *Hyson v. Department of Correction*, 205 Mich. App. 402, 521 N.W. 2d 841 (1994), the Court of Appeals held that the identities of confidential informants must be undisclosed because of the security risk posed to the informants.

10. Police techniques.

Not specifically addressed.

11. Mug shots.

A booking photograph or “mugshot” of a county jail inmate is a public record under FOIA. Disclosure of these photographs cannot be withheld on the basis of the privacy exemption. *Patterson v. Allegbeny County Sheriff*, 199 Mich. App. 638, 502 N.W. 2d 368 (1993). Booking photographs are not entitled to exemption from disclosure under FOIA where individuals involved have been arrested, charged in open court and awaiting trial for bank robbery; in such cases, the booking photograph reveals no information that would constitute an unwarranted invasion of privacy. *Detroit Free Press, Inc v. Oakland County Sheriff*, 164 Mich. App. 656, 418 N.W. 2d 124 (1987). The photograph of a convicted individual contained in the file arrest must, upon request, be disclosed. Op. Atty. Gen. November 14, 1979 Op. 5593. If the release of a photograph would constitute an unwarranted invasion of privacy, a public body may refuse to permit a person access to the photograph. *Id.*

12. Sex offender records.

Not specifically addressed.

13. Emergency medical services records.

Not specifically addressed.

O. Prison, parole and probation reports.

Not specifically addressed.

P. Public utility records.

Not specifically addressed.

Q. Real estate appraisals, negotiations.

1. Appraisals.

See Mich. Comp. Laws 15.243(1)(j).

2. Negotiations.

Not specifically addressed.

3. Transactions.

Not specifically addressed.

4. Deeds, liens, foreclosures, title history.

Names and addresses of those involved in the conveyance of real property are open to public inspection in the Office of the Register of Deeds. Mich. Comp. Laws 565.25. Mich. Comp. Laws 600.2567 provides that a register of deeds is entitled to a fee of \$1 per page of any copies of any records of papers. The Inspection of Records Act (IORA) allows the register of deeds to provide paper copies in response to a request for a copy of the records, even if the register keeps the original records on microfilm. See *Lapeer County*, supra.

5. Zoning records.

Not specifically addressed.

R. School and university records.

1. Athletic records.

Not specifically addressed.

2. Trustee records.

Not specifically addressed.

3. Student records.

The Family Educational Rights and Privacy Act provides for access to student records by eligible students and parents, and establishes the privacy of those records. Michigan State University falls under this statute because it is a recipient of federal funds. See *Kestenbaum v. Michigan State University*, 414 Mich. 510, 327 N.W. 2d 783 (1982).

S. Vital statistics.

1. Birth certificates.

Not specifically addressed.

2. Marriage & divorce.

Not specifically addressed.

3. Death certificates.

Death certificates are public records by Mich. Comp. Laws 333.2882.

4. Infectious disease and health epidemics.

Not specifically addressed.

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

Mich. Comp. Laws Ann. § 15.236 generally assigns responsibility for responding to FOIA requests to the public body's FOIA coordinator:

a. For a public body which is a city, village, township, county, or state department, or under the control thereof, an individual shall be designated as the public body's FOIA coordinator, who shall be responsible for accepting and processing requests for public records and for approving a denial under the FOIA. In a county not having an executive form of government, the chairperson of the county board of commissioners shall be considered the FOIA coordinator for purposes of this subsection. A FOIA coordinator may designate another individual to act on his or her behalf.

b. For all other public bodies, the chief administrative officer of the respective public body, or an individual designated in writing by that chief administrative officer, shall be responsible for approving a denial. Mich. Comp. Laws Ann. § 15.236.

c. If another employee receives a request for a public record, the employees must promptly forward the request to the FOIA coordinator. Mich. Comp. Laws Ann. § 15.233.

Mich. Comp. Laws Ann. § 15.241, which provides for disclosure of records developed or submitted pursuant to administrative adjudications, does not require a specific request. *Blue Cross and Blue Shield of Michigan v. Insurance Bureau Hearing Officer*, 104 Mich. App. 113, 304 N.W.2d 499, 504 (1981). The items which state agencies must make available under Mich. Comp. Laws Ann. § 15.241 include:

a. Final orders and decisions in contested cases and the records on which they were made.

b. Promulgated rules.

c. Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions. Mich. Comp. Laws Ann. § 15.241(1).

2. Does the law cover oral requests?

"A person desiring to inspect or receive a copy of a public record shall make a *written* request for the public record to the FOIA coordinator of a public body." Mich. Comp. Laws Ann. § 15.235(1) (emphasis added). See also Mich. Comp. Laws Ann. § 15.233(1) ("Upon providing a public body's FOIA coordinator with a written request . . .") This is a change effective in 1997 from previous law, which permitted a request to be made orally. Further, a written request made by fax, electronic mail, or other electronic transmission "is not received by [the FOIA coordinator] until 1 business day after the electronic transmission is made."

Public bodies may make "reasonable rules necessary to protect public records and to prevent excessive and unreasonable interference with the discharge of [agency] functions." Mich. Comp. Laws Ann. § 15.233(2). Thus, while public bodies must provide "reasonable opportunity" for inspection of records, it would be wise for the requester to make arrangements to see records beforehand.

Further, in another 1996 revision, the FOIA instructs a public body to "protect public records from loss, unauthorized alteration, mutilation, or destruction." Mich. Comp. Laws Ann. § 15.233(3). The FOIA originally provided that upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has the right to inspect, copy or receive copies of a public record of a public body, except as otherwise provided by the act. *Hoffman v. Bay City School District*, 137 Mich. App. 333, 357 N.W. 2d 686 (1984). The 1996 amendment deleted "oral."

b. If an oral request is denied:

(1). How does the requester memorialize the refusal?

Not specifically addressed.

(2). Do subsequent steps need to be in writing?

Not specifically addressed.

3. Contents of a written request.

a. Description of the records.

An FOIA request must describe the public record "sufficiently to enable the public body to find the public record." Mich. Comp. Laws Ann. § 15.233(1). While Mich. Comp. Laws Ann. § 15.235(2) gives the public body five business days in which to respond to requests, if the request does not contain sufficient information it may be denied on that ground. If additional information is provided that sufficiently describes the public record, the period within which the response must be made dates from the time the additional information is received. 1979-80 Op. Att'y Gen. 255, 268-69 (1979). See *Coblentz*, supra, for discussion of the word "sufficiently."

b. Need to address fee issues.

Not addressed. If release is in the public interest, fee waiver or reduction may be available. Mich. Comp. Laws Ann. § 15.234.

c. Plea for quick response.

Not addressed.

d. Can the request be for future records?

Under Mich. Comp. Laws Ann. § 15.233, one has a right to subscribe to "future issuances of public records which are created, issued, or disseminated on a regular basis." This section provides that such subscriptions be valid for up to six months at the request of the subscriber, and that the subscriptions are renewable. Mich. Comp. Laws Ann. § 15.233(1).

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

A public body has five business days in which to respond to requests for public records, unless otherwise agreed to in writing by the person making the request. Mich. Comp. Laws Ann. § 15.235(2). The five "business days" means five consecutive weekdays, other than Saturdays, Sundays, or legal holidays, and not five consecutive days on which the particular body receiving the request is open for public business. 2005 Op. Att'y Gen. No. 7172 (2005). Any of the following will be considered a response:

- (a) Granting the request.
- (b) Issuing a written notice denying the request.
- (c) Granting the request in part and issuing a written notice denying the request in part.

(d) Under unusual circumstances, as defined in Mich. Comp. Laws Ann. § 15.232(i), issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request. Mich. Comp. Laws Ann. § 15.235(2)(d). The five-business day time limit begins when a sufficient description of the public record is received by the public body at the office where the records are kept. 1979-80 Op. Att’y Gen. 255, 268-69 (1979). A public body may not treat a request for its records as having been received as of the date of its next regularly scheduled meeting; the request must be answered within five business days of the date the request was actually received by the public body. 1981-82 Op. Att’y Gen. 584, 586 (1982). Where a public body issues a notice extending the period for response to the request under Mich. Comp. Laws Ann. § 15.235(2)(d), it is required to set forth in the notice the reasons for the extension and the date by which the public body will either grant the request, issue a written notice denying the request, or grant the request in part and issued a written notice denying the request in part. Mich. Comp. Laws Ann. § 15.235(6). Once a public body timely claims the 10-day extension, the new response deadline is fifteen business days after receipt of the request, regardless of when the notice of extension is issued. *Key v. Twp. of Paw Paw*, 254 Mich. App. 508, 657 N.W.2d 546 (2002). A public body may not use a loss of time attributed to unnecessary delay by its agents in forwarding the request to the proper person as grounds for extending the time during which the response must be made. 1979-80 Op. Att’y Gen. 255, 269-70 (1979).

2. Informal telephone inquiry as to status.

Not addressed.

3. Is delay recognized as a denial for appeal purposes?

Failure to respond to a request within the five-business day statutory period is recognized for appeal purposes as a final determination by the public body to deny the request. Mich. Comp. Laws Ann. § 15.235(3); *see also Hartzell v. Maryville Community School District*, 183 Mich. App. 782, 455 N.W.2d 411 (1990) (awarding costs and attorney’s fees to plaintiff because, instead of advising plaintiff that requested document did not exist, agency simply did not respond to request.)

4. Any other recourse to encourage a response.

The party may resubmit its request and bring suit. A party that re-submits an FOIA request does not lose the right to file suit on the issue of the initial denial. *Krug v. Ingham County Sheriff’s Office*, 264 Mich. App. 475, 691 N.W.2d 50 (2004).

C. Administrative appeal.

The FOIA was amended in 1996 to permit administrative appeals. If a request is denied, a requester may (but is not required to) submit to the head of the public body “a written appeal that specifically states the word appeal and identifies the reason or reasons for reversal of the disclosure denial.” Mich. Comp. Laws Ann. § 15.240(1)(a). Within 10 days after receiving a written appeal, the head of the public body must do one of the following:

- (a) reverse the disclosure denial;
- (b) issue a written notice to the requesting person upholding the disclosure denial;
- (c) reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part; or

(d) under unusual circumstances, as defined in Mich. Comp. Laws Ann. 15.232(i), issuing a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the appeal. Not more than one notice of extension shall be issued for a particular appeal. Mich. Comp. Laws Ann. § 15.240(2)(d). Under Mich. Comp. Laws Ann. § 15.240(3), a board or commission that is the head of a public body is not considered to have received a written appeal until the first regularly scheduled meeting following submission of the written appeal. *See Federated Publications, supra* for discussion of this provision.

1. Time limit.

A requesting party may within 180 days of a public body’s final determination initiate an action in circuit court to compel the public body’s disclosure of the public records. Mich. Comp. Laws 15.240(1)(a).

2. To whom is an appeal directed?

See Mich. Comp. Laws 15.240 for how the requested person should appeal. If a “public body makes a final determination to deny all or a portion of a request,” the requestor can do one of two things. First, he or she can “submit to the head of the public body a written appeal that specifically states the word “appeal” and identifies the reason or reasons for reversal of the denial,” or second, he or she can “commence an action in the circuit court to compel the public body’s disclosure of the public records within 180 days after a public body’s final determination to deny a request.”

a. Individual agencies.

Appeal is directed to the head of the individual agency.

b. A state commission or ombudsman.

No state commission or ombudsman exists.

c. State attorney general.

No role.

4. Contents of appeal letter.

Not specifically addressed.

5. Waiting for a response.

Not specifically addressed.

6. Subsequent remedies.

Not specifically addressed.

D. Court action.

1. Who may sue?

Any person whose FOIA request has been denied in whole or in part may commence an action in circuit court under Mich. Comp. Laws Ann. § 15.240.

Several items under Mich. Comp. Laws Ann. § 15.241 must be published and made available to the public even when not specifically requested. A person may commence an action in circuit court to compel a state agency to comply with Mich. Comp. Laws Ann. § 15.241. Mich. Comp. Laws Ann. § 15.241(5).

A person seeking to enjoin rather than compel disclosure of public records may file a “reverse FOIA” action, but the FOIA analysis applies in those cases and a “reverse FOIA” plaintiff may not have standing to raise certain exemptions. *Bradley, supra*, 455 Mich. 285. A plaintiff’s right to prohibit disclosure must have a basis independent of FOIA. *Tobin v. Michigan Civil Service*, 416 Mich. 661, 331 N.W. 2d 184 (1980).

2. Priority.

Actions brought under the FOIA and appeals from FOIA decisions are to be “assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.” Mich. Comp. Laws Ann. § 15.240(5).

3. Pro se.

The availability of attorney’s fees to a plaintiff who prevails in an FOIA action is intended to make access to legal services easier. Mich. Comp. Laws Ann. § 15.240(6). See *Omdahl v. Iron County Board of Education*, 478 Mich. 423, 733 N.W. 2d 380 (2007) (the fact that a plaintiff is a licensed attorney does not mean that the plaintiff has an attorney, and therefore, the plaintiff may not recover attorney’s fees); *Watkins v. Manchester*, 220 Mich. App. 337, 559 N.W. 2d 81 (1996) (pro se plaintiff-attorney cannot recover attorney’s fees under FOIA).

