

FOIA: Statutory Exemptions and the Rule of Law

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FOIA: Exemptions from Disclosure

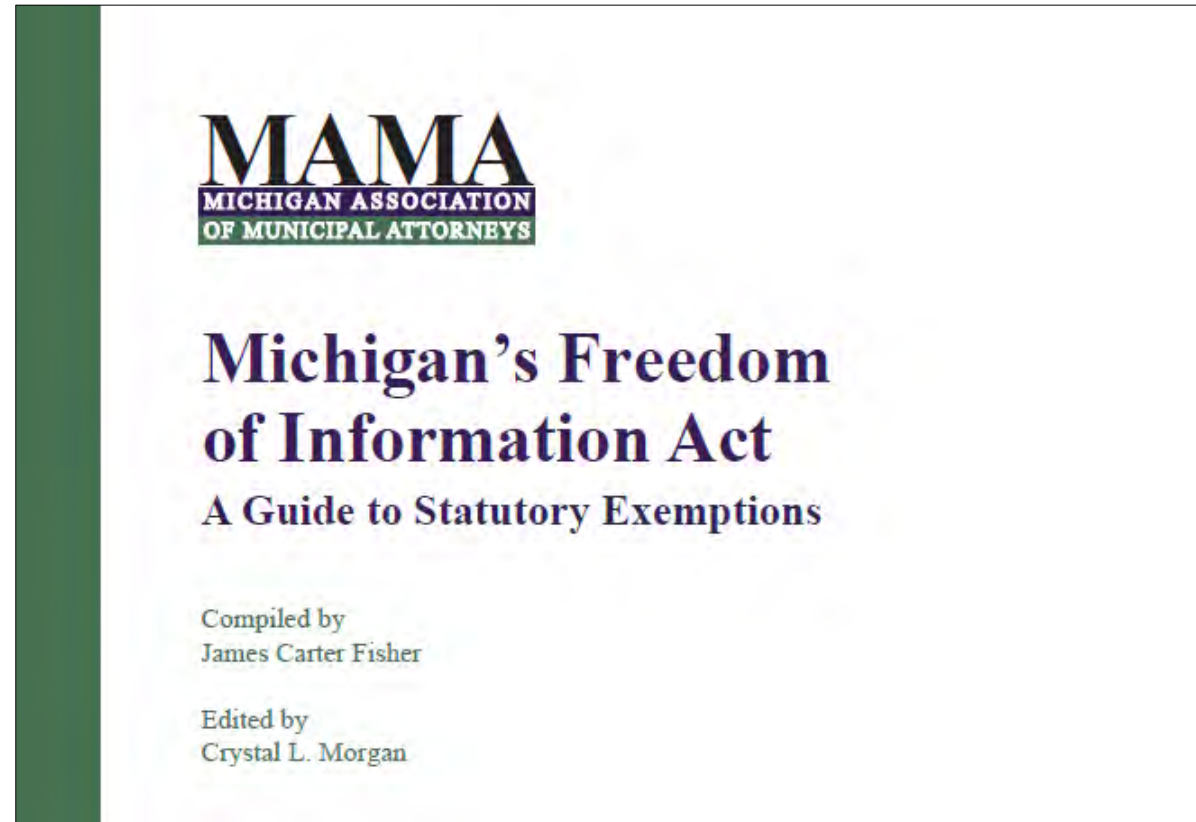
MCL 15.243

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

* * *

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

Statutory Exemptions: a Resource



Statutory Exemptions: a Resource

Topic	Public Act	MCL	Record Types/Examples
Criminal; Setting Aside Convictions; Expungement; Nonpublic records	213 PA 1965	780.623(4)	Nonpublic records of an order setting aside a criminal conviction, including arrest records, conviction, sentence, and fingerprints of the petitioner whose conviction has been set aside or expunged.
Social Security Numbers	454 PA 2004	445.85	Any sequence of more than 4 digits in a person's social security number, which may appear in records concerning employment, taxes, health insurance and elsewhere.

