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1965 50th Anniversary 2015

Recent Changes to the Freedom of Information Act May Impact Local Communities

Andrew J. Brege

On January 11, 2015, Michigan Governor Rick Snyder signed PA 563 of 2014, an act significantly amending the Freedom of Information Act's (FOIA) charging requirements and penalty provisions. The new rules are set to take effect on July 1, 2015. These new statutory rules will require most public bodies to revisit their FOIA policies and guidelines. The following is a brief summary of these statutory changes.

Changes to FOIA Charging Policies

FOIA has always provided a means for the public bodies to recoup some of the costs involved in responding to FOIA requests. The recent amendments alter the way those fees may be recouped, and, in some instances, caps the amounts that may be charged.

MCL 15.234(1)(d) provides that a public body may charge the actual costs of making paper copies, but the cost per sheet may not exceed $0.10/page, if the copies are made on standard 8½" by 11" or 8½" by 14" paper. Under MCL 15.234(1)(c), if the requestor asks for the records to be provided in non-paper format, such as on CD-rom or other digital format, and the public body has the capabilities, it may charge the actual cost of reproduction, so long as those costs are reasonably economical.

A public body may charge for certain labor costs incurred in responding to FOIA requests. MCL 15.234(1)(e) allows the public body to charge for labor incurred to make copies or create other digital media. MCL 15.234(1)(a) allows the public body to charge the cost of labor incurred to search for and locate public records in order to respond to a FOIA request. MCL 15.234(1)(b) allows the public body to charge for labor incurred to separate and delete exempt from non-exempt materials. Under this section, a public body that does not have an employee capable of making those deletions and/or separations may contract those services to an outside individual or firm (such as outside legal counsel), and pass on those labor costs. Charges for labor costs for the outside individual or firm may not exceed six times the state minimum wage. Currently, the minimum wage is $8.15, meaning the most a public body may charge for its outside legal counsel to separate and delete exempt from non-exempt materials is $48.90. Labor costs associated with searching, separating, and deleting must be calculated in 15 minute increments and must be rounded down. Labor costs for making copies, however, may be calculated in whatever increment the public body chooses. Just as under the previous version of FOIA, the public body must show that a failure to charge for labor associated with searching, examination, separation, and deletion would result in unreasonably high costs to the public body before it may charge for those costs. The public body may charge for labor costs associated with making copies without such a showing.

Under MCL 15.234(4), the public body must establish procedures and guidelines to implement its charging policies. A public body may not charge for responding to a FOIA request unless it has already established and published these guidelines. Further, the public body must include a copy of its charging procedure and guidelines whenever it responds to a FOIA request. If the public body has posted its procedures to its website, it may simply provide a link to that website in its FOIA response. All charges must be identified on a detailed itemization. The public body is required to either create its own standard itemization form as part of its policies and guidelines or use a standard form created by the Michigan Department of Technology, Management and Budget.

For every day that a public body is late in responding to a FOIA request, the total amount of labor it is able to charge must be reduced by 5%, up to a 50% total reduction. A public body may require a 50% deposit if the estimated costs exceed $50.00. If the requestor fails to pay after a request has been made, and the total fees did not exceed 105% of the original estimate, the public body may require a 100% deposit from that particular requestor for its next FOIA request.

Electronic Requests

The new amendments take into consideration the fact that many FOIA requests are sent by e-mail. A public body is not consid-

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Recent Changes to FOIA (cont.)

ered to have received a FOIA request sent by e-mail or other electronic means until the next business day. Further, if the request is filtered into the public body's junk or spam folder, it will not be considered received until one day after the public body actually becomes aware of the request.

Appeals, Civil Actions and Penalties

A requestor that is not satisfied with a FOIA response may either file an appeal to the head of the public body or file a suit in circuit court. The new amendments increase the potential civil fine for a public body that acted arbitrarily and capriciously from $500 to $1,000, which is paid directly to the state treasury. The public body must also pay a $1,000 punitive damages award to the successful litigant.

The new amendments also provide for procedures to challenge the fees a public body charges. MCL 15.240(a) provides that the requesting person must first file an appeal to the head of the public body identifying how the requested fee exceeds the amount allowed under the statute. If the public body denies the appeal, does not respond to the appeal, or its procedures do not allow for fee appeals, the requester may file a civil action challenging the fee. The civil action must be filed within 45 days of receipt of the appeal decision, or if no appeal procedure is available, receipt of the itemized statement. If the requesting person prevails in the action by receiving a reduction of 50% or more of the fee, the court may award attorney fees. If a public body is found to have acted arbitrarily and capriciously, it shall be ordered to pay a fine of $500 to the state treasury. The court may also award $500 in punitive damages to the individual.

MCL 15.240(b) provides for further penalties if a court, in any FOIA action, determines that the public body willfully and intentionally failed to comply with the statute or otherwise acted in bad faith. In such a case, the public body shall be ordered to pay a civil fine of between $2,500 and $7,500 for each occurrence, which shall be deposited into the state treasury.

One of the only amendments that appears favorable to public bodies, at least on its face, is the venue provision for civil actions. Under the prior version, a requester had the option of filing suit in either the circuit court where he or she resided, or where the public body was located. Under the amendment, all FOIA suits must be brought in the jurisdiction where the public body resides.

