

**Fahey Schultz
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EXPERT COUNSEL  REAL SOLUTIONS

15 OMA and FOIA Tips and Tricks

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Disclaimer

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to a particular situation.
- Please contact an attorney if you need assistance related to a specific legal issue.





Freedom of Information Act, Act 442 of 1976

1. The Michigan Freedom of Information Act is designed to provide citizens with access to public records.
2. Goal is transparency, and the ability to obtain information on a public body's official activities.
3. The FOIA is a pro-disclosure statute.



Open Meetings Act, Act 267 of 1976

- The OMA requires certain meetings of certain public bodies to be open to the public.
- Similar to the FOIA, the goal is transparency. The OMA is intended to promote governmental accountability and foster openness in government to enhance responsible decision making.





FOIA/OMA - Tip or Trick #1

- The OMA applies to all meetings of a public body and does not include an individual government official.





TIP! - Tip or Trick #1

- MCL 15.262(b) – “ "Meeting" means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy[.]”
- MCL 15.262(a) – “ "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council[.]”
- Informal canvass of elected official to find out stances of other elected officials does not violate OMA if it is not with a quorum of public body and not meant to circumvent the OMA (e.g., "telephone" or "around the horn"). St Aubin v Ishpeming City Council, 197 Mich App 100, 103; 494 NW2d 803 (1992).





FOIA/OMA – Tip or Trick #2

- A violation of the OMA will invalidate decisions made by the public body at the meeting where the OMA violation occurred.



TRICK! - Tip or Trick #2

- MCL 15.270(1) “Decisions of a public body **shall be presumed to have been adopted in compliance with the requirements of this act.**”
- MCL 15.270(2) – Decisions only **may** be invalidated due to OMA violations (meeting not held in public place, decisions not made in public, etc...).
- **“Outs”**
 - Courts do not have jurisdiction to invalidate decisions over 60 days after approved minutes are made available to public.
 - Can reenact decisions that may not have been made in conformity with the OMA.
 - See MCL 15.270(3) and (5).



FOIA/OMA - Tip or Trick #3

- A FOIA request must contain the following information to be considered a valid request:
 - ✓ Complete name
 - ✓ Address written in compliance with USPS addressing standards
 - ✓ Email address or telephone number



TIP! – Tip or Trick #3

- Requestors must provide complete name, address, and telephone number or e-mail ever since amendments made after the “Emily” ballot request. See MCL 15.233(1).
- Failure to provide this information is a basis to deny a FOIA request.
- Helpful for the “spam”/ “form” FOIA requests from out-of-state companies aggregating data.



FOIA/OMA – Tip or Trick #4



- All text messages related to municipal business are public records under the FOIA and must be disclosed.





TRICK! - Tip or Trick #4

- Recent case law suggest otherwise *in certain scenarios*.
- While FOIA includes in the definition of “public body” officers and employees of state government, see MCL 15.232(h)(i), **the definitional section does not also include officers and employees of municipalities such as cities or townships.** *Blackwell v City of Livonia*, No. 357469, 2021 WL 5977221, at *4 (Mich Ct App, December 16, 2021), app den 973 NW2d 139 (Mich 2022) (emphasis added).
- “Defendant met its burden of sustaining its decision to withhold the requested records from disclosure because the record evidence indicates that the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office **in the performance of an official function.**” *Id.* at 6.
- If withholding records under this theory, we suggest you consult an attorney.



FOIA/OMA - Tip or Trick #5



- Records required by law must be produced under the FOIA only if a municipality possesses those records.





TIP! - Tip or Trick #5

- "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. See MCL 15.232(i) (emphasis added).
- "Backfilling Records"
 - If a municipality does not have a record (even if it is supposed to retain the record) it does not generally need to find it some place else (e.g., in the office of a third-party consultant like an engineer) to fulfill FOIA obligations.
 - But see, *Bisio v City of Vill of Clarkston*, 506 Mich 37, 56; 954 NW2d 95, 106, reh den 506 Mich 923; 948 NW2d 595 (2020) (court find third party attorney's records were public records when city charter makes office of city attorney).