4. Issues the court will address:

a. Denial.

The plaintiff in a FOIA suit need only show that a request was made and denied. The burden then shifts to the defendant agency to show a viable defense — insufficient description of the record, the fact that no record existed, or exemption from disclosure. *Pennington v. Washtenaw County Sheriff*, 125 Mich. App. 556, 336 N.W.2d 828, 832 (1983). A written notice denying a request for a public record in whole or in part is considered a final determination by the public body and must contain:

- (1) An explanation of the basis under the FOIA or other statute for the determination that the public record, or the portion thereof, is exempt from disclosure, if that is the reason for denying the request or a portion thereof;
- (2) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion thereof;
- (3) A description of a public record or information on a public record which is separated or deleted if a separation or deletion is made; and
- (4) A full explanation of the requesting person’s right to seek judicial review, including the right to receive attorney’s fees and damages, if the circuit court determines that the public body has not complied with Mich. Comp. Laws Ann. § 15.235 and orders disclosure of all or part of a public record. Mich. Comp. Laws Ann. § 15.235(4).

The individual designated in Mich. Comp. Laws Ann. § 15.236 as responsible for denying requests is to sign the written notice of denial. Mich. Comp. Laws Ann. § 15.235(5).

b. Fees for records.

Fees charged must be computed in accordance with the FOIA’s requirements, not on a basis established by the agency to save money. See Mich. Comp. Laws Ann. § 15.234(1).

c. Delays.

Failure to respond to a request for information pursuant to Mich. Comp. Laws Ann. § 15.235(2) is considered a final determination by the public body to deny the request. See *Local Area Watch v. City of Grand Rapids*, 262 Mich. App. 136, 683 N.W. 2d 745 (2004) (defendant’s failure to timely respond qualifies as a violation of the provision even if the defendant acted in good faith). If a circuit court later orders a public body which has failed to respond to a request to disclose or provide copies of the public record in question, the circuit court may assess punitive damages against the public body under Mich. Comp. Laws Ann. § 15.240(7). Mich. Comp. Laws Ann. § 15.235(3).

But under 15.235(2)(d), a public body may issue a notice extending for not more than ten business days the period during which the public body shall respond to the request. For the purposes of FOIA, “business day” means Monday through Friday and not Saturday or Sunday (or legal holiday). *Key v. Township of Paw Paw*, 254 Mich. App. 508 657 N.W. 2d 546 (2002).

d. Patterns for future access (declaratory judgment).

Not addressed.

5. Pleading format.

Public records are *prima facie* disclosable to any person who makes an adequate request. *Booth Newspapers Inc. v. Regents of the University of Michigan*, 93 Mich. App. 100, 286 N.W.2d 55, 59 n.9 (1979). The complainant need not allege that the materials sought are not subject to statutory exemption. Exemption is a defense in actions brought under the FOIA. *Booth Newspapers Inc. v. Regents of the University of Michigan*, 286 N.W.2d at 60. The application of exemptions requiring legal determinations are reviewed *de novo*, while the application of exemptions requiring determinations of a discretionary nature are reviewed under a clearly erroneous standard. *Federated Publications Inc. v. City of Lansing*, 467 Mich. 98, 649 N.W.2d 383 (2002). The burden is on the public body to sustain denial of the request, Mich. Comp. Laws Ann. § 15.240(4), but in applying the public interest balancing test, the circuit court should consider the fact that records have been made exemptible under § 15.243(1)(s). *Federated Publications Inc. v. City of Lansing*, *supra*, 649 N.W.2d at 385.

6. Time limit for filing suit.

A 1996 amendment to the FOIA requires an action to be commenced within 180 days after a public body’s final determination to deny a request. Mich. Comp. Laws Ann. § 15.240. Previously, there was no time limit.

7. What court.

The proper place to file suit to compel disclosure is in “[t]he circuit for the county in which the complainant resides or has his principal place of business, or the circuit court for the county in which the public record or an office of public body is located.” Mich. Comp. Laws Ann. § 15.240(4). Also, the circuit court for the county in which a state agency is located will have jurisdiction to entertain suits to compel compliance with Mich. Comp. Laws Ann. § 15.241’s requirements that certain records be always available. Mich. Comp. Laws Ann. § 15.241(5). See, *Grebner v. Oakland County Clerk*, 220 Mich. App. 513, 560 NW2d 351 (1997) (FOIA “jurisdiction” provision is venue measure allowing action to be brought in Circuit Court of county of plaintiff’s residence, as well as Circuit Court of county in which governmental unit or records are located.).

8. Judicial remedies available.

Where exemption is claimed, the court may consider allowing plaintiff’s counsel to have access to contested documents *in camera* under special agreement whenever possible. *Evening News Ass’n v. City of Troy*, 417 Mich. 481, 339 N.W.2d 421 (1983). In all cases, if the court determines that the public record is not exempt from disclosure, the court “shall order the public body to cease withholding or to produce all or part of a public record wrongfully withheld, regardless of the location of the public record.” Mich. Comp. Laws Ann. § 15.240(4). The FOIA contains no provision imposing liability upon public officials who release information which may be exempt under the FOIA, but liability may be grounded upon statute or common law protection of records which are also exempt from disclosure under the Act. 1979-80 Op. Att’y Gen. 255, 299-300 (1979).

A party is not required to resubmit an FOIA request to ensure that it receives the requested information if the public body determines that the information has become non-exempt during the course of

litigation. Rather, the trial court should properly consider a plaintiff's lawsuit a continuing request for information under the FOIA. *Krug v. Ingham County Sheriff's Office*, 264 Mich. App. 475, 691 N.W.2d 50 (2004).

9. Litigation expenses.

"[R]easonable attorney's fees, costs, and disbursements" will be awarded to any person who prevails in an action to compel disclosure under Mich. Comp. Laws Ann. § 15.240. If the complainant prevails in part, the court may use its discretion to award reasonable fees, costs, and disbursements, "or an appropriate portion thereof." Mich. Comp. Laws Ann. § 15.240(6). Thus, the complainant is entitled to fees and costs if he or she prevails, and an award of fees and costs is *discretionary* if the complainant prevails in part. *Walloon Lake Water System v. Melrose Twp*, 163 Mich. App. 726, 415 N.W.2d 292, 296 (1987).

A plaintiff who files an action *pro se* is not entitled to a mandatory award of attorney's fees; however, such a person is entitled to recover his or her actual costs, exclusive of attorney's fees. *Laracey v. Financial Institutions Bureau*, 163 Mich. App. 437, 414 N.W.2d 909 (1987); *see also, Michigan Tax Management Services Co. v. City of Warren*, 437 Mich. 506, 473 N.W.2d 263, 265 (1991) (although fees and other expenses must be awarded to a requester who prevails completely, trial court has obligation to exercise its sound judgment in determining a reasonable fee); *Tallman v. Cheboygan Area Schools*, 183 Mich. App. 123, 454 N.W.2d 171 (1990) (public body not at liberty to choose how much it will charge; must compute charges according to statutory method); *but see Easley v. University of Michigan*, 178 Mich. App. 723, 444 N.W.2d 820, 823 (1989) (because record below did not indicate that plaintiff prevailed, any award under FOIA was discretionary; trial court did not err in declining to award costs or sanctions because there was a "balance of unreasonableness as to both parties").

In order for an FOIA plaintiff to demonstrate that he or she has prevailed so as to be entitled to a mandatory award of costs and fees, the rule has been that plaintiff must demonstrate that prosecution of the action was necessary to and had causative effect on delivery or access to the documents in question. *Walloon Lake, supra*, 415 N.W.2d at 296; *see also Schinzel, supra*, 313 N.W.2d at 169 (citing *Bredemeier v. Kentwood Bd. of Education*, 95 Mich. App. 767, 291 N.W.2d 199, 201 (1980)) (the test is whether the action was reasonably necessary to compel disclosure and whether the action had a substantial effect on the delivery of information to the plaintiff). However, the Michigan Court of Appeals has held that a strict application of the "prevailing party" rule is inappropriate where the litigation has been rendered moot by unilateral actions of the public body in disposing of requested materials. *See, Thomas v. City of New Baltimore*, 254 Mich. App. 196, 657 N.W.2d 530 (2002) (fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure after plaintiff commenced the circuit court action not held determinative of plaintiff's entitlement to attorney's fees and costs).

Because the cost provision was intended to encourage plaintiffs unable to afford the expense of litigation to obtain judicial review of wrongful denials, where such a plaintiff "is successful with respect to the central issue, that the requested materials were subject to disclosure under the FOIA, he or she has . . . prevailed" for purposes of mandatory attorney's fees. *Walloon Lake, supra*, 415 N.W.2d at 296.

Moreover, a defendant's good faith in a FOIA action has no bearing on a plaintiff's claim for discretionary attorney's fees where plaintiff has prevailed in part: "The appropriateness of the portion awarded is not to be measured by the good faith of the defendant or the novelty of the litigation, but rather by the amount of attorney's fees, costs, and disbursements fairly allocable to the successful portion of the plaintiff's case." *Kestenbaum v. Mich State University*, 414 Mich. 510, 565-66, 327 N.W.2d 783 (1982), quoted in *Dawkins v. Dep't of Civil Service*, 130 Mich. App. 669, 344 N.W.2d 43 (1983). As long as an action for disclosure of public records is initiated pursuant to the FOIA, the prevailing party's entitlement to an award of reasonable attorney's fees, costs, and disbursements includes "all such fees related to achieving produc-

tion of the public records." *Meredith Corp. v. City of Flint*, 256 Mich. App. 703, 715, 671 N.W.2d 101 (2003). "The fact that a portion of the requested attorney's fees were incurred in a separate, related matter does not preclude recovery of that portion of the attorney's fees." *Id.*

Fees are also available where a court determines that a state agency has failed to comply with Mich. Comp. Laws Ann. § 15.241, which requires that state agencies publish and make available automatically a specified list of records. In such cases of noncompliance, "the court shall order the state agency to comply and shall award reasonable attorney's fees, costs, and disbursements to the person commencing the action." Mich. Comp. Laws Ann. § 15.241(5). In *Swickard v. Wayne County Medical Examiner*, 196 Mich. App. 98, 102, 492 N.W.2d 497 (1992), *aff'd*, 438 Mich. 536, 475 N.W.2d 304 (1991), the Court held that an award of attorney's fees to a newspaper reporter who prevailed in his action was proper, even though the newspaper employer of the reporter actually paid the attorney.

a. Attorney fees.

See Mich. Comp. Laws § 15.240(6) (if plaintiff prevails in an action commenced under this section, plaintiff shall be awarded attorney's fees). But see *Detroit Free Press v. Department of Attorney General*, 271 Mich. App. 418, 722 N.W. 2d 277 (2006) (since the plaintiff did not commence the action under 15.240, it was not entitled to attorney's fees). The controlling criterion in reviewing an award of attorney's fees under the act is the reasonableness of the fees awarded. *Michigan Tax Management Services Co v. Warren*, 437 Mich. 506, 473 N.W. 2d 263 (1991).

b. Court and litigation costs.

See Mich. Comp. Laws § 15.240(6)

10. Fines.

If the circuit court finds that the public body has "arbitrarily and capriciously" violated the FOIA by refusing to disclose or delaying in disclosing or providing copies of a public record, the court will award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500 to the person seeking the right to inspect or receive a copy of a public record." Mich. Comp. Laws Ann. § 15.240(7). These damages are not to be assessed against an individual but against "the next succeeding public body, not an individual, pursuant to whose public function the public record was kept or maintained." Mich. Comp. Laws Ann. § 15.420(7).

A plaintiff is not, of course, entitled to punitive damages or attorney's fees and costs where he or she was not found to be entitled to the requested information. *Bredemeier v. Kentwood Board of Education*, 95 Mich. App. 767, 291 N.W.2d 199 (1980) (defendant's failure to provide plaintiff with written notice of denial constituted a violation of FOIA, but plaintiff could not collect fees, costs, or damages where requested information was not in recorded form).

One example of a case where punitive damages were granted is *Walloon Lake, supra*, 415 N.W.2d at 296, where the actions of township officials in refusing FOIA requests without explanation and in rendering judicial order of disclosure impossible by disposing of the only copy of a document was considered an arbitrary and capricious violation of the FOIA as a matter of law. *See also Kincaid v. Dep't of Corrections*, 180 Mich. App. 176, 446 N.W.2d 604, 607 (1989) (affirming award of \$500 in punitive damages against defendant which arbitrarily and capriciously denied request on basis that requests were not sufficiently specific despite fact that defendant's own records established the opposite to be true).

11. Other penalties.

Not specified.

12. Settlement, pros and cons.

Not specified.

E. Appealing initial court decisions.

1. Appeal routes.

Usual appeal procedures under Michigan Court Rules are available.

2. Time limits for filing appeals.

Usual time limits for appeals under Michigan Court Rules apply. The FOIA, however, specifies that court actions and appeals therefrom must be expedited in every way. Mich. Comp. Laws Ann. § 15.240(3).

