



A Look at State and Federal FOIA

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Introduction

The Michigan and Federal Freedom of Information Acts (FOIA) were originally enacted as a means to encourage government transparency and promote civil engagement. While the purpose of both acts was to encourage accessibility, the FOIA is complex and often times difficult to navigate.

Therefore, a number of public bodies find themselves unintentionally violating FOIA based on an incorrect understanding of its provisions. This is especially true with regard to the FOIA exemption for trade secrets, commercial or financial information.

Federal FOIA

There is confusion on the topic because of the differences between the Federal FOIA and the Michigan Freedom of Information Act ("MFOIA").

Under the Federal Freedom of Information Act, federal agencies are not required to disclose "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Therefore, a federal agency may have authority to promise an individual or business confidentiality with regard to trade secrets, commercial or financial information obtained by the agency during the contract bidding process.

However, this exemption only applies to FOIA requests directed to federal agencies, not state or local government agencies. While the line between federal and state agencies is sometimes blurred due to federal funding of state and local agencies, state courts have ruled that there is a strong presumption that state and local agencies are governed by their respective State's FOIA as opposed to the Federal FOIA.

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In *Lakewood Residents v. Township of Lakewood*, a New Jersey court found that, “extensive, detailed and virtually day-to-day supervision by the federal government is needed before [federal] agency status could be said to attach.” Therefore, Michigan’s state and local governments should presumptively assume they are bound by Michigan’s FOIA as opposed to the Federal FOIA.

Michigan FOIA

Under the MFOIA, the exemption for trade secrets and commercial or financial information is very limited. Specifically, public bodies are not permitted to withhold trade secrets, commercial or financial information obtained during the process of securing a government contract.

Pursuant to Section 13(1)(f) of the MFOIA, a public body may exempt:

Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

- (i) The information is submitted upon a promise of confidentiality by the public body.
- (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
- (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

As a preliminary factor, Michigan FOIA only allows an agency to withhold trade secrets, commercial and financial information when the information was provided to the agency for the development of public policy.

In addition, Michigan FOIA explicitly states that, “[the trade secret exemption] does not apply to information submitted . . . as a condition of receiving a government contract, license, or other benefit.”

Although the provision that excludes trade secrets, commercial information or financial information gained in the process of obtaining a governmental contract is peculiarly placed within a subsection of the exemption, the text of the provision is not ambiguous or obscure with regard to its message.

Additional support for this interpretation is provided by the Legislature when it amended the Management and Budget Act (MCL 18.1261) to exempt trade secrets, commercial and financial information from MFOIA requests when the individual or business was applying for a State of Michigan contract from the Department of Technology, Management and Budget (“DTMB”). The legislative history of this amendment states that,

[a]lthough [M]FOIA contains an exemption for [trade secrets or commercial or financial information] . . . the exemption does not apply to information submitted as a condition of receiving a governmental contract. Therefore, some companies are unwilling to bid on State contracts because they do not want to risk the



disclosure of private information.

It is important to understand that the recently adopted exemption in the Management and Budget Act does not apply to local government contracts.

It is apparent from the amendment of the Management and Budget Act and its legislative history that the State Legislature was aware of how the provision was being interpreted, thoughtfully considered the implications of such a provision, and made a conscious effort to solely exclude information submitted to the DTMB from its enforcement.

However, there was no similar amendment to the MFOIA that would carve out a similar exemption for local units of government like counties, townships, cities, villages and authorities.

Conclusion

Local government agencies should err on the side of caution when requesting contractual bids and ensure they do not promise a degree of confidentiality that is not permissible by law. Under Michigan law, local units of government may not exempt trade secrets, commercial or other financial information obtained as a condition of receiving a governmental contract. Therefore, local governments should review their Request for Proposals and other information to make sure that they are not making representations to potential bidders that their information would automatically be protected from MFOIA disclosure.

If you have any questions about recent state and federal updates concerning FOIA, contact Anne Seuryneck at 616.726.2240 or at aseuryneck@fosterswift.com.

Anne has extensive experience in drafting and reviewing ordinances and policies, serving as general counsel, counseling clients on Freedom of Information Act (FOIA) and Open Meetings Act issues, and working with communities on millage and Michigan campaign finance issues.