

## How public are our public records?

All seemed to be going according to the letter of Michigan law when Caitlin Muciek asked for some information from the city of Southgate, her lifelong hometown.

She wanted to see a copy of the city manager's latest performance evaluation. So Muciek prepared a letter requesting the information and offering to pay up to \$10 in copying fees.

### **8 Days In June**

The Wayne State University student entered City Hall and found the clerk's office. "I gave them the letter. They didn't hassle me at all when I turned it in," she says.

Muciek was one of dozens of Wayne State University students who made requests for public records as an assignment for journalism classes earlier this semester. *Metro Times* compiled the information that the students reported about their treatment and their ability to obtain records as an evaluation of public agencies' compliance with Michigan's Freedom of Information Act (FOIA). That's the law that makes many government records available to the public.

"If newspapers don't keep pounding on these people and spending money on this, government will become increasingly secretive," says Tom O'Hara, the managing editor of the *Cleveland Plain Dealer* who works with the American Society of Newspaper Editors on national Sunshine Week programs.

"We keep alerting people that these laws exist and they're very important for the democracy to function."

A couple days after Muciek asked for information at City Hall, her grandmother, who also lives in Southgate, answered her telephone to find Mayor Norma Wurmlinger was calling.

"She said, 'I got a letter from Caitlin Muciek. Is that your daughter?' and I said, 'No,'" Elizabeth Muciek says. Wurmlinger continued the conversation, wondering why the information was being sought. "I just thought maybe she had a problem with the city," Wurmlinger told Elizabeth Muciek. Wurmlinger did not respond to *Metro Times* inquiries about her phone call.

Michigan's 30-year-old Freedom of Information Act permits members of the general public, like Caitlin Muciek, to review records produced and held by public bodies. The idea is that the public's business paid for with the public's money should be available to the public. Reporters routinely use it too, seeking everything from mayoral spending records to meeting minutes to police reports for news stories.

Michigan's law covers records held by public universities, counties, cities, townships and public school districts as well as many parts of the executive branch of state government.

Some records can be legally exempt from public disclosure, including records of ongoing police investigations, some educational records, trade secrets, information subject to attorney-client privilege, pending public bids for contracts, informers' identities, and medical information, for example.

But other information — salaries of public employees, spending records, performance evaluations, crime reports, correspondence, inmate booking photographs, autopsy test results and corporate tax records — should be provided upon request.

The Michigan Freedom of Information Act prescribes plenty about how public bodies should handle requests like Muciek's and the thousands of others filed statewide each year. After a request is made in writing — sometimes on a form the public body provides — it needs to be responded to, though not necessarily fulfilled — within five business days; the public bodies need to notify the requesters if they are taking a 10-day extension to respond. They may only charge reasonable fees for copying costs incurred.

Nowhere in the law does it say, “Have the mayor call a requester’s grandmother to find out why she wants records.”

Nor does it say requesters have to give their names to get records. They don’t have to show identification to make requests. And they don’t have to tell public officials why they are seeking information.

Yet nearly half of the metro Detroit public agencies that students visited made such inquiries. Some of the students were told they couldn’t have information unless they answered certain questions or provided information about themselves.

Other students reported enjoyable, professional dealings with the school districts, police departments, counties and cities they visited. Most got the records they sought, when the records existed.

But the wide range of responses to the requests, what records public agencies don’t keep, the variety of fees they charged — if they charged — and how they treated the students asking for public information was cause for concern for open-access champions and raises questions for government watchdogs about how the law is being followed.

“We need to be able to see what our government is doing,” says Dawn Phillips Hertz, attorney for the Michigan Press Association and veteran of decades of court battles to preserve public access to public records. “If you look at the basic freedoms, the right of free speech doesn’t mean very much if we don’t have anything to talk about. ... This is a participatory democracy. You can’t participate if you don’t have the facts.”

### **How they did it**

Between Jan. 24 and Feb. 7, 54 students from four Wayne State University journalism law and reporting classes made 153 visits to public agencies, including 50 visits to municipal governments, three to counties, 53 to police and sheriff’s departments and 47 to school districts.

Following FOIA’s requirements, they had prepared written requests for information and, if asked to, they filled out the agencies’ FOIA request forms. They specified how much they were willing to spend for copies of the records: as much as \$10 at each agency.

When questioned about who they were, why they wanted information, whether they were lawyers, whether they wanted the information because of a lawsuit or with what school or organization they were affiliated — all of which happened — the students politely declined to give answers. “I’m just a citizen who’s interested,” was the standard, scripted response.

They acted as closely as they could to how any member of the public might act while seeking the information about how public money is spent, how public employees do their work and how public agencies operate.

The students asked school districts for copies of superintendents’ compensation packages. They requested police departments provide the logs of calls and activity from the day prior to their visits. They sought copies of performance evaluations for top city or county officials. All are documents clearly subject to public disclosure under Michigan’s Freedom of Information Act, according to Hertz.