3. Contact of interested amici.

Usual procedures under Michigan Court Rules apply to *amicus* briefs.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

F. Addressing government suits against disclosure.

A plaintiff may bring an action to prevent disclosure of information held by a public body. See *Bradley v. Saranac Community Schools*, *supra* (a teacher may seek an injunction preventing disclosure of her personnel files); *Tobin v. Michigan Civil Service Comm'n*, *supra* (state employees may seek an injunction preventing the disclosure of the names and addresses of all civil service employees). Such an action, often referred to as a "reverse FOIA" action, usually alleges that the information is exempt from disclosure, and thus is analyzed under the FOIA. *Bradley*, *supra*, 455 Mich. at 292.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

Unlike Michigan's Freedom of Information Act, which complements existing laws, the Open Meetings Act ("OMA"), Mich. Comp. Laws Ann. § 15.261, *et seq.*, was, in part, intended to resolve conflicting provisions of law and expressly provides that it "shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public." Mich. Comp. Laws Ann. § 15.261(2). The purpose of the OMA "is to promote openness and accountability in government; it is therefore to be interpreted broadly to accomplish this goal. Because the OMA is interpreted liberally in favor of openness, we construe the closed-session exceptions strictly to limit the situations that are not open to the public. The burden of establishing that a meeting is exempt from the OMA is on [the]defendant." *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 192 Mich. App. 574, 481 N.W.2d 778, 782 (1992).

A. Who may attend?

The OMA provides generally that "all persons" may attend "all meetings of a public body," except as otherwise provided. Mich. Comp. Laws Ann. § 15.263(1). A person cannot be required as a condition of attendance "to register or otherwise provide his name or other information or otherwise to fulfill a condition precedent to attendances Mich. Comp. Laws Ann. § 15.263(4). The OMA also provides for attendees to address public meetings "under rules established and recorded by the public body." Mich. Comp. Laws Ann. § 15.263(5); see *Lysogorski v. Charter Twp. of Bridgeport*, 256 Mich. App. 297, 662 N.W.2d 108 (2003) (under the OMA, public bodies have the authority to establish and enforce rules regarding public comment); see also, 1977-78 Op. Att'y Gen. 536 (1978) (the right to address a meeting of a school board may not be limited to persons who are residents of or members of the educational community of a school district). One cannot be excluded from public meetings "except for a breach of the peace actually committed at the meeting." Mich. Comp. Laws Ann. § 15.263(6). The public body is under a duty to exercise sincere efforts to accommodate the number of people who may reasonably be expected to attend a meeting. 1977-78 Op. Att'y Gen. 21, 33 (1977); 1979-80 Op. Att'y Gen. 519, 521 (1979).

B. What governments are subject to the law?

The OMA applies to state and local bodies. Mich. Comp. Laws Ann. § 15.262(a). The OMA supersedes all local provisions requiring meetings of local public bodies to be open to the public. However, nothing in the OMA prohibits public bodies from adopting provisions which would require a greater degree of openness than is required by the standards provided for in the OMA. Mich. Comp. Laws Ann. § 15.261.

1. State.

See above.

2. County.

See above.

3. Local or municipal.

See above.

C. What bodies are covered by the law?

"All meetings of a public body" are to be open to the public. Mich. Comp. Laws Ann. § 15.263(l). A "public body" is defined as:

[A]ny state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, char-

ter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee there of performing an essential public purpose and function pursuant to the lease agreement.

Mich. Comp. Laws Ann. § 15.262(a).

1. Executive branch agencies.

Examples of executive branch agencies which have been found to be covered under the OMA are the Huron River Watershed Council, 1977-78 Op. Att’y Gen. 329 (1978), the State Safety Commission, 1977-78 Op. Att’y Gen. 21 (1977), a county concealed weapons licensing board, 2001 Op. Att’y Gen. No. 7073 (2001), and local medical control authorities, 2004 Op. Att’y Gen. No. 7165 (2004). Michigan Parole Board proceedings have been held to be exempted from OMA, *Glover v. Michigan Parole Board*, 460 Mich. 511, 596 N.W.2d 598 (1999). The term “public body” connotes a collective entity; A single individual is not generally recognized as a “board,” “commission,” “committee,” “subcommittee,” “authority,” or “council.” *Herald Company Inc. v. City of Bay City*, 463 Mich. 111, 129-30, 614 N.W. 2d 873 (2000) (city manager acting in his executive capacity not a public body for purposes of OMA and a committee appointed by the manager in selecting a fire chief is also not a public body). An individual acting in his official capacity, even if required to perform the functions of a previous school board (which constitutes a public body) is not a public body for the purposes of the OMA. *Craig v. Detroit Pub. Sch. Chief Exec. Officer*, 265 Mich. App. 572, 579 (Mich. Ct. App. 2005).

a. What officials are covered?

“MCL 15.273(1) provides: ‘A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than \$ 500.00 total, plus court costs and actual attorney’s fees to a person or group of persons bringing the action.’ Accordingly, this statute mandates personal liability for a public official who intentionally violates the OMA.” *Leemreis v. Sherman Twp.*, 273 Mich. App. 691, 701-702 (Mich. Ct. App. 2007).

2. Legislative bodies.

The OMA covers state and local legislative bodies. A joint legislative committee is a “public body” within the meaning of the OMA. 1977-78 Op. Att’y Gen. 451 (1978). Further, any state or local body that is empowered by resolution to exercise governmental or proprietary authority is a public body under the OMA. See *Jackson v. Eastern Michigan University Foundation*, 215 Mich. App. 240, 246-47, 544 N.W.2d 737 (1996) (University foundation which was empowered to manage university’s endowment was a public body); *Jude v. Heselschwerdt*, 228 Mich. App. 667, 578 N.W. 2d 704 (1998) (board of review appointed to review county drain commissioner’s apportionment of benefits subject to OMA); *Morrison v. City of East Lansing*, 255 Mich. App. 505, 660 N.W.2d 395 (2003) (committee appointed by city council to be in charge of development of community center is public body subject to OMA).

3. Courts.

The OMA does not apply to judicial proceedings but it does apply to a court “while exercising rule-making authority and while deliberating or deciding upon the issuance of administrative orders.” Mich. Comp. Laws Ann. § 15.263(7). However, this provision was held to be an unconstitutional legislative intrusion on judicial powers in *In re “Sunshine Law”*, 1976 P.A. 267, 400 Mich. 660, 255 N.W.2d 635 (1977). Nevertheless, the law has not been repealed. In *Herald Co., v. Tax Tribunal*, 258 Mich. App. 78, 85, 669 N.W.2d 862 (2003), the Michigan Court of Appeals determined that the Michigan Tax Tribunal is a public body subject to the OMA. The Court of Appeals has also held that it is not unconstitutional to apply the OMA to constitutionally established universities when they are selecting a president. *Federated Publications Inc. v. Board of Trustees of Michigan State University*, 221 Mich. App. 103, 111-114, 561 N.W.2d 433 (1997). However, the Michigan Supreme Court reversed, holding that the application of

OMA to the internal operations of a university in selecting a president infringes the University Board of Trustees’ constitutional power to supervise the institution, *Federated Publications Inc. v. Board of Trustees of Michigan State University*, 460 Mich. 75, 594 N.W. 2d 491 (1999).

4. Nongovernmental bodies receiving public funds or benefits.

See generally, Mich. Comp. Laws Ann. § 15.263(1) (“lessee[s] . . . performing an essential public purpose and function pursuant to the lease agreement are included in definition of a public body); see also, *Stablein v. Schuster*, 183 Mich. App. 477, 455 N.W. 2d 315, 318 (1990) (“Plaintiff’s claim that the school board meeting was not a public and official proceeding has no merit.”); *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 192 Mich. App. 574, 581, 481 N.W.2d 778, 782 (1992) (“There is no doubt that defendant [University of Michigan Board of Regents] is a public body as defined in the OMA.”); *Jackson v. Eastern Michigan University Foundation*, 215 Mich. App. 240, 544 N.W.2d 737 (1996) (body primarily funded by state or local authority is a public body under FOIA and OMA), and 2001 Op. Att’y Gen. No. 7087 (2001) (the board of trustees of a retirement system established and administered by a home rule city is public body subject to OMA).

5. Nongovernmental groups whose members include governmental officials.

These do not appear to fit the definition of a “public body.” Even if they did, they presumably would be covered by the OMA only to the extent that their decisions “effectuate and formulate public policy.” Mich. Comp. Laws Ann. § 15.262(d).

6. Multi-state or regional bodies.

The definition of “public body” in Mich. Comp. Laws Ann. § 15.262(a) refers to only state and local bodies. Compare the FOIA’s definition, which includes “regional” governing bodies. Mich. Comp. Laws Ann. § 15.232(b)(iii).

7. Advisory boards and commissions, quasi-governmental entities.

Mich. Comp. Laws Ann. § 15.263(7) specifies that the OMA does not apply to the following entities when they are deliberating the merits of a case:

- (a) The workers compensation appeal board created under Mich. Comp. Laws Ann. § 418.101-.941.
- (b) The employment security appeals board created under Mich. Comp. Laws Ann. § 421.1-.67.
- (c) The teacher tenure commission created under Mich. Comp. Laws Ann. § 38.71-.191.
- (d) An arbitrator or arbitration panel appointed by the employment relations commission pursuant to the authority given the commission by Mich. Comp. Laws Ann. § 423.1-3.
- (e) An arbitration panel covering health care arbitration selected pursuant to Mich. Comp. Laws Ann. § 600.5040-.5065.

The definition of a “public body” is also tempered by the definition of “meeting,” which is “the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy.” Mich. Comp. Laws Ann. § 15.262(b). Thus, the Attorney General has surmised that the OMA does not apply to committees and subcommittees of public bodies which are merely advisory or only capable of making recommendations concerning the exercise of governmental authority, but which are not legally capable of rendering a final decision. 1977-78 Op. Att’y Gen. 21, 40 (1977).

However, the Attorney General has also opined that a meeting of a standing committee of a county board of commissioners, composed of

less than a quorum of the full board, is subject to the OMA when the committee is *effectively authorized* to determine what items of county business are referred for action by the full board. 2009 Op. Att’y Gen. No. 7235 (2009)(emphasis added)(quoting 1998 Op. Att’y Gen. No. 7000 (1998)).

Additionally, the Michigan Court of Appeals has taken a broad view of such committees. See *Schmiedicke v. Clare Sch. Bd.*, 228 Mich. App. 259, 577 N.W. 2d 706 (1998) (school board’s referral to a committee for a recommendation regarding method of evaluating administrators and length of their contracts was a delegation of authority to perform a public function and meetings are subject to OMA); *Morrison v. City of East Lansing*, 255 Mich. App. 505, 520, 660 N.W.2d 395 (where city council “effectively authorized” committee to perform a governmental function and the committee held public meetings to solicit public input, despite the fact that the committee was not capable of rendering a final decision, it was still a public body subject to OMA).

Of course, where such a subcommittee contains the entire body of the public body which it serves, it would be a violation of the OMA to allow such subcommittees to meet in closed session. 1977-78 Op. Att’y Gen. at 40. Similarly, the Michigan Environmental Review Board and the Interdepartmental Environmental Review Committee are not subject to the provisions of the OMA as “public bodies,” because they are advisory bodies created by the Governor (who in fact is not authorized under Michigan law to create public bodies which exercise governmental or proprietary functions). 1977-78 Op. Att’y Gen. 21, 29-30 (1977). See also 1997 Op. Att’y Gen. No. 6935 (1997) (OMA not applicable to advisory committee formed by a board of education to study eligibility standards for participation in athletics). The State Board of Ethics, on the other hand, has been held to be subject to the OMA because, although its function is advisory and it is not empowered to take direct action against a person or agency, the Board cannot be considered merely an advisory body since the compulsory language of the act which creates the Board obligates the appointing authority to act upon the Board’s recommendation. 1979-80 Op. Att’y Gen. 935, 937 (1980).

An urban redevelopment corporation organized under the law is subject to OMA and FOIA. 2000 Op. Att’y Gen. No. 7066 (2000). A corporation formed under the summer resort owners corporation act is subject to OMA and FOIA. 1997 Op. Att’y Gen. No. 6942 (1997).

8. Other bodies to which governmental or public functions are delegated.

A Board of Tax Review is a local governing body empowered by statute to exercise governmental authority and a finding of the Board of Review is a “decision” within the meaning of the OMA. Because its determinations effectuate public policy, meetings of boards of review are subject to requirements of the OMA. 1977-78 Op. Att’y Gen. 377 (1978).

9. Appointed as well as elected bodies.

The OMA’s definition of public bodies does not distinguish between appointed and elected bodies. See Mich. Comp. Laws Ann. § 15.262(a).

D. What constitutes a meeting subject to the law.

When a quorum of the members of a public body meet to consider and discuss public business, it is a “meeting” within meaning of Open Meetings Act (OMA). *Nicholas v. Meridian Charter Tp. Bd.*, 239 Mich.App. 525, 609 N.W.2d 574 (2000). However, a chance gathering of members of public body, during which members do not engage in deliberations or render decisions, is not a “meeting,” and thus is not subject to requirements of the OMA. *Ryant v. Cleveland Township*, 239 Mich.App. 430, 608 N.W.2d 101 (2000).

