The Freedom of YOUR Information Act

By Mark A. Porter

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As we enter 2009, most Michigan residents have now learned that cell phone text messages can carry a real wallop. The long-running civil and criminal court dramas in Detroit that sprung from the cell phones operated by the former Mayor and his staff dominated the headlines for several months.

Lost in the abbreviated articles and sound bites, however, was the fact that Michigan's Freedom of Information Act (**FOIA**), passed in 1976, was again having a huge impact on the daily working lives of *all* State, county, and local public employees. As noted before in these columns, "No man is an island." For that reason, let's take a quick look at some of the Michigan Court decisions on FOIA over the last 3-years. We'll start with a quick primer:

The Michigan FOIA is found at **MCL 15.231**.[1] In general, <u>all</u> regularly held documents, data, and recordings kept in the normal course of business are subject to release. The first section of the act states that:

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.

The FOIA has realized that there are some documents should remain beyond the public view. Certain law enforcement materials; testing materials for civil service exams; sealed bids for government projects; and privileges such as doctor-patient and attorney-client are records that should have some confidentiality. **MCL 15.243**.

These types of records are called ***exempt*** records, in that they can be held onto by the public agency and "exempted from automatic release" under FOIA.

Scattered throughout the Michigan Compiled Laws are other, specific exemptions from the FOIA. For instance, all personnel records of State employees in the Department of Corrections and the State Psychiatric Hospitals are exempt from FOIA – to keep them from falling into the hands of the current and former inmates. **MCL 791.230a**.

In 2006, the FOP was successful in passing **Public Act 563**, which exempts the compelled *Garrity* statements from the FOIA. **MCL 15.391**. For most law enforcement records, however, the ability to exempt a record – and thereby avoid its release – is tentative.

Many law enforcement labor contracts in Michigan still contain ancient contract language that claims officer personnel files cannot be released "without a Court order." Michigan Courts have long-ruled that those contract clauses are invalid – because the FOIA trumps a labor contract. Put another way, "a public body may not contract away its obligations under FOIA."[2]

The FOIA does permit numerous law enforcement records to be exempted from FOIA, but <u>only</u> if "the public interest in **<u>non</u>**-disclosure outweighs the public interest in disclosure" of the records **MCL 15.243(1)(s)**. Those types of records include the personal information of law enforcement officers <u>and</u> their families; the identity of undercover officers; and "law enforcement personnel records."

But the burden is <u>always</u> on the public agency to show that exempting the release of the records is appropriate. **MCL 15.240(4)**. The Michigan Supreme Court has stated that the FOIA "is a pro-disclosure act; all public records are subject to full disclosure unless they are clearly exempt."[3]

Since 1976 – and especially over the last 10-years – the Michigan Courts have repeatedly tried to untangle the knotty question of what records can be exempted; what records must always be released; and what to do if requested

records contain a mixture of *both* exempt – and non-exempt – materials. Here are some recent important cases which you should keep in mind:

Public Employee Personal Information:

In 2007, the Michigan Court of Appeals ruled that when demanded, public employers must cough up the home addresses and telephone numbers of all of their employees. Fortunately, in the summer of 2008, the Michigan Supreme Court unanimously reversed both the Court of Appeals and the Washtenaw County trial court. It held that such information was of a personal nature and invaded the privacy of public employees and their families. The Court also noted that such information had nothing to do with a citizen's right to examine how government functions in day-to-day operations.[4]

Mails on Public Agency Computers:

The Michigan Court of Appeals has confirmed that there is "no reasonable expectation of privacy" for the content of employee E-mails on the public employers' computer systems.[5] Needless to say, since an employer has a right at any time to review employee E-mails, no search warrant is required. I am still amazed at how many employees in the public and private sectors still assume that they "own" their private E-mails that are sent and received while working. Be forewarned – and be cautious.

Advisory Memoranda Sent by Public Officials.

The FOIA uses the term "frank communications" designate certain confidential information that contains opinion as well as fact. For instance, an investigating officer may send a memo relating the *Garrity* interview of the targeted officer – and the memo will offer the opinion that the officer is being truthful. The Michigan Courts have held that there is a valid reason to keep these communications confidential – as long as they are made during the investigation and are not a final agency determination.[6] A final determination of employee conduct will almost always be subject to release under the FOIA.

Lawsuit Settlements Involving Public Employees.

This ruling, while hailed at the time in the news media, is truly a double-edged sword for public employees. In 2008 the Michigan Supreme Court ruled that the then-Mayor of Detroit could not exempt a law suit settlement from release under the FOIA.[7] The settlement agreement was released – and the scandal allegations caught fire.

Most law suits are settled quietly, during telephone conversations between attorneys for both sides. Once an agreement to settle is reached, the attorneys will draw up a settlement agreement – which is a binding contract on both sides.

For instance, a township may agree – given no finding of any fault – that it will pay a person a sum of money for injuries suffered in a vehicle accident with a police car driven by one of its police officers. The settlement will usually be less than the injured person demanded – but more than the township initially wanted to pay. Neither side, however, wishes to risk a jury trial.

In return for the payment, the injured person agrees to dismiss the lawsuit "with prejudice," meaning that it can never be brought again, in any court, for any reason. In addition, the injured person agrees not to disclose the settlement terms under penalty of repayment of the settlement.

This settlement – the contract – remains in the possession of both sides, and becomes valid once both have signed and dated it. It is enforceable in the same manner as any other contract – but it is not entered into the Court's public record.

Instead, a simple Order is signed by both attorneys and the trial judge. The Order simply states that the case is "Dismissed with Prejudice," and is entered into the Court's public records.

Prior to the Supreme Court decision, the township (and the officer) would then be protected from public disclosure of the actual settlement agreement. That privacy would prevent other would-be plaintiffs from getting ideas about filing new lawsuits, and searching for similar settlement payments.

Unfortunately, those privacy protections for the governmental agencies and their employees are now in jeopardy – absent another amendment to the FOIA by the Michigan Legislature.

There is one other cautionary note that we see from these cases. The Detroit newspaper was only interested in getting the settlement agreement of a lawsuit filed against the Mayor by several police officers. In the University of Michigan case, the Federation of Teachers only wanted the home addresses and phone numbers of employees for its own use – to run an election campaign.

Their unintended consequences, however, were far-reaching – and they touched every public employee in Michigan. The next time a FOIA request floats into your agency's mailbox, take it seriously – very seriously.

1 www.michiganlegislature.org

2 Kent Co. Deputy Sheriffs' Ass'n v. Kent Co. Sheriff, 463 Mich. 353; 616 N.W.2d 677 (2000)

3 Coblentz – v – City of Novi, 475 Mich 558; 719 NW2d 53 (2006)

4 Mich Fed of Teachers – v – UM, 481 Mich 657; 753 NW2d 28 (2008)

5 Hoff – v – Spoelstra, Docket Number 272898 (2008)

6 Bukowski – v – Detroit, 478 Mich 268; 732 NW2d 35 (2007)

7 Det Free Press – v – Detroit, 480 Mich 1079; 744 NW2d 677 (2008)