



TO: Mayor and Council

FROM: Steven D. Powers, City Administrator

DATE: March 16, 2015

SUBJECT: Follow up to Resolution R-14-391 – Resolution Directing the City Administrator to Revise FOIA Administrative Policy

On December 1, 2014 City Council passed Resolution R-14-391 directing a review of the City's FOIA policy. Reviews of the policy had been delayed pending amendments to the state FOIA law. Subsequent to passage of the City Council resolution, the state legislature amended the FOIA law. The changes take effect July 1, 2015. The amendments make significant changes to how FOIA requests are handled. Staff is revising the City's FOIA policy to reflect the requirements of those amendments. This work includes broader research into other communities and best practices for handling FOIA requests. Specific policy recommendations will be provided to City Council.

While this work continues, I have prepared responses and recommendations as directed by City Council regarding 1) waiver of fees for media outlets, 2) appointment of a FOIA officer for Council and establishing a separate appeal to Council for requests made to the Council; and 3) general recommendations for increasing openness and transparency.

Waiver of Fees for Media Outlets

I am unaware of any body subject to Michigan or federal FOIA laws, or other open records law, that automatically waives fees for media or any other class of requestors. Fee waivers are typically discretionary and based on the standards set forth in the applicable open records law. Because the FOIA itself provides that "Fees shall be uniform and not dependent upon the identity of the requesting person," it may not be permissible to have a policy of waiver for media. Even if it were permissible, there would be an inherent unfairness to non-media requestors under such a blanket waiver.

There is substantial difficulty in determining media in the internet age. Could any person who posts information on the internet for public consumption be considered media?

Any narrowing down of the definition of media would necessarily be somewhat arbitrary and raise issues of fairness.

The City's current FOIA policy provides one hour of free staff time and one hour of FOIA coordinator time for most requests. This appears to be relatively generous in comparison to other Michigan public bodies, most of which do not have any public written policy that automatically grants any free time. The vast majority of requests to the City, including those from media outlets, are handled within this time frame and do not result in a charge for staff time. If the City receives a very broad request that would result in substantial costs in staff time, the FOIA Coordinator often works with the requester to bring the request under one hour of staff time. This can save both staff and the requester from wading through voluminous information of no interest to the requester. Without the fees, media requesters would have no incentive to submit narrow requests, which could increase the burden on both the City and requester to sort through large amounts of records.

We cannot predict what effect a waiver of fees for media may have on City processes. A recent issue in Seattle, however, illustrates the scope of potential problems. After Seattle began implementing a police body camera program, an anonymous person set up an automatic daily request for all of the body camera and dashboard videos, 911 calls, radio traffic, databases, emails, and other records. Unlike Michigan, under Washington state law, cities are not allowed to charge for search, retrieval, or redaction of records. The requestor posted the videos online for public viewing and his stated intention was to bring attention to privacy issues and force the City to redact the videos, rather than any interest in the record itself. In response, the Washington legislature is currently considering a bill to authorize charging for redaction of videos to prevent such abuses.

City Information Technology staff receive requests to search large volumes of email (e.g. to search all email for a year). While such searches seem simple to requesters accustomed to instant web searches using the huge computing capacity of Google, they actually involve a significant amount of City computing time and server load. Some of the requests can take many hours to run. This can place a large burden on the City server systems, increase the risk of data corruption, and affect the performance of City staff trying to access applications while the systems are being scanned for data. If unlimited media access were permitted, it would be advisable to create a permanent mirror of much of the data to allow "offline" searching of records to reduce the risk of computing disruptions. This would entail additional costs.

The amount of free staff time given by the City appears to be working well and to meet the needs of the vast majority of requesters without fees, while avoiding potential abuses and issues of fairness. (Please see attached information on types of FOIA requests and charges). Very few requesters have complained about fees or waivers. When requesters do make requests that are burdensome enough to trigger fees, staff often can work with them to narrow the scope and provide them free of charge. For those requests that will take up significant staff time, fees are appropriate to recover some of the City's costs. Otherwise, the City would end up subsidizing a few individuals or for-profit businesses at the public's expense. The FOIA fee is consistent with the City's fee philosophy of charging a range of fees for services provided to residents and

businesses. These fees are imposed as a result of use, such as recreational services, rental uses, water utilities and other types of services that benefit the specific individual or business rather than the general public.

Without a fee incentive to narrow the scope of requests or break them up into manageable pieces, the City would need to be prepared to respond to very broad single requests, e.g. all City email for 2014, any email from Hillary Clinton (a FOIA request this month) that could involve hundreds of staff searching for records, which would then need to be examined for redaction within the relatively short time frame required by the FOIA. The cost in lost fees, while significant, would not be as great as the cost in City staff time devoted to responding rather than performing their other duties.

Additionally, the FOIA provides a relatively limited time to respond to a request— five business days, plus one 10 business day optional extension. Staff may not be able to compile all email for 2014 within the time allotted or they may need to devote all their time to responding to meet the deadline.