FOIA/OMA - Tip or Trick #6

- I have five business days (or 15 with an extension) to provide responsive documents to a requestor's FOIA request.



TRICK! - Tip or Trick #6



- Don't sell yourself short when counting your FOIA request response time!
 - FOIA requests sent by e-mail are not deemed received until one business day after electronic transmission made or when found in a SPAM folder. See MCL 15.235(1).
 - When you issue a 10-business day extension, your time to respond is 15 business days after receipt of request. See MCL 15.235(2)(d).
 - If FOIA costs to respond exceed \$50, you can request a deposit for the records and your time to produce records no longer has statutory deadlines (just a “best efforts” estimate). MCL 15.234(8).

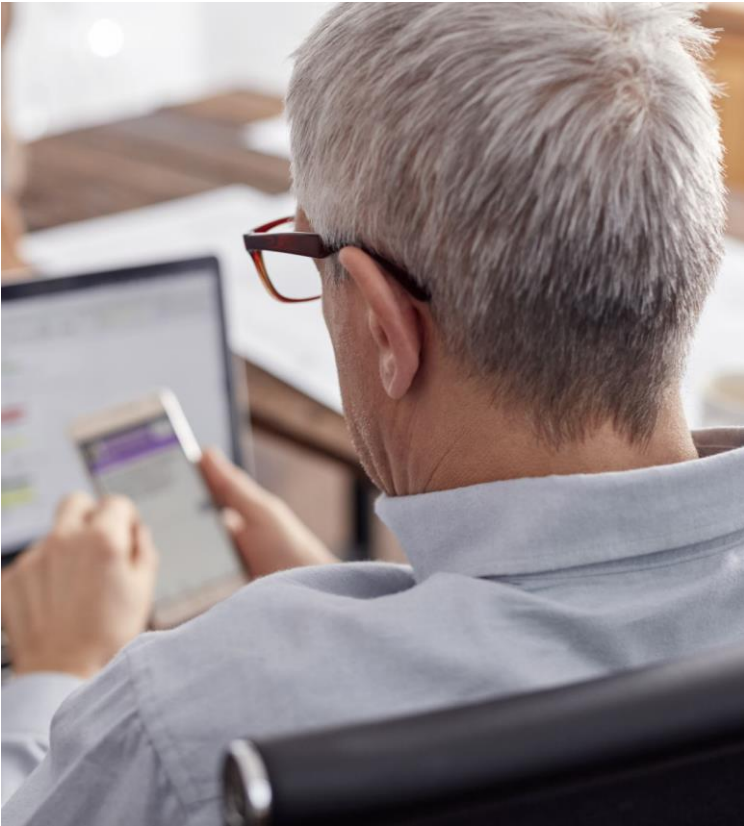


FOIA/OMA - Tip or Trick #7

- When my council or board e-mails each other, it is not an impermissible public meeting that violates the Open Meetings Act.



