



Testimony on the Freedom of Information Act
House Oversight Committee

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Good afternoon. My name is Steve Delie, and I am the Director of Open Government at the Mackinac Center for Public Policy. I also serve as the Executive Director for the Michigan Coalition for Open Government.

I am here today to discuss ongoing and persistent problems with the state's response to Freedom of Information Act requests.

The purpose of the FOIA is to provide the people of the state with "full and complete information regarding the affairs of government and the official acts of those who represent them." Sadly, this purpose is consistently being thwarted by the way in which FOIA requests are processed. In our experience, there have been three primary issues which prevent the public from getting access to public records: 1) excessive delays, 2) excessive costs, and 3) excessive redactions.

Excessive delays have been a common occurrence in FOIA responses, often ending only after a lawsuit. Take, for instance, a case we filed regarding one of our requests to the Department of Licensing and Regulatory Affairs. We made a request to the Department to review a file on behalf of a single licensee. The Department failed to respond for months with even an estimate of when records would be produced. The Department released the documents almost immediately.

Equally disturbing is a consistent pattern of overcharging for requests. In one recent example, we asked the Department of Health and Human Services for e-mails between specific officials and representatives of the McKinsey consulting firm during the pandemic. In response, DHS estimated a total cost of over \$60,000 dollars was needed to fulfill the request. After revisions and clarifications, DHS eventually reduced that charge to \$12,000.

Estimates like these essentially prevent Michigan's citizens from obtaining records, as the costs are simply beyond what they would be willing to pay. Requests subject to this strategy are commonly abandoned, and no documents are ever produced.

Unfortunately, even when documents are produced, they are often so heavily redacted that they are meaningless. It is not uncommon to see entire pages redacted, even though FOIA requires all non-exempt information to be disclosed. These redactions are permissive, with only a few actually required by law. Despite this, there is an overarching culture of reviewing every document with an eye toward exempting as much as possible. This increases both the delays and the costs associated with requests.

Change is needed. Thankfully, the legislative fixes are relatively straightforward.



First, the legislature should amend the FOIA to create a rebuttable presumption that documents be produced within thirty days. A public body that cannot fulfill a particular request within that period could then petition a newly-created oversight body to review the request and determine whether more time is needed to respond, and, if so, establish an appropriate time frame. This measure would result in more minor requests being fulfilled quickly, while still providing public bodies the flexibility needed to respond to larger requests.

The second change that can easily be made is to clarify what fees can be charged, and when a charge is appropriate. Currently, FOIA allows a public body to charge a fee when failure to do so "would result in unreasonably high costs to the public body because of the nature of the request in the particular instance." This language is essentially ignored by public bodies, as I almost never see documents produced without charge. FOIA should be amended to require a public body to provide evidence that a particular request would lead to unreasonably high costs, including a statement of the public body's average costs for completing requests in the past year. This would enable requestors to meaningfully challenge a public body's decision to charge a fee, and prevent this provision from being abused.

The final change I would suggest today would be an attempt to discourage excessive redactions. This could be accomplished by requiring public bodies to explain why a redaction is appropriate each time one is applied. Each redaction would need a citation to an exemption, along with an explanation of why the information that's redacted falls within the exemption. This additional requirement would lead to more carefully tailored redactions, and better empower citizens to challenge an exemption on appeal.

There are more reforms that would improve FOIA, and I would be happy to discuss those with the members of the committee. But the three changes I outlined today would go a long way to making FOIA more workable, and would benefit Michiganders.

Thank you for your time today. I would be happy to answer questions at this time.