An overly broad waiver of fees may also hamper the ability of the City to obtain relief if faced with an abuser of the FOIA process. Other Michigan municipalities have been forced to obtain court injunctions to protect them from abusive FOIA requestors who, for example, submit numerous and/or voluminous FOIAs weekly. Granting a broad waiver of fees could undermine the City's position that an abusive request is a burden on the City's resources in terms of cost or time.

Appointment of a FOIA Officer for Council and Establishing a Separate Appeal to Council For Requests Made to Council.

I am unaware of any municipality in Michigan that has bifurcated its appeals process between the legislative body and the rest of the municipality. Even if Michigan law permits this arrangement, it would entail several additional steps that would increase the time and complexity of requests while not adding any clear benefit in terms of transparency or efficiency.

As an initial matter, the FOIA coordinator would need to determine whether the requested records are in the possession of councilmembers or other City staff to determine where the appeal should be directed. The FOIA defines "public records" as "a writing prepared, owned, used, or in the possession of, or retained by a public body in the performance of an official function." Under this definition it appears that most requests for Council records would belong to both categories. For example, emails sent between councilmembers and staff could exist locally on a councilmember's computer, on the City's servers, and locally in City staff computers. Councilmembers may also rely on City staff to retain other public records, such as reports, presentations, memos, etc., that they have "prepared, owned, or used," which would require the councilmembers to go to City staff to retrieve them in response to a FOIA request to the City Council.

The bifurcation of appeals would create situations where both avenues of appeal could be appropriate for one request. Assuming that such an arrangement is permitted under the Michigan FOIA, it would be confusing, and the determination of which appeal is correct would necessarily be somewhat arbitrary. Relying on the requester to make the

determination could create a situation where the requester could ask once through the City Council process, and, if denied, ask for the same records again through the other City process. This could lead to two separate appeals to circuit court, particularly if the result or reasoning of the appeals differ.

A separate appeal process would also entail additional costs in staff and City Council time. For each City Council appeal, staff would need to fully brief City Council, possibly including a closed session for legal advice, and City Council would be required to decide each appeal within 10 days of the next regularly scheduled meeting after the appeal was submitted. This could create issues of timing if appeals are submitted immediately before meetings or if City Council wanted more time to deliberate. A special meeting might be needed to address such an appeal.

Separating appeals would appear to reduce efficiency and create duplication and overlap for many requests, without an appreciable benefit to the requester or the general public. In the last three years, the City has processed the following number of appeals:

2012: 10
2013: 4
2014: 11

Although variable from year to year, these numbers appear to be in line with or slightly above other Michigan municipalities on a per capita basis. It also appears that the majority of large Michigan public bodies that deal with even a modest volume of appeals submit those appeals to an individual, such as a mayor (e.g. Kalamazoo), city manager (e.g. East Lansing) or president (e.g. the University of Michigan). For these reasons, I do not recommend treating City Council as a separate public body or having a separate appeals process for FOIAs addressed to the City Council.

Increasing Openness and Transparency

The City continues to expand transparency by placing an increasing number of public records and tools online. The City's FOIA webpage includes how to access city checkbook and financial records, police calls for service, construction and trade permits, planning projects, GIS maps, crime maps, City assessor and property tax records, and City Council records. These efforts to place records online will continue, as they encourage public awareness and participation and reduce the need for the public to file and the City to respond to FOIA requests. With respect to FOIA, the City has also placed the FOIA log online.

The City will be exploring software solutions to improve efficiency and transparency in tracking requests, fee calculations, and responses.

Other specific policy changes will be reflected in the revised FOIA policy, which is being prepared in advance of the July 1, 2015 effective date of the new state FOIA amendments. The policy changes will be consistent with openness and transparency, such as not having mandatory denials of optional exemptions specified in the FOIA law.

Attachment: Types of FOIA Requests and Charges

The City has two FOIA coordinators, Jackie Beaudry for general government and Amy Cervantes for Police.

General Government FOIA requests in 2014:

Insurance = 41
Media = 59
Commercial = 181
Citizen = 89
Attorney = 20

TOTAL General Government FOIA requests for 2014 = 390

18 out of 390 general government FOIA requests generated an estimated or actual charge.

Charges for General Government requests are typically the result of very broad and time-consuming requests. There are far fewer of these charges than for police FOIAs, but these charges typically involve fees for over one hour of staff time. Often, these charges are reduced after a conversation with the requester. Only 8 out of 390 general government requesters ended up actually paying a fee in 2014, with an average cost of \$106.27.

Police FOIA requests in 2014:

Businesses = 75
Citizens = 195
Insurance Companies = 41
Law Offices = 152
Media = 82
Schools = 20

TOTAL Police FOIA requests for 2014 = 565

342 out of 565 police FOIA requests generated an estimated or actual charge.

Because police FOIA requests involve more creation and mailing of hard copies (e.g. to insurance companies) and redactions of private information from police reports, police FOIA requests generate a greater number of fees. However, the resulting fees are usually low, averaging \$12.24 for each request that generated a fee in 2014. Many of these fees are for postage and copies only and not for staff time.