TRICK! - Tip or Trick #7

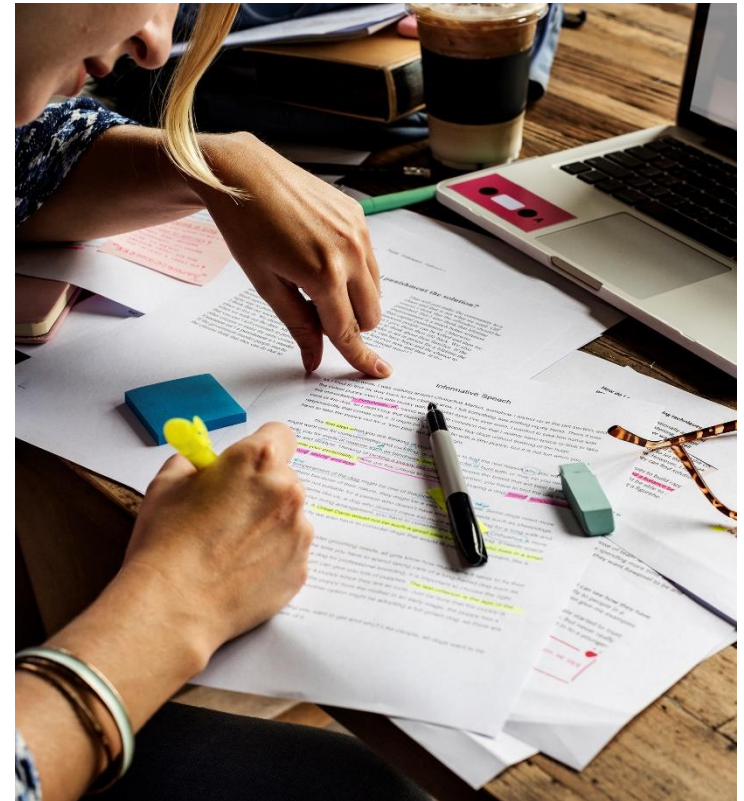


- Remember, a “meeting,” under the OMA can include where a quorum is present deliberating toward a decision on public policy. MCL 15.262(b).
- BEWARE of e-mail chains where all elected officials are in the “TO” line and “REPLY-ALL” that could be considered deliberating with a quorum.
 - BCC is your friend to avoid OMA challenges!



FOIA/OMA - Tip or Trick #8

- I can't redact from FOIA responses the identify of complainants who send complaints about property owners in my municipality (e.g., code enforcement complaints).





TRICK! - Tip or Trick #8

- In certain circumstances, you can use the FOIA privacy exemption to redact the identities of complainants. See MCL 15.243(1)(a).
 - *Richman v Ingham County*, unpublished opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 356147), 2021 WL 5407497, p *1 (upheld use of privacy exemption to redact name and address of individual making complaint about county dispatch employees).



FOIA/OMA - Tip or Trick #9

- A clerk **is not** automatically the FOIA Coordinator of a municipality.



TIP! - Tip or Trick #9

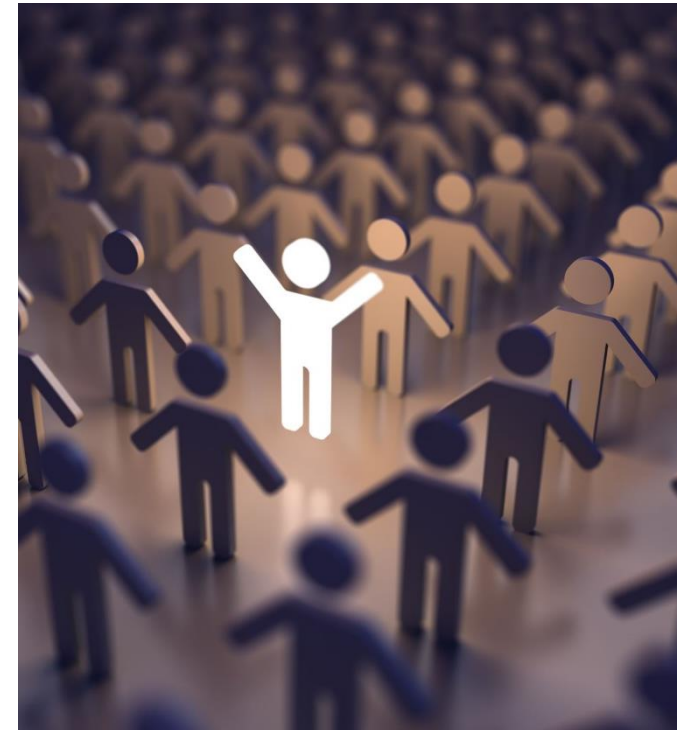


- Municipalities should appoint an individual to serve as FOIA coordinator. See MCL 15.236(1).
- If this hasn't happened, consider:
 - Having your elected body make a motion to designate the FOIA Coordinator.
 - Specifying the FOIA Coordinator in your Written FOIA Procedures and Guidelines.



FOIA/OMA - Tip or Trick #10

- It's best practice to never have a quorum of an elected or appointed body together with each other as it will violate the Open Meetings Act.