1. Number that must be present.

Mich. Comp. Laws Ann. § 15.262 defines those meetings which are subject to the OMA as: “Meeting’ means the convening of a public body at which a quorum is present for the purpose of deliberating

toward or rendering a decision on a public policy.” Mich. Comp. Laws Ann. § 15.262(b). See also Mich. Comp. Laws Ann. § 15.263(3) (“All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as otherwise provided in [the exemption sections of the OMA]”). Any exceptions to the requirement of an open meeting when a quorum is present have been based on the purpose for which the quorum is present. See 1979-80 Op. Att’y Gen. 386 (1979) (a quorum of a local board of education may meet with the State Board of Education to listen to the State Board’s position on issues of concern to the local board without complying with the requirements of the OMA, as long as the local board does not, at such a meeting, deliberate upon or decide matters of public policy); 1977-78 Op. Att’y Gen. 21, 35 (1977) (where members of a public body are invited to address a civic organization and a sufficient number of the members of the body are present to constitute a quorum, such a situation is neither the “convening” of a public body nor is the quorum present “for the purpose of deliberating toward or rendering a decision”; thus, such an occasion is not a “meeting” within the definition of the OMA); *Ryant v. Cleveland Twp.*, 239 Mich. App. 430, 608 N.W. 2d 101 (2000) (planning commission meeting in which quorum of township board present not a meeting subject to OMA where the board members other than the supervisor, were observers only and did not engage in discussion).

a. Must a minimum number be present to constitute a “meeting”?

By definition, a gathering of less than a quorum of a public body generally does not constitute a “meeting” within the meaning of the OMA and need not comply with the requirements set forth in the OMA. 2009 Op. Att’y Gen. No. 7235 (2009) Quorum is not defined in the act, so the dictionary definition is applicable; Black’s Law Dictionary defines a quorum as the minimal number of members (usually a majority of all of the members) who must be present for a deliberative assembly to legally transact business. 8th ed. p. 1284.

b. What effect does absence of a quorum have?

See above.

2. Nature of business subject to the law.

Mich. Comp. Laws Ann. § 15.263(10) specifically provides that the OMA does not apply to “a meeting which is a social or chance gathering or conference not designed to avoid this act.” The Attorney General opined that the legislature included this exception so that members of a public body, even though constituting a quorum, could listen to the concerns of members of the public or persons with special knowledge in the presence of other interested persons. Examples would be a conference of the American Association of State Transportation Officials or a conference of educators designed to provide information of professional interest to the participants.

However, when a gathering is designed to receive input from officers or employees of a public body, the OMA requires that the gathering be held at a public meeting. 1979-80 Op. Att’y Gen. 29 (1979). Furthermore, since this exception includes meetings “not designed to avoid the act,” this suggests a legislative intent that the OMA should apply to those meetings designed to avoid the OMA. Thus, a public body cannot avoid the OMA by deliberately dividing itself into groups of less than a quorum to deliberate on public policy, because doing so would circumvent this apparent legislative intent, as well as the overall objective of the OMA to promote openness and accountability in government. *Booth Newspapers Inc. v. Wyoming City Council*, 168 Mich. App. 459, 425 N.W.2d 695 (1988); see also *Booth Newspapers Inc. v. University of Michigan Board of Regents*, *supra*, 481 N.W.2d at 782, “Because defendant, a public body, deliberately divided itself into sub-quorum groups to deliberate on public business [the selection of a new university president], in direct circumvention of the OMA’s objective of promoting openness and accountability in government, we hold that “they constituted a constructive quorum under the OMA.”

All “decisions” of a public body are to be made at meetings which

are open to the public. Mich. Comp. Laws Ann. § 15.263(2). A “decision” is defined in Mich. Comp. Laws Ann. § 15.262(d) to include “a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy. All deliberations of a public body constituting a quorum of its members” must also take place at open meetings. Mich. Comp. Laws Ann. § 15.263(3). Thus, when a public body meets to consider information from its staff relating to issues of fact and law contained in a proposal for decision, it is deliberating toward a decision within the scope of the OMA and must do so at a meeting to which the public will be admitted. 1977-78 Op. Att’y Gen. 465, 467 (1978). The discussion of the form and style of a decision or order is also part of the deliberation toward and rendering of the final decision. 1977-78 Op. Att’y Gen. at 467; *see also Booth Newspapers Inc. v. University of Michigan Board of Regents, supra*, 481 N.W.2d at 783 (“The shortening of the candidate list [by subquorum groups] consisted of an undisputed decision-making process that was carried out with the full consensus of the board . . . and these decisions should have been made only at open meetings.”). Some loopholes in the general “decision” rule have been recognized in terms of content, since the definition of “decision” is restricted to actions “by which a public body effectuates or formulates public policy.” Mich. Comp. Laws Ann. § 15.262. For example, when members of a public body meet to discuss their individual elections and political concerns, they are not considering matters of public policy within the OMA, and need not follow its requirements. 1979-80 Op. Att’y Gen. 55 (1979).

Since “decisions” must be made at open meetings under Mich. Comp. Laws Ann. § 15.263(2), a number of methods of decision-making which would skirt this requirement have been struck down by the courts. Thus, a legislative committee may not engage in the practice of “round-robinning” by which votes on a measure are obtained by a member of the committee going to other members and obtaining their signatures on a tally sheet. 1979-80 Op. Att’y Gen. 216 (1977). Moreover, any voting procedure at a public meeting which prevents citizens from knowing how members of a public body have voted is prohibited. 1977-78 Op. Att’y Gen. 338 (1978). The OMA thus prohibits public bodies from voting by secret ballot, *Esperance v. Chesterfield Township*, 89 Mich. App. 456, 280 N.W.2d 559, 563 (1979) and from holding phone call conference meetings, 1977-78 Op. Att’y Gen. 21, 32 (1977).

A provision in the bylaws of a city’s downtown development authority that allows board members to vote by proxy violates the Open Meetings Act because proxy voting fails to make the important deliberative aspects of the absent board member’s decision-making process open to the public when rendering a decision that effectuates public policy. Op. Att’y Gen. 7227 (2009). The OMA’s requirements are met when vote is by roll call, show of hands, or “any other method whereby the way a public official voted is made known to the public.” *Esperance, supra*, 280 N.W.2d at 563.

3. Electronic meetings.

Open Meetings Act [§ 15.261 et seq.] was not violated by Department of Social Services in contested case hearings in which teleconference calls were conducted over speaker phones and all interested persons who wished to attend hearings were allowed to do so; furthermore, release of a written opinion to public, rather than convening a second hearing for sole purpose of announcing hearing officer’s decision, would meet requirements of the Act. *Goode v. Department of Social Services*, 143 Mich.App. 756, 373 N.W.2d 210 (1985).

a. Conference calls and video/Internet conferencing.

Interactive television can be used to enable some directors to participate in a meeting if a central site is set up so that interaction among all the directors, whether they be on or off that site, and interested members of the public is possible. 1995 Op. Att’y Gen 6835 (1995).

b. E-mail.

Not addressed by the law

c. Text messages.

Not addressed by the law

d. Instant messaging.

Not addressed by the law

e. Social media and online discussion boards.

Not addressed by the law

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

Regular meetings, which are regulated under Mich. Comp. Laws Ann. § 15.265, are not defined within the OMA, nor does the Act specifically require public bodies to establish regular meetings schedules. 1977-78 Op. Att’y Gen. 21, 37 (1977). However, where such a schedule is established, it must be posted yearly. *See* Mich. Comp. Laws Ann. § 15.265(2).

b. Notice.

Notice is required for all meetings under the OMA: “A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.” Mich. Comp. Laws Ann. § 15.265(1). The requirement that a person be “designated” to carry out the posting of public notice means that such a person must be formally chosen by resolution noticed in the minutes of the public body. 1977-78 Op. Att’y Gen. 21, 36 (1977).

(1). Time limit for giving notice.

For regular meetings, a public body must post within ten days after the first meeting in each calendar or fiscal year a public notice stating the dates, times, and places of its regular meetings. Mich. Comp. Laws Ann. § 15.265(2). If there is a change in the schedule of regular meetings, the public body is required to post, within three days after the meeting at which the change is made, a public notice stating the new dates, times, and places of regular meetings. Mich. Comp. Laws Ann. § 15.265(3).

(2). To whom notice is given.

The OMA provides for interested parties to request copies of required notices:

(a) Upon the written request of an individual, organization, firm, or corporation, and upon the requesting party’s payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a public body shall send to the requesting party by first class mail a copy of any notice required to be posted pursuant to section 5(2) to (5) [Mich. Comp. Laws Ann. § 15.265(2) to (5)].

(b) Upon written request, a public body, at the same time a public notice of a meeting is posted pursuant to section 5 [Mich. Comp. Laws Ann. § 15.265], shall provide a copy public notice of that meeting to any newspaper published in the state and to any radio and television station located in the state, free of charge. Mich. Comp. Laws Ann. § 15.266.

(3). Where posted.

Public notices must be posted at the principal office of the public body, as well as at “any other locations considered appropriate by the public body.” Mich. Comp. Laws Ann. § 15.264(b). In addition, if the public body is part of a state department, the legislative or judicial branch, an institution of higher education, or a political subdivision or school district, public notices are also to be posted “in the respec-

tive principal office of the state department, the institute of higher education, clerk of the house of representatives, secretary of the state, senate, clerk of the supreme court, or political subdivision or school district.” Mich. Comp. Laws Ann. § 15.264(c). Cable television may be used as a medium for posting public notices. Mich. Comp. Laws Ann. § 15.264(b).

(4). Public agenda items required.

No public agenda items are specifically required by the OMA.

(5). Other information required in notice.

Public notices must contain the name of the public body to which the notice applies, its telephone number, and its address. Mich. Comp. Laws Ann. § 15.264(a). See *Lysogorski v. Bridgeport Charter Tp.*, 256 Mich.App. 297, 662 N.W.2d 108 (2003) (Despite an attendee’s contention that he was unable to determine from the agenda the precise matter that the township board planned to discuss, the agenda contained the public body’s name, address, and telephone number, and was properly published and therefore satisfied the statutory requirement of public notice).

When the place where the meeting of a public body is to be held is different from the address of the public body, the notice must contain both addresses in order to comply with the OMA. 1977-78 Op. Att’y Gen. 21, 36 (1977). The OMA sets forth special notice requirements for meetings which take place in residential dwellings. First, such meetings may only be held if a nonresidential building is not available within the boundary of the local government unit or school system without cost to the public body. Second, notice of such a meeting must be published as a display advertisement in a newspaper of general circulation in the city in which the meeting is to be held at least two days before the meeting and must state the date, time, and place of the meeting. The notice, which must be at the bottom of the display ad and set off in a conspicuous manner, must include the following language: “This meeting is open to all members of the public under Michigan’s open meetings act.” Mich. Comp. Laws Ann. § 15.265(6).

(6). Penalties and remedies for failure to give adequate notice.

An action of a public body may be invalidated under Mich. Comp. Laws Ann. § 15.270; a court may compel compliance with the OMA or enjoin further noncompliance under Mich. Comp. Laws Ann. § 15.271. An action for mandamus against a public body may be commenced in the Court of Appeals under Mich. Comp. Laws Ann. § 15.271(3). Public officials who are found to have intentionally violated the OMA may be fined up to \$1,000 under Mich. Comp. Laws Ann. § 15.272(1).

c. Minutes.

(1). Information required.

Public bodies are required to keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made if the meeting was open to the public, and the purpose or purposes for which a closed session was held. The minutes must also include all roll call votes taken at the meeting. Mich. Comp. Laws Ann. § 15.269(1). Corrections must be made to the minutes no later than the next meeting after the meeting to which the minutes refer. Corrected minutes, then, must be available no later than the next subsequent meeting after correction, and must show both the original entries and the correction. Mich. Comp. Laws Ann. § 15.269(l).

(2). Are minutes public record?

Minutes are considered public records under the OMA and must be available for public inspection at the address designated on the public notices posted pursuant to Mich. Comp. Laws Ann. § 15.264. Mich. Comp. Laws Ann. § 15.269(2). Although, generally, neither advance notice nor supervision should be required for the inspection of copies of open meeting minutes, a public body may, under rules established

and recorded by the body, request advance notice of and require supervision of any copy of the public body’s record copy of open meeting minutes to protect the record from loss, unauthorized alteration, mutilation, or destruction. 2010 Op. Att’y Gen. 7244 (2010). Thus, as with other public records under the FOIA, copies of the minutes must be available to the public at the reasonable estimated costs for printing and copying. Mich. Comp. Laws Ann. § 15.269(2). Since the OMA requires that minutes be available for public inspection at the address designated on the public notice, it is reasonable to conclude that a public body having no permanent location may select a readily accessible location to store its minutes and may state in its notice where that location is. 1977-78 Op. Att’y Gen. 21, 36 (1977). Proposed minutes must be available for public inspection no more than eight business days after the meeting to which the minutes refer, while approved minutes are to be available within five business days after the meeting at which the minutes are approved by the public body. Mich. Comp. Laws Ann. § 15.269(3).

2. Special or emergency meetings.

a. Definition.

Special meetings are not defined under the OMA.

b. Notice requirements.

(1). Time limit for giving notice.

