



# OPEN MEETINGS ACT, FOIA, and LIBRARY PRIVACY ACT

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## DISCLAIMER

This outline is intended as general information only and may not be relied upon as legal advice. Libraries should always consult with their legal counsel regarding legal matters including, but not limited to, the Open Meetings Act, Freedom of Information Act and Library Privacy Act.



## Topics

- Open Meetings Act
- Freedom of Information Act
- Library Privacy Act / Patriot Act



## I. Open Meetings Act

MCL 15.261 et seq.

### Purpose:

- To require meetings of public bodies to be open to the public (limited exceptions for closed sessions)
- To require public notice and the keeping of minutes of meetings



## Open Meetings Act - Mandates

- Section 3 - Meeting Mandates
- Sec. 3(1) - Meetings must be “open” and held in places available to the general public
  - May be videotaped, tape-recorded, broadcast live on radio or TV - No prior approval by public body is needed
  - But ... public body may establish reasonable rules and regulations to minimize possibility of disruption of a meeting



## Open Meetings Act – Mandates, cont'd.

### Meeting Mandates -continued

- Sec. 3(2) - Decisions must be made at meeting open to public
- Sec. 3(3) - All deliberations of a public body constituting a quorum (majority) shall be made at an open meeting, with limited EXCEPTIONS for closed sessions in Sec. 8.
- Sec. 3(4) - No need to register or give name as precondition to attend



## Open Meetings Act – Mandates, cont’d.

### Meeting Mandates – cont’d.

- Sec. 3(5) - Members of public must be allowed to address meetings under rules established and recorded by public bodies.
- Sec. 3(6) - No exclusion of public from public meeting, EXCEPT for a breach of the peace actually committed at the meeting.
- Sec. 3(10) - OMA does not apply to social or chance gatherings or conferences not designed to avoid the OMA.
- Issue: Is a committee of a library board a “public body” that must comply with the OMA? Conservative approach: Comply with OMA for all committee meetings.



## Open Meetings Act – Notice

### Meeting Notice Requirements

- Sec. 4(a) - Must contain name of public body, phone number and address
- Sec. 4(b) - Notice must be posted at principal office, and may be placed at other locations deemed appropriate by public body
- Sec. 4(c) - If the public body, such as township, village or city library board, is part of a political subdivision, notice must be posted at city, township or village office



## **Open Meetings Act – Notice, cont'd.**

- Sec. 5(2) - Post notice of all regular meetings w/in 10 days of first meeting of year; indicate dates, times, and places of meetings
- Sec. 5(3) - If change in schedule, post notice of change w/in 3 days after meeting at which change is made
- Sec. 5(4) - Rescheduled regular meetings or special meetings, at least 18 hours in advance of meeting



## **Open Meetings Act – Notice, cont'd.**

- Sec. 6(1) - Upon written request from individual or firm, etc., and upon payment of yearly fee of reasonable costs of printing and postage, copy of meeting notices must be sent to requesting party by first class mail
- Sec. 6(2) - Upon written request from radio station, TV station, or newspaper, copy of meeting notices must be provided at same time as posting, free of charge.



## Open Meetings Act – Closed Session

- Sec. 7(1) - Closed sessions are only called upon 2/3 roll-call vote of total membership of public body. (NOTE: Closed sessions for dismissal, suspension, or hearing charges against an employee, or periodic evaluation of personnel, and collective bargaining agreement negotiations do not require 2/3 vote but do require roll call vote.)
- Sec. 7(1), (2) - Purpose of closed session must be stated in the public minutes - Separate set of minutes taken for the closed session.
- Sec. 7(2) - Minutes of closed session must be kept for at least a year and a day after approval of minutes of open meeting at which closed session was conducted.
- Sec. 7(2) - Closed session minutes are not available to the public and are not subject to disclosure under the Freedom of Information Act.



## Open Meetings Act – Closed Session, cont'd.

- Sec. 8 lists the only permissible purposes for holding closed sessions
- Most frequently used closed sessions under section 8:
  - To consider personnel dismissal/suspension, hear complaints/charges, or periodic personnel evaluation, if requested by the employee
  - For collective bargaining, if requested by either party
  - To consider purchase or leasing of real estate
  - To consult with attorney regarding trial strategy or case settlement if open session would have a detrimental financial effect
  - To consider materials exempt from disclosure by statute (such as confidential written communication from a library's attorney which is exempt under FOIA due to attorney-client privilege)



## Open Meetings Act - Minutes

- Sec. 9(1) - Meeting minutes must include date, time, place, members present, members absent, any decisions made (and the purposes of any closed sessions)
  - Corrections must be made at next meeting, and both corrections and original entry must be shown.
- Sec. 9(2) - Minutes are to be made available to the public at the official address; copies are available at reasonable estimated cost of printing and copying.
- Sec. 9(3) - Draft minutes must be available for public inspection within eight business days; when approved, final minutes must be available within five business days