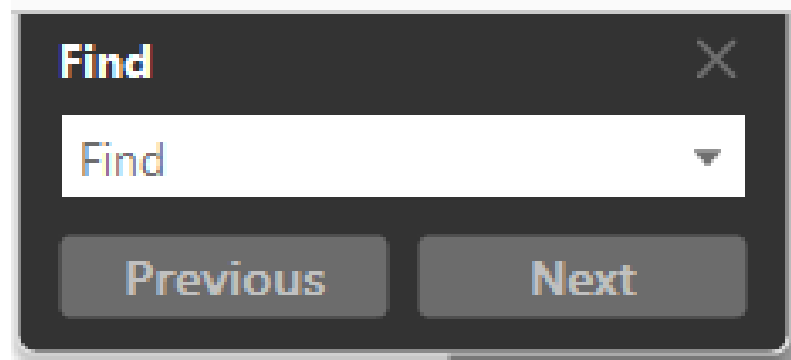
Statutory Exemptions: a Resource

To use the guide, search for key words, public acts, or MCL citations:

- ❖ Right-click in the pdf file and choose “Find”

- ❖ On the “Edit” tab, choose “Find”

- ❖ Ctrl + F



Recent Cases

Mansour Law PC v Oakland Co, COA Docket 332797 (September 19, 2017), lv den

- The plaintiff submitted a FOIA request for 16 categories of records, including citizen complaints, grievances, and disciplinary reports concerning deputies.
- The Sheriff's Department denied the request, claiming that the only responsive record—a disciplinary report—was exempt under MCL 15.243(1)(s)(ix) (personnel records of law enforcement agencies).
- The plaintiff filed suit seeking to compel production of the document. The plaintiff also alleged that the FOIA response was inadequate because the defendants denied the entirety of the request based on the exemption, but did not specifically certify that no grievances or citizen complaints existed.
- The trial court concluded the record was exempt as a personnel record and that the public body's response was adequate.

Mansour Law PC v Oakland Co (cont'd)

- The Court of Appeals agreed that the disciplinary report was exempt from disclosure under the exemption for personnel records of law enforcement agencies.
- “ ‘Personnel’ encompasses all facets of the employment process”, including discipline.
- There may be a distinction between internal discipline and official disciplinary proceedings (i.e., disciplinary actions mandated by statute or legal proceeding).

Mansour Law PC v Oakland Co (cont'd)

- MCL 15.235 sets for the requirements for a public body's response to a FOIA request.
- A public body must certify that a record doesn't exist only when non-existence of the record is the reason for denying the request or a portion of the request.
- If a requestor groups items together in a single paragraph or FOIA request, it indicates that the requestor expect a single response to the request.
- If a requestor expects a more individualized response, they have to craft the request accordingly.

Bisio v City of the Village of Clarkston, COA Docket 335422 (July 3, 2018), lv pending

- The plaintiff submitted a FOIA request for various records, including correspondence referenced in billing invoices submitted by the city attorney and engineering consultants.
- The city attorney informed her that multiple items were not public records because the city had never received the records and neither the city attorney nor the consultant was a “public body” for purposes of FOIA.
- The plaintiff argued that the city attorney is the city’s agent and that the documents that the city attorney creates, possesses, retains, and uses in the conduct of his work for the city belong to the city—the city attorney's principal.

Bisio v City of the Village of Clarkston (cont'd)

- The trial court held that the contested records were not public records.
- It found no documentary evidence establishing that the city attorney shared the contested records with the city, that the city used the contested records to make a decision related to the subject matter of the records, or that the city retained the contested records in performance of an official function.
- A “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.” MCL 15.232(i).

Bisio v City of the Village of Clarkston (cont'd)

- Public records are not insulated from FOIA by their location or the fact that a private entity created them originally for its own use.
- But, the Legislature did not include officers or employees, or agents, in the definition of public body as it pertains to cities, townships, and villages.
- “That it did not indicates the Legislature’s intent to limit ‘public body’ in [MCL 15.232(d)(iii)] to the governing bodies of the entities listed.”
- Thus, “public body” does not include agents of a city, township, or village.