TRICK! - Tip or Trick #10

- Remember, a meeting means convening a public body with a quorum for the purposes of deliberating toward or deciding on public policy. See MCL 15.262(a).
- Quorums of a public body can attend social, community, and other events!
 - Often times, it is good for a board to know each other outside of meetings.





FOIA/OMA - Tip or Trick #11

- My public body is allowed to bring certain staff, officers, consultants, citizens, and/or employees into a closed session portion of a public meeting.



TIP! - Tip or Trick #11

- Yes, a public body essentially has the freedom to choose who can attend a closed session. See OAG, 1979-1980, No 5532, p 324 (August 7, 1979).





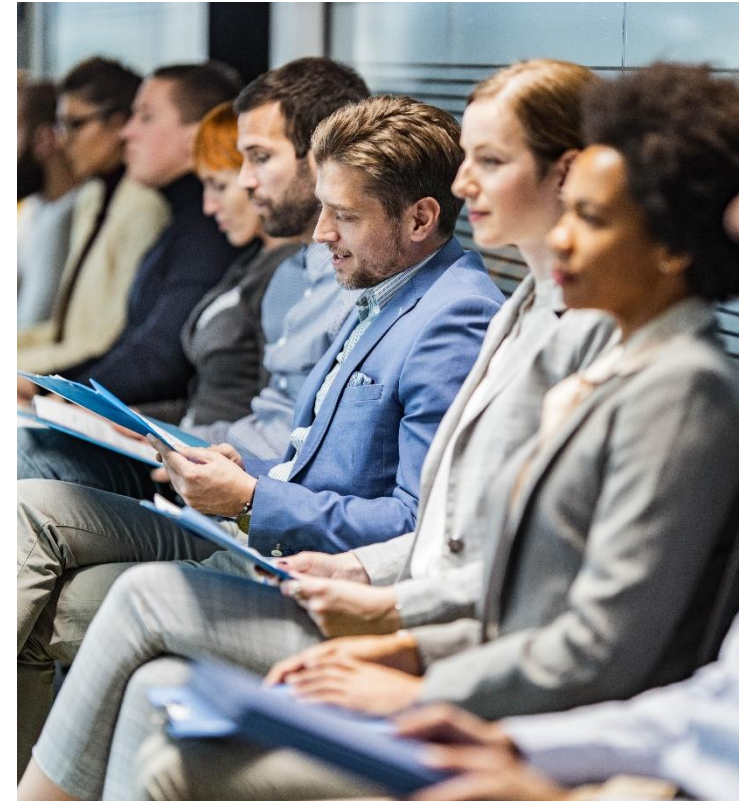
FOIA/OMA - Tip or Trick #12

- You do not need to provide a public comment period for a council or board workshop. Public comment is only necessary for actual meetings.



TRICK! - Tip or Trick #12

- Remember, the OMA defines “meeting” to include meetings where a public body will just deliberate public policy (e.g., a workshop). See MCL 15.262(b).
- At all meetings, there must be a period where the public can address the public body. See MCL 15.263(5).



FOIA/OMA - Tip or Trick #13



- If a document is exempt from disclosure under the FOIA, I cannot release it to a FOIA requestor.