## Open Meetings Act - Penalties

- Intentional violations by public officials are misdemeanors, with up to \$1,000 fines; or if second offense, criminal, up to \$2,000 fines or imprisonment up to one year, or both.
- A public official who intentionally violates the Act is personally liable in a civil action for damages up to \$500 plus plaintiff's costs and attorneys fees.
- Attorney General, prosecuting attorney, or any person may commence a civil action to challenge the validity of a decision in violation of the Act.
- An action to invalidate a decision for violation of the Act must be brought within 60 days after approved minutes are made available to the public (30 days for contracts, bids, bonds, or borrowing proposal to voters).
- If the court concludes that the governmental entity violated the Act and the court grants relief, the governmental entity must pay plaintiff actual attorneys fees.



## Open Meetings Act – “Emerging Issues”

- Teleconferencing: Are members of public body permitted to participate and vote by teleconferencing (telephone or video conferencing)?
  - Difference of opinion among attorneys; conservative approach is to require physical presence
  - HB 5335 would prohibit voting unless each member of a public body is physically present (i.e., no teleconferencing). HB 5335 passed the House on February 28, 2012.



## Open Meetings Act – “Emerging Issues” – cont’d

- E-mail: E-mail communications among board members can violate the Open Meetings Act if a quorum deliberates toward or makes a decision through e-mail or similar communication.
  - A public body may deliberate toward a decision only at a properly noticed and held meeting open to the public.
  - Educate and caution board members about the pitfalls of interactive e-mail communications among board members.



## Open Meetings Act – “Emerging Issues” – cont’d

- Board members should also avoid e-mail to engage in “round robin” (sequential communications by one board member with other board members for the purpose of deliberating on or deciding a matter by a quorum of members).
- One-way communications with board members or two-way communications between two board members are OK, but very easy to “cross the line” into interactive e-mail communication with a quorum of board members. Be careful!



## II. Freedom of Information Act

- Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, adopted in 1976.
- FOIA provides for public access to public records with some specific exemptions from disclosure.



## FOIA – Key Points

- FOIA requests must be in writing. If not in writing, not legally required to respond.
- All written requests for information should be treated as FOIA requests. No requirement for a request to refer expressly to FOIA in order to constitute a FOIA request.
- A library must have a designated FOIA coordinator responsible for denial of FOIA requests. A library should have a FOIA policy for reviewing and responding to FOIA requests including forms for a FOIA request.
- All FOIA requests must be responded to within 5 business days (may be extended for 10 additional business days if the requester is notified within the 5 business day time frame).



## FOIA Key Points – Cont'd.

- FOIA contains exemptions for disclosure including:
  - Records protected from disclosure under other statutes such as Library Privacy Act.
- The FOIA coordinator should carefully review written FOIA requests to determine if any exemptions are applicable.
  - E.g., records exempt from disclosure by another statute (such as Library Privacy Act), privacy exemption, exemption for social security numbers, information subject to attorney-client privilege, bid for contract until public bid opening or deadline, etc.
  - Review the application of any exemptions with legal counsel before denial

## FOIA Key Points – Cont'd.

- Written requests (other than search warrants, subpoenas, and Section 215 orders under the Patriot Act) should be treated as FOIA requests pursuant to the library's FOIA policy.
- Denial of verbal request does not violate FOIA.
- Denial of written FOIA requests could be challenged in court and the library will be required to pay plaintiff's attorney fees if the court determines the denial was not permitted under FOIA.
- Denials may be made only by the designated FOIA coordinator.



## FOIA – Emerging Issues

- Meeting Notes/Board Members

– The Michigan Court of Appeals held last year that handwritten notes of a township board member taken for personal use, not circulated among board members, not used to create minutes, and retained or destroyed at the board member’s sole discretion are not “public records” subject to FOIA.

## FOIA – Emerging Issues – Cont’d.

- Personal E-mails:

- The Michigan Court of Appeals held that personal e-mails regarding union matters by school district employees/union officials were not “public records” subject to FOIA since they were not prepared, owned, used, or in the possession of a public body in the performance of an official function.
- The Court reached this conclusion even though the e-mails were on the school district computer system and the school district had a policy prohibiting personal e-mails by employees.
- FOIA request for e-mails or similar internal communications requires review to determine if they are “public records” or personal e-mails not subject to FOIA. Review with legal counsel.



### III. Library Privacy Act/Patriot Act

- 1982 P.A. 455, MCL 397.601 *et seq.*, as amended
- Main purpose
  - Protects confidentiality of library records/patron information
- Important to understand Library Privacy Act to properly respond to requests for library records/patron information and to situations involving Internet access
- If a record is protected by the Library Privacy Act, a FOIA request for that record must be denied.