“[F]or a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting.” Mich. Comp. Laws Ann. § 15.265(4). The eighteen-hour notice requirement is not fulfilled if the public is denied access to notice for any part of the eighteen hours. 1979-80 Op. Att’y Gen. 840 (1980). It does not apply to special meetings of subcommittees of a public body or conference committees of the state legislature. Mich. Comp. Laws Ann. § 15.265(4). Conference committees operate under shorter time limits. A conference committee must give six-hour notice. A second conference committee must give one-hour notice. Notice of a conference committee meeting must include written notice to each member of the conference committee and to the majority and minority leaders of each house indicating the time and place of the meeting. Mich. Comp. Laws Ann. § 15.265(4).

There are also special notice requirements for meetings which have reconvened. A meeting recessed for more than 36 hours can be reconvened only after a public notice is posted which meets the requirements above. Mich. Comp. Laws Ann. § 15.265(5). If either house of the state legislature is adjourned or recessed for less than eighteen hours, the notice provisions above are not applicable. Beyond all this, the OMA has a broad emergency provision: “Nothing in this section [Mich. Comp. Laws Ann. § 15.265] bars a public body, however, from meeting in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public when 2/3 of the members serving on the body decide that delay would be detrimental to efforts to lessen or respond to the threat.” Mich. Comp. Laws Ann. § 15.265(5).

(2). To whom notice is given.

Public notices which are posted to meet the above requirements must be made available upon the written request of interested parties as described in Mich. Comp. Laws Ann. § 15.264(b).

(3). Where posted.

Posting requirements for special meetings are the same as those for regular meetings. See Mich. Comp. Laws Ann. § 15.264(b) and (c).

(4). Public agenda items required.

No specific agenda items are required by the OMA.

(5). Other information required in notice.

The OMA sets forth special notice requirements for meetings

which take place in residential dwellings. First, such meetings may only be held if a nonresidential building is not available within the boundary of the local government unit or school system without cost to the public body. Second, notice of such a meeting must be published as a display advertisement in a newspaper of general circulation in the city in which the meeting is to be held at least two days before the meeting and must state the date, time, and place of the meeting. The notice, which must be at the bottom of the display ad and set off in a conspicuous manner, must include the following language: "This meeting is open to all members of the public under Michigan's open meetings act." Mich. Comp. Laws Ann. § 15.265(6).

(6). Penalties and remedies for failure to give adequate notice.

Generally, the same remedies for failure to give adequate notice of regular meetings applies.

c. Minutes.

(1). Information required.

The information required for the minutes of special meetings is the same as for regular meetings.

(2). Are minutes a public record?

Minutes of special meetings are, like minutes for regular meetings, public records.

3. Closed meetings or executive sessions.

a. Definition.

The OMA contains no express definition of closed meetings. A person intruding upon a closed session of a public body may be forcibly removed by a law enforcement officer, or removal may be accomplished by recessing and moving the closed session to another location. 1985-86 Op. Att'y Gen. 268, 271 (1986).

b. Notice requirements.

While the OMA contains no express definition of closed meetings, it does state: "A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body." Mich. Comp. Laws Ann. § 15.265(1). A public body must meet in public before closing a meeting and take a 2/3 roll call vote of its members to enter into a closed session. Mich. Comp. Laws Ann. § 15.267(1). Additionally, for purposes of calling a closed meeting, there must be a two-thirds roll call vote of all the members of the public body appointed to and serving, not merely two-thirds of those attending the particular meeting. 1977 Op. Att'y Gen. 5183, p. 21. (1977). Thus, notice of the public meeting during which the 2/3 vote is taken must be given in accordance with Mich. Comp. Laws Ann. § 15.264.

(1). Time limit for giving notice.

Pursuant to Mich. Comp. Laws Ann. § 15.265, notice for regular meetings must be posted within 10 days of the first meeting of the body with all the dates, times and places of the regular meetings. Mich. Comp. Laws Ann. § 15.265(2). Rescheduled or special meetings must provide at least 18 hours notice, conference calls, 6 hour notice. Mich. Comp. Laws Ann. § 15.265(4).

(3). Where posted.

Notice of meetings must be posted at the principal office of the public body and "any other locations considered appropriate by the public body." Mich. Comp. Laws Ann. § 15.264(a), (b). Cable television may also be used. *Id.* For public bodies without a "principal office," notice must be posted at the county clerk's office in which the public body serves. Mich. Comp. Laws Ann. § 15.264(d). For state public bodies without a principal office, notice must be posted in the office of the secretary of state. *Id.*

(4). Public agenda items required.

Nothing more is required in the notice/agenda other than the public body's name, telephone number and address. Mich. Comp. Laws Ann. § 15.264(a); *See also Lysogorski v. Bridgeport Charter Tp.* 662 N.W.2d 108 (Mich. App. 2003) (finding that an agenda containing only the public body's name, address and telephone number was properly published and satisfied the notice requirement). The nature of the business to be conducted at the meeting does not need to be set forth in advance. *See Haven v. City of Troy*, 197 N.W.2d 496 (Mich. App. 1972).

(5). Other information required in notice.

Nothing more is required in the notice/agenda other than the public body's name, telephone number and address. Mich. Comp. Laws Ann. § 15.264(a)

c. Minutes.

(1). Information required.

As a 2/3 roll call vote of members is required to call a closed session, the roll call vote and the purpose or purposes for calling the closed session must be entered into the minutes of the meeting at which the vote is taken. Mich. Comp. Laws Ann. § 15.267(1). *See also Mich. Comp. Laws Ann. § 15.269(l).*

(2). Are minutes a public record?

Minutes of closed meetings, which are to be retained by the clerk of the public body, are not available to the public and will only be disclosed if required by a civil action filed under Mich. Comp. Laws Ann. §§ 15.270, 15.271, or 15.273. *See Mich. Comp. Laws Ann. § 15.267.* Transcripts of closed sessions are part of the minutes and are exempt from disclosure. *Titus v. Shelby Charter Twp.*, 226 Mich. App. 611, 574 N.W. 2d 391 (1997). A public official who disseminates closed session minutes to the public risks criminal prosecution and civil penalties. 2000 Op. Att'y Gen. No. 7061 (2000).

d. Requirement to meet in public before closing meeting.

A public body must meet in public before closing a meeting in order to take the 2/3 roll call vote of its members which is required to call a closed session. Mich. Comp. Laws Ann. § 15.267(1). No final action may be taken during a closed meeting, since Mich. Comp. Laws Ann. § 15.263 requires that "decisions" be made at open meetings. 1979-80 Op. Att'y Gen. 57 (1979).

e. Requirement to state statutory authority for closing meetings before closure.

Not specified.

f. Tape recording requirements.

Audiotape of a closed session meeting of city council was part of the minutes of the session meeting, and thus audiotape was required under OMA to be filed with the city clerk for retention, despite claim that retention of such audiotapes would be overly burdensome; audiotape of public meetings could be disposed of once written minutes were officially adopted, and audiotapes of closed meetings was sufficiently rare to not be overly burdensome. *Kitchen v. Ferndale City Council*, 253 Mich.App. 115, 654 N.W.2d 918 (2002).

F. Recording/broadcast of meetings.

The right to attend a meeting of a public body now includes the right to tape-record, videotape, broadcast live on radio, or telecast live on television the proceedings of a public body, subject to the prior approval of the public body. Public bodies may establish reasonable rules and regulations in order to minimize the disruption of their meetings. Mich. Comp. Laws Ann. § 15.263(l).

1. Sound recordings allowed.

See above.

2. Photographic recordings allowed.

See above.

G. Are there sanctions for noncompliance?

The Attorney General, prosecuting attorney of the county where the public body serves, or a person may commence a civil action to obtain an injunction requiring compliance with the OMA. Mich. Comp. Laws Ann. § 15.271(1). If a person is successful in obtaining this injunctive relief, the person is entitled to recover “court costs and actual attorney’s fees.” *Id.*

Moreover, the OMA provides criminal penalties for noncompliance. A public official who intentionally violates the OMA is guilty of a misdemeanor punishable by a maximum fine of \$1,000.00. Mich. Comp. Laws Ann. § 15.272(1). If the public official intentionally violates the OMA a second time within the same term, the public official will again be guilty of a misdemeanor and receive a maximum fine of \$2,000.00 or imprisonment for a maximum of 1 year, or both. Mich. Comp. Laws Ann. § 15.272(2).

A person may also bring a civil action for damages against a public official who violates the OMA. A public official who has intentionally violated the OMA will be held personally liable for “actual and exemplary damages of not more than \$500.00 total, plus court costs and actual attorney’s fees.” Mich. Comp. Laws Ann. § 15.273(1). This action may be joined with an action for injunctive relief. Mich. Comp. Laws Ann. § 15.273(3).

The OMA provides for substantial fines against universities in certain circumstances. If an institution of higher education violates the OMA with respect to the process of selecting the institution’s president at any time after the recommendation of final candidates to the governing board, the institution is responsible for a maximum civil fine of \$500,000.00. Mich. Comp. Laws Ann. § 15.273a. This civil fine is in addition to any other remedy or penalty under the OMA. *Id.*

However, Mich. Comp. Laws Ann. §15.270(3) limits when actions to invalidate a decision can be brought to 60 days after the minutes have been made available to the public. §15.273 limits causes of action against public officials for intentional violations of OMA to 180 days after the date of violation. See *Maiberger v. City of Livonia*, 724 F.Supp.2d 759 E.D.Mich. (2010).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

A public body may meet in closed session only for the purposes listed in Mich. Comp. Laws Ann. § 15.268. The closed session exceptions are to be construed strictly to limit the types of situations that are not open to the public. *Wexford County Prosecuting Attorney v. Pranger*, 83 Mich. App. 197, 268 N.W.2d 344 (1978); see also *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 168 Mich. App. 459, 425 N.W.2d 695 (1988).

b. Mandatory or discretionary closure.

Mich. Comp. Laws Ann. § 15.268 states that “a public body may meet in a closed session” only under specific exemptions. *Id.*

2. Description of each exemption.

a. A public body may meet in a closed session “[t]o 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 indi-

vidual agent, if the named person requests a closed hearing. Mich. Comp. Laws Ann. § 15.268(a). A person may rescind a request for a closed hearing at any time, after which the matter will be considered after the rescission only in open sessions. Mich. Comp. Laws Ann. § 15.268(a). The phrase “after the rescission” was recently added to the last sentence of Mich. Comp. Laws Ann. § 15.268(a), suggesting that matters do not need to be reheard from the beginning if a request for a closed hearing is rescinded.

b. A public body may meet in a closed session to consider the dismissal, suspension, or disciplining of a student under two conditions: if the public body is part of the school district or institution which the student is attending, and if the student’s parent or guardian requests a closed hearing. Mich. Comp. Laws Ann. § 15.268(b).

c. “[S]trategy and negotiation sessions connected with the negotiation of a collective bargaining agreement’ may be closed to the public if either negotiating party requests a closed hearing. Mich. Comp. Laws Ann. § 15.268(c). This exemption has been interpreted strictly to permit closed strategy sessions only when negotiation of a labor agreement is in progress or about to commence. *Wexford County Prosecuting Attorney*, *supra*, 268 N.W.2d at 348. Thus, a city commission’s May meeting to discuss the residency policy for city employees did not qualify for exemption, since a mandatory collective bargaining subject was involved and since collective bargaining was not to begin until August for renewal of a labor contract to expire December 31. *Id.* “Negotiation sessions” as used in this exemption, refers to “actual collective bargaining sessions between employer and employee.” *Id.* In *Moore v. Fenville Public Schools Board of Education*, 223 Mich. App. 196, 566 N.W. 2d 31 (1997), it was held that the members could meet in a closed session to reach consensus on a union’s proposal because consensus reflected a goal in negotiations and not a final determination.

d. A public body may meet in closed session “[t]o consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.” Mich. Comp. Laws Ann. § 15.268(d). Under this section, it has been held proper for a public body to meet in closed session to vote upon rejection of an owner’s offer to sell real property at a designated price, or to direct its agents as to their limits in negotiating for the purchase of real property. 1977-78 Op. Att’y Gen. 606 (1978). A public body may not hold a closed meeting for the purpose of disposing of a building through sale or lease, although it may hold a closed meeting for the purpose of acquiring or leasing a building up to the time that an option is obtained. 1977-78 Op. Att’y Gen. 389 (1978).

e. Closed sessions may be held “[t]o consult with [an] 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.” Mich. Comp. Laws Ann. § 15.268(e); see also *The Detroit News Inc. v. City of Detroit*, 185 Mich. App. 296, 460 N.W.2d 312, 315 (1990) (rejecting defendant’s claim that closed meeting to review consent judgment regarding City’s acquisition of Chrysler/Jefferson plant was exempt because settlement had already been accepted and there was no longer any issue in dispute); *Manning v. City of East Tarwas*, 243 Mich. App. 244, 593 N.W. 2d 649 (1999) (the attorney does not need to be the attorney who is actually responsible for the litigation). *People v. Whitney*, 228 Mich. App. 230, 578 N.W. 2d 329 (1998) (settlement negotiations occurring before initiation of a judicial or ADR proceeding is not “pending” litigation).

f. A public body may meet in closed session “[t]o review the specific contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential.” Mich. Comp. Laws Ann. § 15.268(f). How-

ever, the public body must hold open meetings to interview such candidates. Mich. Comp. Laws Ann. § 15.268(f). The Attorney General has interpreted this “open interview” rule as applying only for those positions for which employment interviews must be conducted by the public body itself, since requiring public interviews for all positions, with all the attendant public notice requirements, would force public bodies to spend an inordinate amount of time on hiring procedures. Thus, in all other cases, where the public body itself is not required to interview the applicant, interviews for employment may be conducted in private by the staff of the public body. 1977-78 Op. Att’y Gen. 21, 38 (1977). However, under a 1996 amendment to the OMA, Mich. Comp. Laws Ann. § 15.268(f) does not apply to searches for the selection of a president of an institution of higher education established under Section 4, 5, or 6 of Article VIII of the Michigan Constitution. Instead, other rules apply to such searches. See Mich. Comp. Laws Ann. § 15.268(j). An Ingham County Circuit Court in May, 1997, ruled, however, that a university governing body must interview finalist university presidential candidates in public, and only advisory presidential selection committees may conduct preliminary interviews in closed session. *Detroit Free Press v. Northern Michigan University*, Ingham County Circuit Court No. 97-860046-CZ. But see, *Federated Publications Inc. v. Board of Trustees of Michigan State University*, *supra*.