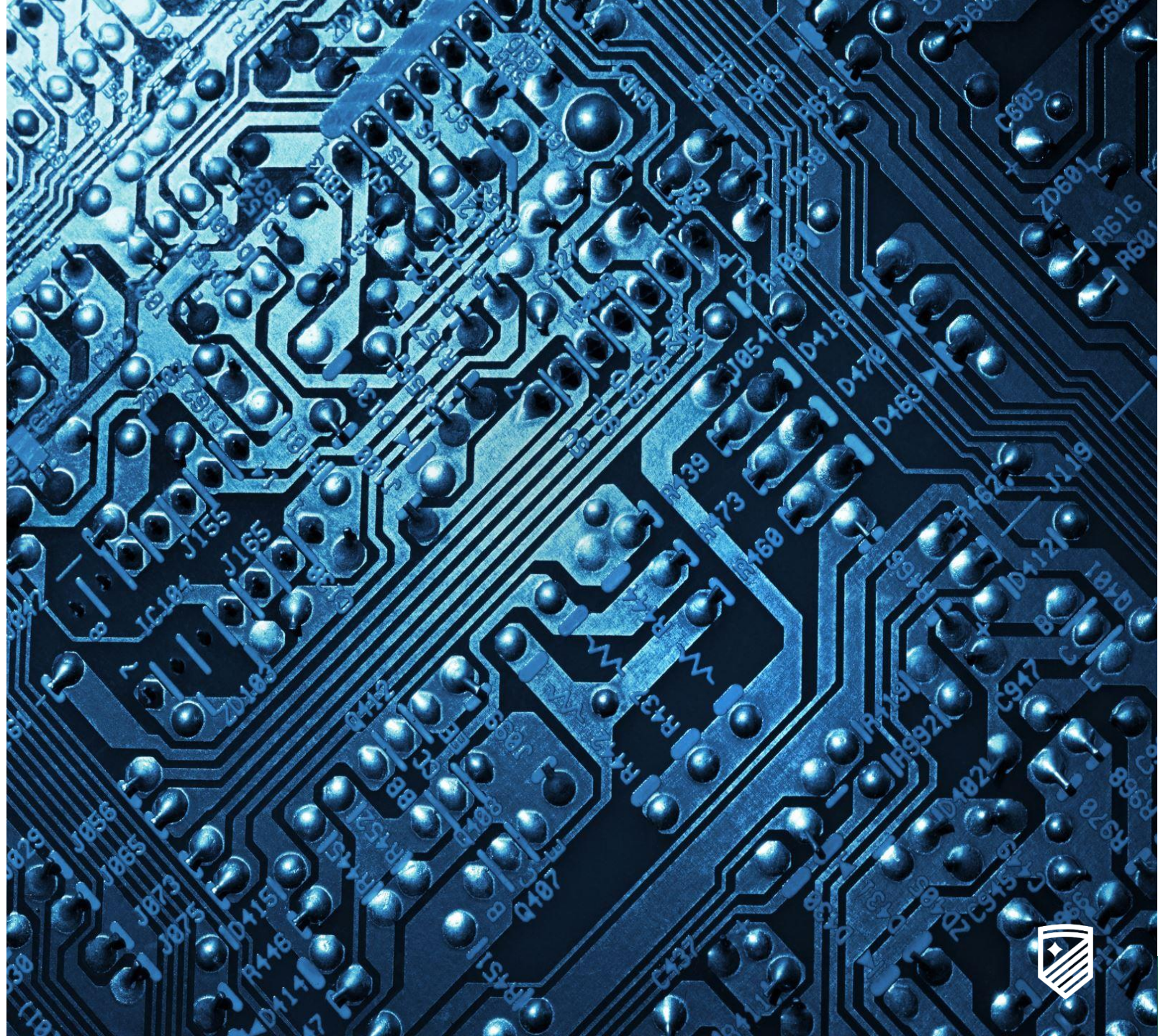
TRICK! - Tip or Trick #13

- Section 13 of the FOIA generally lists items that a municipality does not need to disclose in a FOIA response, but a municipality can always “over disclose” besides when other laws would prohibit disclosure of a record (e.g., social security numbers, banking information, etc...).



FOIA/OMA - Tip or Trick #14

- I always need to post public notices on our municipality's website to comply with the OMA.



TRICK! - Tip or Trick #14

- It is a good practice, but technically no!
- Not necessary to post public notices on a website if your municipality does not post monthly or more frequently updates of meeting agendas or minutes. MCL 15.263a(4).



FOIA/OMA - Tip or Trick #15

- If a meeting is taking too long, my public body can briefly adjourn and come back to business in the near future to finish everything up without posting additional notice.





TIP! - Tip or Trick #15

- You can “recess” a meeting for up to 36 hours and reconvene to finish business without posting additional notice. See MCL 15.265(5).
- This can be helpful if you have a meeting that has a controversial topic (e.g., zoning, etc...) with a lot of public comment.



Questions

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***See website for additional FOIA/OMA resources**

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