## Recommendations – Library Records

- Adopt and keep policy up to date on FOIA.
- Designate FOIA coordinator (required by FOIA).
- Be careful. Before responding to requests for information, review FOIA and Library Privacy Act (if request involves patron records). When in doubt, consult with library attorney.

## Library Privacy Act - Records

- Library Records
  - Library record: a document, record, or other method of storing information retained by a library that contains information that: (1) personally identifies a library patron, including his or her name, address, and telephone number, or (2) that identifies a patron has having requested or obtained specific materials from a library.
  - Library record includes any record with a patron's information or information regarding a patron's use of library materials (circulation records, access to computers/Internets, computer history of web site visits, etc.)
  - Library record does not include nonidentifying information for evaluation of circulation of library materials.
  - Library record does not include personal recollection.



## Prohibition on Disclosure

- Library Privacy Act prohibits a library or library employee/agent from disclosing a library record (as defined) without the written consent of the person who is liable for the return of the material identified in the library record.
- Example: Parent/guardian liable for return of material on child's library card may access the child's library information and may consent to disclosure to third parties. (NOTE: "liable person" not limited to parent or guardian.)
- Cannot disclose patron database to ballot question committee for millage campaign or to third parties for mailing lists.
- May use patron database to conduct library business (*e.g.*, to collect overdue fines).
- If improper disclosure of "library record," penalty = actual damages or \$250, whichever is greater, plus reasonable attorneys fees and costs.



## Library Privacy Act - Emerging Issues

- Video

- Is a library surveillance video a “library record” protected by the Library Privacy Act?
- Unclear answer under the Act; no guidance in Michigan case law
- Conservative approach – treat surveillance videos as protected by the Act.



## Court Order – Exception to Consent

- Exception to Consent Requirement: Court order for release of library record after hearing and opportunity to be heard by library.



## Law Enforcement Requests – Informal

- Law enforcement may make verbal request for “library record” as defined.

Response: Advise police officer of Library Privacy Act, unable to provide “library record,” and refer to Director/Branch Manager. Police officers are not different from private citizens for these types of requests.



## Law Enforcement Requests– Formal

- Police officers may appear at library with search warrant or subpoena for “library record” of a particular person or set of persons (e.g., computer access logs during certain time).
- Search warrant: Immediately executable; contact Director/ Branch Manager; contact library attorney; advise officer of Library Privacy Act but comply with search warrant.
- Subpoena: Describes requested record and time for compliance; not immediately executable; contact Director/ Branch Manager; contact library attorney for attorney response.
- A library should have a policy identifying who is responsible for responding to search warrants/subpoenas and who should be contacted. All personnel should be thoroughly familiar with the policy.



## Response to Search Warrant

- Library Privacy Act prohibits disclosure except by court order after hearing where library may be heard.
- Search warrant is a court order but no prior opportunity for library to be heard.
- Request identification and copy of search warrant.
- Contact Director/Branch Manager and library attorney immediately per library policy. Send/fax copy of search warrant to library attorney.
- No consent to search/seizure beyond scope of warrant.
- Keep record of documents or items seized or reviewed.
- After search warrant executed, library attorney may file a motion to quash the search warrant.
- If the court does not quash the search warrant, it may order limitations on how library record is used to protect patrons' privacy (especially those not the target of police investigation).



## Response to Subpoena

- Subpoena allows more time.
- Contact Director/Manager and library attorney per library policy.
- Library attorney may file a motion to quash the subpoena and have a hearing before any disclosure.
- If court orders disclosure after the hearing, it may order limitations on how library record is used to protect patrons' privacy.
- Same process for civil subpoenas issued in civil lawsuits.



## USA Patriot Act

- 2001 Act in response to 9/11
- Section 215 addresses library records
- Section 215 order (national security letter) cannot be issued unless the information sought is relevant to a national security investigation
- Section 215 orders must now be signed by Director or Deputy Director of FBI
- Recipients may seek judicial review
- In May 2011, Section 215 was reauthorized for four years (just before it was scheduled to sunset)

## USA Patriot Act – Cont'd.

- Section 215 orders are immediately executable (like search warrants)
- Gag order: When served a Section 215 order, there is a gag order prohibiting disclosure of the existence of the order to anyone except the person responsible for releasing information per library policy (typically Director). (Contacting library legal counsel is nevertheless permitted.)
- A library must have a specific policy identifying who is responsible for releasing the information and all library personnel must be familiar with the policy.
- If a library employee is served with Section 215 order, review policy and contact only the person authorized to release protected information. Comply with gag order!



# QUESTIONS?