Although Mich. Comp. Laws Ann. § 15.263(5) affords members of the public an opportunity to address a public body at some point during an open meeting according to rules established and recorded by the public body, they do not have the right to ask questions of applicants for employment during open interviews. 1981-82 Op. Att’y Gen. 507 (1981).

g. “Partisan caucuses of members of the state legislature” may meet in closed session. Mich. Comp. Laws Ann. § 15.268(g).

h. A public body may meet in closed session “[t]o consider material exempt from discussion or disclosure by state or federal statute.” Mich. Comp. Laws Ann. § 15.268(h). Thus, public bodies may meet in closed session to consider matters which are exempt from disclosure under the state or federal FOIAs. 1979-80 Op. Att’y Gen. 255, 270-71 (1979). *Ridenour v. Board of Education*, 111 Mich. App. 798, 314 N.W. 2d 760 (1981) (information may be discussed at a closed meeting if it is exempt from disclosure under the FOIA as information of a personal nature, the public disclosure of which would constitute a clearly unwarranted invasion of the individual’s privacy); *Booth Newspapers Inc. v. Regents of the University of Michigan*, 93 Mich. App. 100, 286 N.W. 2d 55 (1979) (written opinion of counsel to the University Board of Regents need not have been disclosed under the FOIA, and thus was exempt from open meeting requirements even though the opinion was not rendered in regard to specific pending litigation and so did not fall under Mich. Comp. Laws Ann. § 15.268(e)). But, when faced with FOIA exempt material as applied to the OMA, a public body must state on the record those documents it deems exempt under the FOIA together with the associated FOIA exemption justifying nondisclosure, describe those documents — unless description would defeat the purpose of nondisclosure — and complete this process on the record in open session before conducting a closed session. *Herald Company Inc. v. Tax Tribunal*, 258 Mich. App. 78, 669 N.W.2d 862 (2003). Note, however, that the exemption contained in the FOIA regarding communications and notes within a public body or between public bodies (Mich. Comp. Laws Ann. § 15.243(l)(n)) does not constitute an exemption for purposes of the OMA, because that section specifically states that it does not constitute an exemption for purposes of section 8(h) of the OMA [Mich. Comp. Laws Ann. § 15.268(h)]. See 1979-80 Op. Att’y Gen. 496 (1979).

Any exemption based on a claim of attorney-client privilege under OMA is narrowly construed. Closed sessions may not be held

to receive oral legal opinions and a proper discussion of a written legal opinion at a closed meeting is limited to any strictly legal advice presented in a written opinion. *People v Whitney*, 228 Mich. App. 230, 578 N.W. 2d 329 (1998). However, one court has reasoned that the term “consider” in 15.268(h) permits discussion and deliberation with respect to matters of attorney-client privilege. *Berryman v. Madison Sch. Dist.*, No. 265996, 2007 Mich. App. LEXIS 464, at *4 (February 22, 2007).

Other statutes for which Mich. Comp. Laws Ann. § 15.268(h) has been held to apply are Mich. Comp. Laws Ann. § 400.9, involving administrative hearings which can be closed to the general public if the matters to be discussed involve records concerning categorical assistance, medical assistance, or federally funded assistance and service programs protected from disclosure under federal and state statutes. 1979-80 Op. Att’y Gen. 31, 33-35 (1979). Also exempt are proceedings involving the Youth Parole and Review Board pursuant to Mich. Comp. Laws Ann. § 803.308, part of which may be closed when confidential records, as defined by that section, are under discussion. 1979-80 Op. Att’y Gen. at 32-33 (1979). The meetings of several other public bodies are exempt, when they are deliberating on the merits of a case. See Mich. Comp. Laws Ann. § 15.263(8).

i. A public body may meet in closed session “for a compliance conference conducted by the department of commerce under [Mich. Comp. Laws Ann. § 333.16231] before a complaint is issued.

j. In another 1996 amendment to the OMA, a public body may meet in closed session “in the process of searching for and selection of a president of an institution of higher education established under Section 4, 5, or 6 of Article VIII of the Michigan Constitution, to review the specific contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate. However, this exception only applies if the institution’s process for searching for and selecting a candidate meets all of the following requirements:

(1) the search committee has at least one student, one faculty member, one administrator, one alumnus, and one representative of the general public. The search committee may also include one or more members of the governing board, but not a quorum of the governing board. No one of these groups can constitute a majority of the search committee.

(2) After the search committee recommends the five final candidates, the governing board does not take a vote on a final session until at least 30 days after the five final candidates have been publicly identified by the search committee.

(3) The deliberations and vote of the governing board of the institution on selecting the president take place in an open session of the governing board. An Ingham County Circuit Court ruling has held that this provision applies to interviews of candidates, as well.

B. Any other statutory requirements for closed or open meetings.

Not specified.

C. Court mandated opening, closing.

Not specified.

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

Some administrative adjudications are specifically exempted in Mich. Comp. Laws Ann. § 15.263(8). In other cases, statutes governing certain administrative adjudications may render some information confidential. See Mich. Comp. Laws Ann. § 15.268(h).

1. Deliberations closed, but not fact-finding.

Some administrative adjudications are specifically exempted in Mich. Comp. Laws Ann. § 15.263(8). In other cases, statutes governing certain administrative adjudications may render some information confidential. See Mich. Comp. Laws Ann. § 15.268(h).

2. Only certain adjudications closed, i.e. under certain statutes.

Some administrative adjudications are specifically exempted in Mich. Comp. Laws Ann. § 15.263(8). In other cases, statutes governing certain administrative adjudications may render some information confidential. See Mich. Comp. Laws Ann. § 15.268(h).

B. Budget sessions.

Presumably open.

C. Business and industry relations.

Presumably open.

D. Federal programs.

Presumably open.

E. Financial data of public bodies.

Presumably open.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Not addressed.

G. Gifts, trusts and honorary degrees.

Presumably open.

H. Grand jury testimony by public employees.

Not addressed, but presumably closed.

I. Licensing examinations.

Not addressed.

J. Litigation; pending litigation or other attorney-client privileges.

Not addressed. See generally Mich. Comp. Laws Ann. § 15.268(e). A closed session may be held “[t]o consult with [an] 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.” *Id.* See also, *People v. Whitney, supra*.

K. Negotiations and collective bargaining of public employees.

See generally Mich. Comp. Laws Ann. § 15.268(c). Strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement may be closed to the public if either negotiating party requests a closed hearing. See also, *Moore v. Fenville Public Schools*, 223 Mich. App. 196, 566 N.W. 2d 31 (1997) (“In order to conduct a meaningful strategic session, the public body must be allowed to make determinations concerning its goals and tactics relative to the negotiations. Thus, the OMA must be interpreted so as to allow a public body to make strategic determinations during its closed-door deliberations”).

L. Parole board meetings, or meetings involving parole board decisions.

Not subject to OMA. *Glover v. Michigan Parole Board, supra*.

M. Patients; discussions on individual patients.

Not addressed.

N. Personnel matters.**1. Interviews for public employment.**

Interviews for public employment are to be open, although meeting to review the specific contents of an application for employment may be closed. See also *Booth Newspapers Inc. v. University of Michigan Board of Regents, supra*, 481 N.W.2d at 783 (public body may meet to review specific content of applications for employment if candidate requests confidentiality but all interviews must be conducted at open meeting).

Exception: Searches and interviews for presidents of certain educational institutions, as set forth in Mich. Comp. Laws Ann. § 15.268(j). But see *Federated Publications v. Board of Trustees of Michigan State University, supra*.

2. Disciplinary matters, performance or ethics of public employees.

A public body may meet in a closed session “[t]o 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. Mich. Comp. Laws Ann. § 15.268(a).

3. Dismissal; considering dismissal of public employees.

A public body may meet in a closed session “[t]o 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. Mich. Comp. Laws Ann. § 15.268(a).

O. Real estate negotiations.

A public body may meet in closed session “[t]o consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.” Mich. Comp. Laws Ann. § 15.268(d).

P. Security, national and/or state, of buildings, personnel or other.

Not addressed.

Q. Students; discussions on individual students.

A public body may meet in a closed session to consider the dismissal, suspension, or disciplining of a student under two conditions: if the public body is part of the school district or institution which the student is attending, and if the student’s parent or guardian requests a closed hearing. Mich. Comp. Laws Ann. § 15.268(b).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS**A. When to challenge.**

The OMA does not provide for administrative review.

B. How to start.

The OMA does not provide for administrative review.

1. Where to ask for ruling.**a. Administrative forum.****(1). Agency procedure for challenge.**

N/A

(2). Commission or independent agency.

N/A

b. State attorney general.

N/A

c. Court.

N/A

2. Applicable time limits.

N/A

3. Contents of request for ruling.

N/A

4. How long should you wait for a response?

N/A

5. Are subsequent or concurrent measures (formal or informal) available?

N/A

C. Court review of administrative decision.

1. Who may sue?

“The attorney general, the prosecuting attorney of the county in which the public body serves, or any person may commence a civil action in the circuit court to challenge the validity of a decision of a public body made in violation of [the OMA].” Mich. Comp. Laws Ann. § 15.270(1).

2. Will the court give priority to the pleading?

No provision of the OMA specifically gives priority to complaints under the Act.

3. Pro se possibility, advisability.

The availability of actual attorney’s fees for a plaintiff who prevails in an action under the act is intended to provide access to legal services. Mich. Comp. Laws Ann. § 15.271(4).

4. What issues will the court address?

a. Open the meeting.

“[I]f a public body is not complying with [the OMA], the attorney general, prosecuting attorney of the county in which the public body serves, or person may commence a civil action to compel compliance or enjoin further noncompliance with [the Act].” Mich. Comp. Laws Ann. § 15.271 (1). Injunctive relief is an extraordinary remedy which issues only when justice requires and there is no adequate remedy at law, and when there is real and imminent danger of irreparable injury. *Wexford County Prosecuting Attorney, supra*, 268 N.W.2d at 348; *see also Booth Newspapers Inc. v. University of Michigan Board of Regents, supra*, 507 N.W.2d at 431 (enjoining university board of regents from future use of subquorum committees to reach decision or hiring new university president). A person commencing an action for injunctive relief is not required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order. Mich. Comp. Laws Ann. § 15.271(2).

A court may order that the minutes of an improperly closed meeting be subject to disclosure. *The Detroit News v. City of Detroit, supra*, 460 N.W.2d at 315-316.

b. Invalidate the decision.

A decision made by a public body may be invalidated (a) if the body has not complied with the requirements of Mich. Comp. Laws Ann. § 15.263(1), (2), and (3) in making the decision or if the failure to give notice in accordance with Mich. Comp. Laws Ann. § 15.265 has “interfered with substantial compliance with” Mich. Comp. Laws Ann. § 15.263. However, a decision will only be invalidated if the court finds that the noncompliance or failure “has impaired the rights of

the public under the OMA].” Mich. Comp. Laws Ann. § 15.270(2). For example, deficiencies in the maintenance of meeting minutes do not provide grounds for invalidating an action taken by a public body. *Willis v. Deerfield Twp.*, 257 Mich. App. 541, 669 N.W.2d 279 (2003).

Further limitations on a circuit court’s jurisdiction to invalidate a decision are that the action must be commenced within 60 days after the approved minutes are made available to the public — unless the decision involves “the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors,” in which case the action must be commenced within 30 days after the approved minutes relating to that decision are made available to the public. Mich. Comp. Laws Ann. § 15.27(3). Invalidation of decisions made in contravention of the OMA is discretionary with the court. *Esperance, supra*, 280 N.W.2d at 559. Moreover, in any case where an action has been initiated to invalidate a public body’s decision, that body may reenact the disputed decision, in conformity with the OMA “without being deemed to make any admission contrary to its interest . . .” Mich. Comp. Laws Ann. § 15.270(5). “A decision reenacted in this manner [will] be effective from the date of reenactment and [will] not be declared invalid [because of any] deficiency in the procedure used for its initial enactment.” Mich. Comp. Laws Ann. § 15.270(5).

c. Order future meetings open.

