FOIA FACTS

Under the Michigan Freedom of Information Act,

[**15.233**](http://legislature.mi.gov/doc.aspx?mcl-15-233) (1)“…..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.”

A Library, as a “public body” under FOIA, must:

[**15.233**](http://legislature.mi.gov/doc.aspx?mcl-15-233) …(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.** (emphasis added)

Under the act, “Public Records” are considered:

[15.232](http://legislature.mi.gov/doc.aspx?mcl-15-232)*(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.*

When making determinations about FOIA requests, a useful rule of thumb is to consider the intent of the legislature behind the law. With FOIA, the intent of the act is fairly clear, and codified within the first section of the act:

[15.231](http://legislature.mi.gov/doc.aspx?mcl-15-231) *(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.*

In other words, judicial and other interpretations of this act will tend to err on the side of access to information rather than non-disclosure (assuming, of course that the information requested is not exempt)under [MCL 15.243](http://legislature.mi.gov/doc.aspx?mcl-15-243)

*“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. Swickard v. Wayne Cty. Med. Exam'r, 438 Mich. 536, 544, 475 N.W.2d 304, 307 (1991)”*

However, this does not mean that libraries are at the veritable mercy of any and every type of request, no matter how broad:

Public Bodies do not have to *“… compile, summarize, or create a report of information in response to a request, MCL 15.233(4), or to “create a new public record,” MCL 15.233(5). In other words, if the record requested does not exist, then the public body is under no obligation to scrutinize its existing records in order to create a responsive document.” Bitterman v. Vill. of Oakley, 309 Mich. App. 53, 67–68, 868 N.W.2d 642, 650–51, appeal denied, 497 Mich. 987, 861 N.W.2d 48 (2015)*

Similarly:

*“Newspaper's Freedom of Information Act (FOIA) request to city for a list of individuals who received the 20 largest pension payouts from the general employee, police, and fire retirement systems* ***did not require city to compile a summary or create a new record in violation of statute stating that FOIA did not require public bodies to make compilations or create new records****; request could have been satisfied by allowing newspaper access to information or by providing copies of redacted records containing only requested information, given that FOIA did not require a precise description of actual records sought but focused on public access to information.”  Detroit Free Press, Inc. v. City of Southfield (2005) 713 N.W.2d 28, 269 Mich.App. 275, appeal denied 713 N.W.2d 775, 475 Mich. 860, appeal denied 713 N.W.2d 776, 475 Mich. 860. (emphasis added)*

*“The Act does not require a public body to create a new record although a public body, to the extent practicable, should separate exempt information from nonexempt information. Section 14(2)”[1979-1980 Mich. Op. Att'y Gen. 255 (1979)](http://www.ag.state.mi.us/opinion/datafiles/1970s/op05500.htm).*

It should be noted, however, that a public body DOES have a duty to provide access to information from which a compilation can be made – if the information is consistent with what is being requested.

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It is well established that Public Bodies do have the ability to “*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.”(*[*MCL 15.233(3)*](http://legislature.mi.gov/doc.aspx?mcl-15-233) *)*

Those rules can include charges for the cost of copying and delivering the requested information:

“*The Freedom of Information Act permits a public body to charge a fee for the actual incremental cost of duplicating or publishing a record, including labor directly attributable to those tasks, 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.”*  [Op.Atty.Gen.2001, No. 7083, .](http://www.ag.state.mi.us/opinion/datafiles/2000s/op10158.htm)

*“In calculating the cost of labor for purposes of establishing the fee to be charged for processing a request under the Freedom of Information Act, a public body may include fringe benefits paid to its employees*”.  [Op.Atty.Gen.1999, No. 7017](http://www.ag.state.mi.us/opinion/datafiles/1990s/op10086.htm)

Where requestors are found to require excessive materials and/or assistance, there is some authority supporting reasonable costs or ramifications aimed at those who may submit requests that can be thought of as excessive:

*“Where individual requesting access to university records under Freedom of Information Act sought to examine extremely large quantities of documents, trial court could limit individual's free use of university's viewing and copying equipment, personnel, and office space to period of two weeks, thereafter requiring individual to cover her own expenses”.*  Cashel v. Regents of University of Michigan (1985) 367 N.W.2d 841, 141 Mich.App. 541

*The phrase “unreasonably high costs,” as used in section 4(3) of the Freedom of Information Act prohibits a public body from charging a fee for the costs of search, examination, review, and deletion and separation of exempt from nonexempt information* ***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.*** *[Op.Atty.Gen.2001, No. 7083](http://www.ag.state.mi.us/opinion/datafiles/2000s/op10158.htm)*[,](http://www.ag.state.mi.us/opinion/datafiles/2000s/op10158.htm) *(emphasis added)*

In extreme situations, it is even possible that harassing or disruptive requestors may be faced with stronger deterrents:

“*Second, while I agree remand is necessary to allow the trial court to address plaintiff's request for costs and attorney fees, I stress that on remand, the trial court should pay particular attention to the fact that after the initial denial of plaintiff's FOIA request, defendant continuously offered plaintiff the opportunity to review and copy the requested tape but plaintiff failed to acknowledge such. Even after plaintiff was given a copy of the requested tape, it appears plaintiff failed to acknowledge whether the copy was satisfactory. Defendant asserts that plaintiff's FOIA request in this case is only one in a string of requests made by plaintiff with the intent to harass defendant. Under the circumstances, it appears plaintiff's pursuance of this matter may not be completely in good faith. Thus, I believe the trial court should be permitted to address plaintiff's behavior and gamesmanship throughout this case in determining whether plaintiff is entitled to costs and attorney fees*. *[Adamski v. Twp. of Addison, No. 241474, (Mich. Ct. App. Dec. 11, 2003)](http://law.justia.com/cases/michigan/court-of-appeals-unpublished/2003/20031211-c241474-41-241474-opn.html)(Gage,J, Concurring) (unpublished)”*

**However**, While there seems to be little authority that addresses the recourse a public body has in responding to a requestor whose demands seem abusive and harassing, there **IS,** in fact, ample authority that forbids a public body from straying from their established FOIA procedure, or issuing a denial to a request, based on the perceived intent of the requestor.

So what can a library do?

It would seem that the best defense in this situation is a good offense (as they say!)- A library should have a good set of FOIA rules and procedures that lay out the costs that may be incurred. It is also seems like a good idea to include the language of the act stating that libraries are not required to compile or create documents that they do not already produce.

While a library does not want to deter requests, nor appear to be resistant of requests, Providing friendly, but clear and complete information to a requestor with regards to the cost ramifications - particularly if the request can be considered excessive or which could interfere with library operations is probably the best initial step.

If a true problematic, seemingly harassing situation develops, given the limited options a public body has, and the fine line between deterring a true harasser and refusing a legitimate (although perhaps challenging ) request, and given the severe ramifications for deterring a legitimate request, **a library’s best, safest option is to consult their attorney for advice and options.**