Bisio v City of the Village of Clarkston (cont'd)

- The city had also denied the plaintiff's request on the basis that the purpose of the plaintiff's request was to obtain documents for use by her husband in a previously-filed OMA lawsuit.
- The city claimed the records were exempt under MCL 15.243(1)(v) ("records or information relating to a civil action in which the requesting party and the public body are parties").
- The exemption did not apply.
- A requestor's motive and future uses of the information are not relevant.

MLive Media Group v Grand Rapids, 321 Mich App 263 (2017)

- The plaintiff requested recordings, copies of recordings, and transcripts of phone calls made by police officers to a police lieutenant regarding the citation of a former assistant prosecutor for a driving offense.
- The telephone calls at issue were made on a department line (“Non-Recorded Line 3407”) but the city discovered during an internal investigation that the phone calls to Line 3407 had been recorded.
- The city sought to use the recordings as evidence in officer disciplinary actions and legal proceedings and filed a declaratory action seeking a determination of its rights and obligations to use and disclose the Line 3407 recordings.
- The city denied the FOIA request for the recording pending the outcome of the federal litigation.

MLive Media Group v Grand Rapids (cont'd)

- The city claimed it could invoke MCL 15.243(1)(d) (“records or information specifically described and exempted from disclosure by statute”) because the federal court had not yet determined whether complying with the FOIA request would violate the federal wiretapping act or Michigan’s eavesdropping statutes.
- The Court concluded that the city failed to meet its burden to prove a FOIA exemption applied. The city did not properly invoke MCL 15.243(1)(d) because never argued that disclosure would actually violate a statute.
 - The city had argued that the phone calls were accidentally or inadvertently recorded, and the statutes at issue did not prohibit the inadvertent interception or disclosure of communications.
- “The city cited no FOIA provision that allows it to pass this decision to a federal court.”

Analyzing and Invoking Statutory Exemptions

Federal Law

MCL 15.243(1)(d): “Records or information specifically described and exempted from disclosure by statute.”

- If a federal statute prohibits the disclosure of a record or communication, the public body can invoke MCL 15.243(1)(d).
 - *MLive Media Group v Grand Rapids*, 321 Mich App 263 (2017)
- “federal law is generally instructive in FOIA cases”
 - *Mager v Dep't of State Police*, 460 Mich 134 (1999)

Burden of Proof

MCL 15.243(1)(d): “Records or information specifically described and exempted from disclosure by statute.”

- When a public body invokes this exception, it is necessary to examine the statute under which the public body claims disclosure is prohibited.
- The public body has the burden to “sustain its denial” of a FOIA request. MCL 15.240(4).
- The trial court reviews the denial de novo and is required to construe FOIA exemptions narrowly.

Standard of Review on Appeal

In general, whether a public record is exempt from disclosure under FOIA is a mixed question of fact and law. However, when the facts are undisputed and reasonable minds could not differ, whether a public record is exempt under FOIA is a pure question of law for the court.

- *Rataj v City of Romulus*, 306 Mich App 735 (2014)

Recent Amendments

68 PA 2018 (effective June 17, 2018)

- Added hard drives and solid state storage components in the definition of “writing”, which is incorporated in the definition of a “public record”
 - MCL 15.232

Recent Amendments

68 PA 2018 (effective June 17, 2018)

- Added definitions of “cybersecurity assessment”, “cybersecurity incident”, “cybersecurity plan”, and “cybersecurity vulnerability”
 - MCL 15.232
- Exempts records or information of measures designed to protect the confidentiality, integrity, or availability of information systems, and cybersecurity plans, assessments, or vulnerabilities
 - MCL 15.243(1)(y)

Recent Amendments

68 PA 2018 (effective June 17, 2018)

- Added an exemption for “information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.”
 - MCL 15.243(1)(z)
- Added an exemption for “research data on road and attendant infrastructure collected, measured, recorded, processed, or disseminated by a public agency or private entity, or information about software or hardware created or used by the private entity for such purposes.”
 - MCL 15.243(1)(aa)

Thank you.

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