A court may order future meetings open. However, where the court finds that there is no reason to believe that a public body will deliberately fail to comply with OMA in the future, injunctive relief is unwarranted. *Nicholas v. Meridian Charter Twp. Board*, 239 Mich. App. 525, 609 N.W.2d 574 (2000).

5. Pleading format.

Those seeking to have a decision of a public body invalidated under the OMA must allege not only that the public body failed to comply with the OMA, but also that this failure impaired the rights of the public. *See* Mich. Comp. Laws Ann. § 15.270(2); *Esperance, supra*, 280 N.W.2d at 563; and *Cape v. Howell Board of Education*, 145 Mich. App. 459, 378 N.W.2d 506, 510 (1985). “A mere recital that the rights of the public were impaired is insufficient to support a request for invalidation. . . . Rather, the plaintiff must present factual allegations to support the conclusion that the rights of the public were impaired.” *Jude, supra*, 228 Mich. App. 667. The similar structure of the FOIA and OMA suggests that, as with the FOIA, an OMA plaintiff need not allege that the meetings in question were not subject to statutory exemption, since exemption is a defense to actions under the OMA. *Booth Newspapers Inc. v. Regents of the University of Michigan*, 93 Mich. App. 100, 286 N.W.2d 55, 59 (1979).

6. Time limit for filing suit.

An action to invalidate a decision of a public body must be commenced within 60 days after the approved minutes are made available to the public, unless a decision involves “the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal through the electors,” in which case an action must be commenced within 30 days after the approved minutes are made available to the public. Mich. Comp. Laws Ann. § 15.270(3). There are no specific time limits for filing actions for injunctive relief under Mich. Comp. Laws Ann. § 15.271. An action seeking damages for intentional violation of the OMA, which may be brought under Mich. Comp. Laws Ann. § 15.273, must be commenced within 180 days after the date of the violation which gave rise to the cause of action. Mich. Comp. Laws Ann. § 15.273(2).

7. What court.

Venue for an invalidation action under Mich. Comp. Laws Ann. § 15.270 will be in any county in which a local public body serves or, if the decision of a state public body is at issue, in Ingham County. Mich.

Comp. Laws Ann. § 15.270(4). Venue in an action for injunctive relief against a local body under Mich. Comp. Laws Ann. § 15.271 will also be in any county in which that body serves or, if the action is against a state public body, in any county in which that body has its principal office, or in Ingham County. Mich. Comp. Laws Ann. § 15.271(2).

8. Judicial remedies available.

An action of a public body may be invalidated under Mich. Comp. Laws Ann. § 15.270; a court may compel compliance with the OMA or enjoin further noncompliance under Mich. Comp. Laws Ann. § 15.271. An action for mandamus against a public body may be commenced in the Court of Appeals under Mich. Comp. Laws Ann. § 15.271(3).

9. Availability of court costs and attorneys' fees.

Court costs and actual attorney's fees (as opposed to reasonable attorney's fees under the FOIA) are available to persons bringing actions for injunctive relief where they are successful in obtaining such relief (Mich. Comp. Laws Ann. § 15.271(4)) and to persons who prevail in civil actions for damages for intentional violations of the OMA (Mich. Comp. Laws Ann. § 15.273(3)). The Michigan Court of Appeals has held that where a trial court granted declaratory judgment in favor of plaintiff who contended that a closed meeting violated the OMA and where, but for the defendants promise to comply with the decision, the court would have granted a permanent injunction, an award of attorney's fees and costs to the plaintiff was proper. *Ridenour*, *supra*, 314 N.W.2d at 764. But the requesters of a special use permit issued for construction of a condominium project were not entitled to court costs and attorney's fees, although there was an admitted violation of the OMA, where they had withdrawn their claim for injunctive relief by stipulation prior to or at the hearing in the matter and no court order or judgment was rendered compelling compliance or enjoining noncompliance, or invalidating any decision of the zoning commission. *Felice v. Cheboygan County Zoning Commn*, 103 Mich. App. 742, 304 N.W.2d 1 (1981).

However, it has been held that a finding that an OMA violation occurred constitutes declaratory relief that is adequate itself to justify an award of attorney's fees and costs. *Nicholas*, *supra*, 239 Mich. App. at 528; *Schmiedicke*, *supra*, 228 Mich. App. at 259; *but see*, *Willis*, *supra* (a technical violation of the OMA which does not provide the plaintiff relief in the action held not to be grounds for an award of attorney's fees). The Michigan Court of Appeals has also emphasized that the OMA provides for actual attorney's fees and court costs. A trial court's reduction of the fees and costs award to 1/2 of the amount requested out of concern for the burden on the taxpayers was improper, since the statute leaves no room for discretion. *Booth Newspapers*, *supra*, 425 N.W.2d at 701-702. Deposition costs for depositions not filed with the clerk of the court, however, are not included in the actual attorney's fees proscribed by the OMA. *Morrison*, *supra*, 660 N.W.2d at 404.

10. Fines.

Public officials who are found to have intentionally violated the OMA may be fined up to \$1,000 under Mich. Comp. Laws Ann. § 15.272(1). A public official who is convicted of intentionally violating the act for a second time within the same term may be fined up to \$2,000, or imprisoned for up to one year, or both. Mich. Comp. Laws Ann. § 15.272(2). This is a specific intent crime and the offender must have a subjective desire to violate OMA or knowledge that the offender is committing an act violative of OMA. *People v Whitney*, *supra*. The phrase "official" used in this section and in Mich. Comp. Laws Ann. § 15.273 is limited to the definition contained in *People v. Freeland*, 308 Mich. 449, 14 N.W.2d 62 (1944), and may not be expanded to public employees. 1977-78 Op. Att'y Gen. 21, 42 (1977). Five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature:

- a. It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;

- b. It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;

- c. The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority;

- d. The duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; and

- e. It must have some permanency and continuity, and not be only temporary or occasional.

11. Other penalties.

A public official who intentionally violates the OMA may be personally liable in a civil action for actual and exemplary damages of up to \$500, plus costs and attorney's fees to the person or group of persons bringing the action. Mich. Comp. Laws Ann. § 15.273(1). An action for damages under this section may be joined with an action for injunctive or exemplary relief under Mich. Comp. Laws Ann. § 15.271. Mich. Comp. Laws Ann. § 15.272(3). A 1996 amendment to the OMA provides for penalties if the governing board of an institution of higher education covered under Mich. Comp. Laws Ann. § 15.268(j) violates the OMA with respect to the process of selecting a president any time after the recommendation of final candidates to the governing board. In this situation, the institution is responsible for the payment of a civil fine of "not more than \$500,000." Mich. Comp. Laws Ann. § 15.273a. This fine is in addition to other remedies or penalties in the OMA. Mich. Comp. Laws Ann. § 15.273a also provides that "[t]o the extent possible, any payment of fines imposed under this section shall be paid from funds allocated by the institution . . . to pay for the travel and expenses of the members of the governing board."

D. Appealing initial court decisions.

1. Appeal routes.

Usual appeal proceedings under Michigan Court Rules are available.

2. Time limits for filing appeals.

No time limit is expressed generally. Nevertheless, if the relief sought is invalidation of a decision of a public body, the action must be commenced within 60 days after the approved minutes are made available to the public, except in the case of certain contracts, bids, assessments and issuance of bonds and evidences of indebtedness, where the action must be commenced within 30 days. Mich. Comp. Laws Ann. § 15.270(3).

3. Contact of interested amici.

The general rules for filing *amicus* briefs found in the Michigan Court Rules apply.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

V. ASSERTING A RIGHT TO COMMENT.

The right to comment is not covered by the Open Meetings Act. This right is typically provided for by provisions in the charters of the specific local governmental unit.

Statute

Open Records

Michigan Compiled Laws

Chapter 15. Public Officers and Employees

Freedom of Information Act

15.231. Short title; public policy

Sec. 1.

(1) This act shall be known and may be cited as the “freedom of information act”.

(2) It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

15.232. Definitions

Sec. 2. As used in this act:

(a) “Field name” means the label or identification of an element of a computer data base that contains a specific item of information, and includes but is not limited to a subject heading such as a column header, data dictionary, or record layout.

(b) “FOIA coordinator” means either of the following:

(i) An individual who is a public body.

(ii) An individual designated by a public body in accordance with section 6 to accept and process requests for public records under this act.

(c) “Person” means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. Person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

(d) “Public body” means any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(e) “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:

(i) Those that are exempt from disclosure under section 13.

(ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

(f) “Software” means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.

(g) “Unusual circumstances” means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(h) “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

(i) “Written request” means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means.

15.233. Inspection, copying and receipt of public records, right and opportunity; subscriptions; custodian

Sec. 3.

(1) Except as expressly provided in section 13, upon providing a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable. An employee of a public body who receives a request for a public record shall promptly forward that request to the freedom of information act coordinator.

(2) A freedom of information act coordinator shall keep a copy of all written requests for public records on file for no less than 1 year.

(3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.

(4) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.

(5) This act does not require a public body to create a new public record, except as required in section 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record.

(6) The custodian of a public record shall, upon written request, furnish a requesting person a certified copy of a public record.

15.234. Fees; waiver; deposit; computation of costs; application of section

Sec. 4.

(1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching

for or furnishing copies of the public record can be considered as primarily benefiting the general public. A public record search shall be made and a copy of a public record shall be furnished without charge for the first \$20.00 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.

(2) A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds \$50.00. The deposit shall not exceed 1/2 of the total fee.

(3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

(4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

15.235. Written request, receipt, response, time; failure to respond, court action, damages; denial of request, written notice; extension notice, reasons, requirements

Sec. 5.

(1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body. A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until 1 business day after the electronic transmission is made.

(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

- (a) Granting the request.
- (b) Issuing a written notice to the requesting person denying the request.

(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.

(d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

(3) Failure to respond to a request pursuant to subsection (2) constitutes a public body's final determination to deny the request. In a circuit court action to compel a public body's disclosure of a public record under section 10, the circuit court shall assess damages against the public body pursuant to section 10(8) if the circuit court has done both of the following:

- (a) Determined that the public body has not complied with subsection (2).
- (b) Ordered the public body to disclose or provide copies of all or a portion of the public record .
- (4) A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice shall contain:

(a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request .

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if

that is the reason for denying the request or a portion of the request.

(c) A description of a public record or information on a public record that is separated or deleted pursuant to section 14, if a separation or deletion is made.

(d) A full explanation of the requesting person's right to do either of the following:

(i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.

(ii) Seek judicial review of the denial under section 10.

(e) Notice of the right to receive attorney's fees and damages as provided in section 10 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

(5) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

(6) If a public body issues a notice extending the period for a response to the request, the notice shall specify the reasons for the extension and the date by which the public body will do 1 of the following:

- (a) Grant the request.
- (b) Issue a written notice to the requesting person denying the request.
- (c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(7) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:

- (a) Appeal the denial to the head of the public body pursuant to section 10.
- (b) Commence an action in circuit court, pursuant to section 10.

15.236. FOIA coordinator for public body, designation; responsibility for denial; designation of alternate

Sec. 6.

(1) A public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, shall designate an individual as the public body's FOIA coordinator. The FOIA coordinator shall be responsible for accepting and processing requests for the public body's public records under this act and shall be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county.

(2) For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

(3) An FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial under section 5(4) and (5).

15.240. Requesting person's options upon denial of request; written appeal, required actions by public body head; failure of public body to respond, judicial review; attorney's fees, costs, disbursements, damages

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 days after receiving a written appeal pursuant to subsection (1) (a), the head of a public body shall do 1 of the following:

- (a) Reverse the disclosure denial.
- (b) Issue a written notice to the requesting person upholding the disclosure denial.
- (c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.
- (d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing an action in circuit court under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter *de novo* and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorney's fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorney's fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

15.241. State agencies; available items; action to compel compliance

Sec. 11.

(1) A state agency shall publish and make available to the public all of the following:

- (a) Final orders or decisions in contested cases and the records on which they were made.
- (b) Promulgated rules.
- (c) Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in pamphlet, loose-leaf, or other appropriate form in printed, mimeographed, or other written matter.

(3) Except to the extent that a person has actual and timely notice of the terms thereof, a person shall not in any manner be required to resort to, or be adversely affected by, a matter required to be published and made available, if the matter is not so published and made available.

(4) This section does not apply to public records which are exempt from

disclosure under section 13.

(5) A person may commence an action in the circuit court to compel a state agency to comply with this section. If the court determines that the state agency has failed to comply, the court shall order the state agency to comply and shall award reasonable attorney's fees, costs, and disbursements to the person commencing the action. The circuit court for the county in which the state agency is located shall have jurisdiction to issue the order.

(6) As used in this section, "state agency", "contested case", and "rules" shall have the same meanings as ascribed to those terms in Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

15.243. Items exempt from disclosure

Sec. 13.

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

- (i) Interfere with law enforcement proceedings.
- (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
- (iii) Constitute an unwarranted invasion of personal privacy.

(iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

(v) Disclose law enforcement investigative techniques or procedures.

(vi) Endanger the life or physical safety of law enforcement personnel.

(c) A public record that 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.

(d) Records or information specifically described and exempted from disclosure by statute.