Conclusion

With these new amendments scheduled to take effect on July 1, 2015, it is important that public bodies familiarize themselves with the changes, as well as prepare and implement new FOIA fee charging policies and guidelines. Without new policies and guidelines in place, public bodies may not charge for responding to FOIA requests. Further, without policies and guidelines in place that strictly comply with the statutory requirements, a public body risks increased civil fines and penalties.

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Your Attorney Needs You

Gregory R. Grant

Communication with your attorney is the key to a successful litigation outcome. The following are some tips to follow that will help your attorney to be a more effective advocate on your behalf. These tips will not only save you time and money, but will also certainly result in a more positive outcome for you in your case.

1. Follow your attorney's instructions carefully.

When your attorney provides you with instructions, be sure to follow them specifically. At some point, your attorney will ask you to provide written answers and/or documents that are relevant to the litigation. It is important that you follow your attorney's directions and ask questions when you have them.

2. Do not withhold anything from your attorney.

Understand that conversations between you and your attorney are confidential and subject to the attorney-client privilege. Only you can waive that privilege. You should be candid and honest with your attorney at all times. This will ensure that your attorney will have all of the necessary information to help you succeed.

3. Keep your attorney informed of your schedule.

You will be required from time to time to meet with your attorney, respond to document requests, attend court hearings, mediations, and settlement conferences. Your attorney must know your schedule to be able to provide your availability at a moment's notice.

4. Be accessible to your attorney.

If you are unavailable, return your attorney's call as soon as possible. He or she is contacting you because it is important. Also, many attorneys utilize e-mail correspondence for client communication and to provide clients with certain documents quickly. Check your e-mail account regularly.

These tips will help you and your attorney become more successful and increase the chances of winning your case.

Gregory R. Grant

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Public and Private Employers Subject to 50 Employee Threshold Under the FMLA:

Does Unconditional Language in Employee Manual Create a Jury Question?

Linda Davis Friedland

Both private and public employers are subject to the Family Medical Leave Act (FMLA), which allows eligible employees to take up to 12 months of unpaid leave from their employment if they meet certain statutory requirements (employed for at least 12 months and worked 1,250 hours within the preceding 12 months). The FMLA defines a "covered employer" as being "any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year." The FMLA specifically includes public agencies within this definition.

The Federal Regulations have complicated the issue for public agencies. For example, 29 CFR 825.104(a) confirms the 50 employee threshold language for employers, but then adds: "Public agencies are covered employers without regard to the number of employees employed." 29 CFR 825.108(d) then goes on to state, "All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year." An ambiguity is then created in the second half of 29 CFR 825.108(d) which states, "However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g. State) employ 50 employees at the work site or within 75 miles." Which is it? Are public agencies with less than 50 employees covered or not?

The Sixth Circuit recently cleared up this ambiguity in *Tilley v Kalamazoo County Road Commission*, 2015 WL 304190 (decided January 26, 2015). In *Tilley*, the Court of Appeals interpreted 29 CFR 825.108(d) as meaning that even though a public agency is considered to be a covered employer under the FMLA, the public employee himself is only eligible for FMLA leave if his employer, the public agency, meets the 50/75 employee threshold.

The Court of Appeals rejected Tilley's argument that applying the FMLA 50/75 employee threshold would create "the oxymoron that a public employer with less than 50 employees is covered under the FMLA, but none of its employees would ever be eligible to take a leave under the FMLA." The Court reasoned that it is an "entirely sensible conclusion that public employees, like their private counterparts," are only eligible under the FMLA if their employers meet the 50/75 employee threshold. In other words, the Court of Appeals has addressed the ambiguity directly, and has resolved it in favor of treating both private and public employees equally. The Court also clarified that the determination of the 50/75 threshold is as of the date of the employee's application under the FMLA.

This holding should have resulted in an immediate dismissal of Tilley's claims against the Kalamazoo County Road Commission. However, the Court held that a jury must decide whether the Commission should be estopped from asserting the 50/75 threshold, because of the following language in the Commission's employee manual:

> *"Employees covered under the Family and Medical Leave Act are full-time employees who have worked for the Road Commission and accumulated 1,250 work hours in the previous 12 months."*

The Court found this to be a material misrepresentation upon which Tilley could have reasonably relied. The Court found that the Commission should have used qualifying language to inform employees of their rights under the FMLA, such as that they "***could*** be eligible for FMLA benefits "***if***, among other things, there are at least 50 employees within 75 miles [at the time of the FMLA application]." (Emphasis added). Because the Commission did not use such qualifying language, the *Tilley* Court held that the case must be presented to a jury for determination when it should have been summarily dismissed based on the 50/75 employee threshold. Employers should, therefore, review their employee manuals before relying on the threshold.

Linda Davis Friedland

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To commemorate CMDA's 50th Anniversary, every month throughout 2015 we are donating 50 (or more) items to a local charity. March is Reading Month in Michigan, and we are donating new and gently used books to **Most Holy Trinity School** in Detroit. The school will be using the books to expand their Kindergarten through 8th grade classroom libraries. Please stop by our Livonia office throughout March if you are interested in donating. Thank you for your support.

MARCH

Donation: New and Gently Used Books
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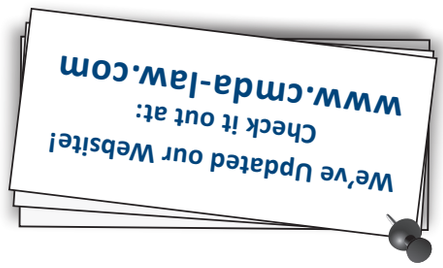

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