(e) A public record or information described in this section that 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 considerations originally giving rise to the exempt nature of the public record remain applicable.

(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.

(g) Information or records subject to the attorney-client privilege.

(h) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.

(i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals

has expired.

(j) Appraisals of real property to be acquired by the public body until either of the following occurs:

(i) An agreement is entered into.

(ii) Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

(k) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(l) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.

(m) Communications and notes within a public body or between 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. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, Mich. Comp. Laws 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, Mich. Comp. Laws 423.201 to 423.217.

(n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.

(o) Information that would reveal the exact location of archaeological sites. The department of history, arts, and libraries may promulgate rules in accordance with the administrative procedures act of 1969, 1969 PA 306, Mich. Comp. Laws 24.201 to 24.328, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

(p) Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.

(q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.

(r) Records of a campaign committee including a committee that receives money from a state campaign fund.

(s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

(i) Identify or provide a means of identifying an informant.

(ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.

(iii) Disclose the personal address or telephone number of active or retired law enforcement officers or agents or a special skill that they may have.

(iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents.

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(vii) Endanger the life or safety of law enforcement officers or agents or

their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

(viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.

(ix) Disclose personnel records of law enforcement agencies.

(x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.

(t) Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department of consumer and industry services under article 15 of the public health code, 1978 PA 368, Mich. Comp. Laws 333.16101 to 333.18838, before a complaint is issued. This subdivision does not apply to records or information pertaining to 1 or more of the following:

(i) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

(ii) The fact that an allegation was received by the department of consumer and industry services; the fact that the department of consumer and industry services did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

(u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

(w) Information or records that would disclose the social security number of an individual.

(x) Except as otherwise provided in this subdivision, an application for the position of president of an institution of higher education established under section 4, 5, or 6 of article VIII of the state constitution of 1963, materials submitted with such an application, letters of recommendation or references concerning an applicant, and records or information relating to the process of searching for and selecting an individual for a position described in this subdivision, if the records or information could be used to identify a candidate for the position. However, after 1 or more individuals have been identified as finalists for a position described in this subdivision, this subdivision does not apply to a public record described in this subdivision, except a letter of recommendation or reference, to the extent that the public record relates to an individual identified as a finalist for the position.

(y) Records or information of measures designed to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, Mich. Comp. Laws 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

(2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by section 444 of subpart 4 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this sub-

section shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

(3) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the administrative procedures act of 1969, 1969 PA 306, Mich. Comp. Laws 24.201 to 24.328.

(4) Except as otherwise exempt under subsection (1), this act does not authorize the withholding of a public record in the possession of the executive office of the governor or lieutenant governor, or an employee of either executive office, if the public record is transferred to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received by a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government that is subject to this act.

15.243a. Educational institutions; employee salary records

Sec. 13

a. Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college.

15.244. Exempt and nonexempt material, separation

Sec. 14.

(1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

15.245. Repealer

Sec. 15. Sections 21, 22 and 23 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.221, 24.222 and 24.223 of the Michigan Compiled Laws, are repealed.

15.246. Effective date

Sec. 16. This act shall take effect 90 days after being signed by the governor.

Open Meetings

Michigan Compiled Laws Annotated

Chapter 15. Public Officers and Employees

15.261. Short title; effect on related local charter provisions, ordinances, resolutions

Sec. 1.

(1) This act shall be known and may be cited as the "Open meetings act".

(2) This act shall supersede all local charter provisions, ordinances, or reso-

lutions which relate to requirements for meetings of local public bodies to be open to the public.

(3) After the effective date of this act, nothing in this act shall prohibit a public body from adopting an ordinance, resolution, rule, or charter provision which would require a greater degree of openness relative to meetings of public bodies than the standards provided for in this act.

15.262. Definitions

Sec. 2. As used in this act:

(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; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 40 of the home rule city act, 1909 PA 279, Mich. Comp. Laws 117.40.

(b) "Meeting" means the convening of a public body at which a quorum 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, 1909 PA 279, Mich. Comp. Laws 117.40.

(c) "Closed session" means a meeting or part of a meeting of a public body that is closed to the public.

(d) "Decision" means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.

15.263. Meetings of public bodies; attendance, nonapplication

Sec. 3.

(1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. The right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting. The exercise of this right shall not be dependent upon the prior approval of the public body. However, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.

(2) All decisions of a public body shall be made at a meeting open to the public.

(3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8.

(4) A person shall not be required as a condition of attendance at a meeting of a public body to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance.

(5) A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only.

(6) A person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting.

(7) This act does not apply to the following public bodies only when deliberating the merits of a case:

(a) The worker's compensation appeal board created under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(b) The employment security board of review created under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.73 of the Michigan Compiled Laws.

(c) The state tenure commission created under Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Michigan Compiled Laws, when acting as a board of review from the decision of a controlling board.

(d) An arbitrator or arbitration panel appointed by the employment relations commission under the authority given the commission by Act No. 176 of the Public Acts of 1939, as amended, being sections 423.1 to 423.30 of the Michigan Compiled Laws.

(e) An arbitration panel selected under chapter 50A of the revised judiciary act of 1961, Act No. 236 of the Public Acts of 1961, being sections 600.5040 to 600.5065 of the Michigan Compiled Laws.

(f) The Michigan public service commission created under Act No. 3 of the Public Acts of 1939, being sections 460.1 to 460.8 of the Michigan Compiled Laws.

(8) This act does not apply to an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(9) This act does not apply to a committee of a public body which adopts a nonpolicymaking resolution of tribute or memorial which resolution is not adopted at a meeting.

(10) This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act.

(11) This act shall not apply to the Michigan veterans' trust fund board of trustees or a county or district committee created under Act No. 9 of the Public Acts of the First Extra Session of 1946, being sections 35.601 to 35.610 of the Michigan Compiled Laws, when the board of trustees or county or district committee is deliberating the merits of an emergent need. A decision of the board of trustees or county or district committee made under this subsection shall be reconsidered by the board or committee at its next regular or special meeting consistent with the requirements of this act. "Emergent need" means a situation which the board of trustees, by rules promulgated under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, determines requires immediate action.

15.264. Public notice; name of public body, posting locations

Sec. 4. The following provisions shall apply with respect to public notice of meetings:

(a) A public notice shall always contain the name of the public body to which the notice applies, its telephone number if one exists, and its address.

(b) A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice.

(c) If a public body is a part of a state department, part of the legislative or judicial branch of state government, part of an institution of higher education, or part of a political subdivision or school district, a public notice shall also be posted in the respective principal office of the state department, the institution of higher education, clerk of the house of representatives, secretary of the state senate, clerk of the supreme court, or political subdivision or school district.

(d) If a public body does not have a principal office, the required public notice for a local public body shall be posted in the office of the county clerk in which the public body serves and the required public notice for a state public body shall be posted in the office of the secretary of state.

15.265. Public notice of meetings; regular, rescheduled, special, or recessed meetings; meetings in residential dwellings

Sec. 5.

(1) A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.

(2) For regular meetings of a public body, there shall be posted within 10 days after the first meeting of the public body in each calendar or fiscal year a public notice stating the dates, times, and places of its regular meetings.

(3) If there is a change in the schedule of regular meetings of a public body, there shall be posted within 3 days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings.

(4) Except as provided in this subsection or in subsection (6), for a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting. The requirement of 18-hour notice shall not apply to special meetings of subcommittees of a public body or conference committees of the state legislature. A conference committee shall give a 6-hour notice. A second conference committee shall give a 1-hour notice. Notice of a conference committee meeting shall include written notice to each member of the conference committee and the majority and minority leader of each house indicating time and place of the meeting. This subsection does not apply to a public meeting held pursuant to section 4(2) to (5) of Act No. 239 of the Public Acts of 1955, as amended, being section 200.304 of the Michigan Compiled Laws.

(5) A meeting of a public body which is recessed for more than 36 hours shall be reconvened only after public notice, which is equivalent to that required under subsection (4), has been posted. If either house of the state legislature is adjourned or recessed for less than 18 hours, the notice provisions of subsection (4) are not applicable. Nothing in this section shall bar a public body from meeting in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public when 2/3 of the members serving on the body decide that delay would be detrimental to efforts to lessen or respond to the threat.

(6) A meeting of a public body may only take place in a residential dwelling if a nonresidential building within the boundary of the local governmental unit or school system is not available without cost to the public body. For a meeting of a public body which is held in a residential dwelling, notice of the meeting shall be published as a display advertisement in a newspaper of general circulation in the city or township in which the meeting is to be held. The notice shall be published not less than 2 days before the day on which the meeting is held, and shall state the date, time, and place of the meeting. The notice, which shall be at the bottom of the display advertisement and which shall be set off in a conspicuous manner, shall include the following language: "This meeting is open to all members of the public under Michigan's open meetings act".

15.266. Public notice; requests for copies of notice

Sec. 6.

(1) Upon the written request of an individual, organization, firm, or corporation, and upon the requesting party's payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a public body shall send to the requesting party by first class mail a copy of any notice required to be posted pursuant to section 5(2) to (5).

(2) Upon written request, a public body, at the same time a public notice of a meeting is posted pursuant to section 5, shall provide a copy of the public notice of that meeting to any newspaper published in the state and to any radio and television station located in the state, free of charge.

15.267. Closed sessions; vote, minutes

Sec. 7.

(1) A 2/3 roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken.

(2) A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.

15.268. Closed sessions; purposes

Sec. 8. A public body may meet in a closed session only for the following purposes:

(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. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.

(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.

(d) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.

(e) 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.

(f) 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. This subdivision does not apply to a public office described in subdivision (j).

(g) Partisan caucuses of members of the state legislature.

(h) To consider material exempt from discussion or disclosure by state or federal statute.

(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, being section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.

(j) In the process of searching for and selecting a president of an institution of higher education established under section 4, 5, or 6 of article viii of the state constitution of 1963, to review the specific contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate if the particular process of searching for and selecting a president of an institution of higher education meets all of the following requirements:

(i) The search committee in the process, appointed by the governing board, consists of at least 1 student of the institution, 1 faculty member of the institution, 1 administrator of the institution, 1 alumnus of the institution, and 1 representative of the general public. The search committee also may include 1 or more members of the governing board of the institution, but the number shall not constitute a quorum of the governing board. However, the search committee shall not be constituted in such a way that any 1 of the groups described in this subparagraph constitutes a majority of the search committee.

(ii) After the search committee recommends the 5 final candidates, the governing board does not take a vote on a final selection for the president until at least 30 days after the 5 final candidates have been publicly identified by the search committee.

(iii) The deliberations and vote of the governing board of the institution on selecting the president take place in an open session of the governing board.

15.269. Minutes; contents, corrections, availability for public inspection, inclusion of personally identifiable information covered by federal law

Sec. 9.

(1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

(2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public

notices pursuant to section 4. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

(3) A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.

(4) A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974.

15.270. Decisions; invalidation action, venue, reenactment

Sec. 10.

(1) Decisions of a public body shall be presumed to have been adopted in compliance with the requirements of this act. The attorney general, the prosecuting attorney of the county in which the public body serves, or any person may 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.

(2) A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision or if failure to give notice in accordance with section 5 has interfered with substantial compliance with section 3(1), (2), and (3) and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

(3) The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specified period of time:

(a) Within 60 days after the approved minutes are made available to the public by the public body except as otherwise provided in subdivision (b).

(b) If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within 30 days after the approved minutes are made available to the public pursuant to that decision.

(4) Venue for an action under this section shall be any county in which a local public body serves or, if the decision of a state public body is at issue, in Ingham county.

(5) In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.

15.271. Noncompliance; actions for injunctive relief and mandamus

Sec. 11.

(1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further non-compliance with this act.

(2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.

(3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.

(4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney's fees for the action.

15.272. Intentional violations; penalties

Sec. 12.

(1) A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00.

(2) A public official who is convicted of intentionally violating a provision of this act for a second time within the same term shall be guilty of a misdemeanor and shall be fined not more than \$2,000.00, or imprisoned for not more than 1 year, or both.

15.273. Intentional violations; civil actions for damages

Sec. 13.

(1) A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than \$500.00 total, plus court costs and actual attorney's fees to a person or group of persons bringing the action.

(2) Not more than 1 action under this section shall be brought against a public official for a single meeting. An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.

(3) An action for damages under this section may be joined with an action for injunctive or exemplary relief under section 11.

15.273a. Selection of institution's president; violations by governing board; civil fine

Sec. 13a.

If the governing board of an institution of higher education established under section 4, 5, or 6 of article viii of the state constitution of 1963 violates this act with respect to the process of selecting a president of the institution at any time after the recommendation of final candidates to the governing board, as described in section 8(j), the institution is responsible for the payment of a civil fine of not more than \$500,000.00. This civil fine is in addition to any other remedy or penalty under this act. To the extent possible, any payment of fines imposed under this section shall be paid from funds allocated by the institution of higher education to pay for the travel and expenses of the members of the governing board.

15.274. Repealer

Sec. 14. Act No. 261 of the Public Acts of 1968, being sections 15.251 to 15.253 of the Compiled Laws of 1970, is repealed.

15.275. Effective date

Sec. 15. This act shall take effect January 1, 1977.