*Metro Times* compiled the information the students provided and found patterns in 153 visits.

Some 44 percent of the students were asked questions that are inappropriate under state FOIA law:

- 38 students (25 percent) were asked their names.
- 11 (7 percent) were asked for identification.
- 27 (18 percent) were asked their affiliation.
- 53 (34 percent) were asked why they wanted the record.
- 5 (3 percent) were told that they would not be given information if they did not provide information about themselves.

A handful of agencies complied with the law fully and immediately when the students visited:

- 7 agencies (5 percent) — all police departments — provided the records on the spot when the students first requested them. These were Bloomfield Hills, Grosse Pointe Shores, Huntington Woods, Lincoln Park, Novi, Orchard Lake and Romulus.

Overall, the compliance rate was 76 percent with:

- 83 agencies providing the records as requested, although 8 of those did not respond in the five-day time frame.
- 34 agencies complying with the five-day deadline and saying the requested records do not exist.

“That’s higher [compliance] than I might’ve thought, pitiful as that may be,” says Herschel Fink, an attorney with Honigman, Miller, Schwartz and Cohn, the firm that represents the Detroit Free Press and other media in FOIA and other open government cases.

Some agencies did not comply with the law’s requirement for responding, and others could not or did not provide any information.

- 27 of the agencies (18 percent) did not respond to the request in the five-day deadline required by law. Of those, 9 eventually provided the documents, one sent a letter containing the information and 7 later said the document didn’t exist. Students reported that the 10 others never responded: police in Hamtramck (asked by two students), Highland Park, Inkster, River Rouge and Warren; Oakland and Wayne county sheriff’s departments; and the cities of Inkster and Huntington Woods.
- 41 agencies (27 percent) responded that the record sought did not exist. Of these, Madison District Schools in Madison Heights said the district has a contract with a private employment agency for its interim superintendent and therefore the document requested — the superintendent’s compensation package — does not exist. Southfield police said they don’t have a daily log. The rest were cities and counties responding that written records of performance evaluations of top administrators are not kept.
- 8 of the school districts (17 percent of districts visited) provided some information about superintendents’ compensation packages in summary form in a letter, not in a copy of the original document as requested.
- 18 agencies (12 percent) did not provide the complete records requested. Of these, 4 were municipalities (Huntington Woods, Inkster, Pleasant Ridge and Sterling Heights), one was a school district (Mount Clemens) and 13 were police agencies (Allen Park, Detroit, Eastpointe, Grosse Pointe Park, Hamtramck which was visited twice, Highland Park, Inkster, Oakland County Sheriff’s Department, River Rouge, Taylor, Warren and Wayne County Sheriff’s Office).

That was where the class exercise ended. But if a public body declines to provide a record, the law says the requester can make an administrative appeal. That can be as simple as sending back the denial letter with the word “appeal” written on it, Hertz says, and that can often be successful. In some cases, a clerk may have declined to provide a record, but the appeal means the request will reach the desk of a higher level administrator who better knows the law and will grant it, she says.

“It gets you a second bite of the apple,” Hertz says. “If you really sound serious, it may get the attorney [of the government agency] involved who may say, ‘You’ve got to give them the information.’”

If that doesn’t work, a court challenge is the only option, which can be expensive when lawyers are hired. If the court decides the record should have been provided, however, it can award attorneys fees to cover the litigation costs.

“But if you don’t prevail, you’re stuck with the fees,” Hertz says.

While court challenges for FOIA’d records are supposed to get expedited treatment, Hertz knows of cases that have taken four years with appeals. Legal expenses would reach in the tens of thousands of dollars for those.

### **Sign of the times**

During the 1976 introduction of the bill that would become Michigan’s FOIA law, chief sponsor Rep. Perry Bullard (D-Ann Arbor) insisted on penalties for agencies that didn’t comply with requests. He called the law — and its provision to allow courts to award civil damages if agencies acted in bad faith — “necessary” to allow the public to hold government officials accountable.

His attitude reflected the nation’s post-Vietnam, post-Watergate mood in 1976.

“Government secrecy is a virus which made the cancerous Nixonian deceptions possible and will kill the democratic body politic by creating public distrust and apathy unless governmental secrecy is limited by a Freedom of Information Act,” Bullard said when he introduced the legislation in March 1976.

He lauded FOIA’s ability to prevent government officials from covering up bad decisions and lining the pockets of special interests since records of those actions would be available.

“Honest public officials will welcome the new protections,” Bullard said as the bill was scheduled for its first committee meeting at the end of March 1976.

Bullard had some 25 co-sponsors of the first FOIA proposal that took nine months to go from introduction to then-Gov. William Milliken’s desk. It became effective in April 1977.

Michigan’s law, like many states, came in the decade following Congress’ adoption of the federal Freedom of Information Act in 1966.

### **Police response**

Among the first inquiries to the Michigan attorney general for clarification about who was subject to the state’s new FOIA law was a question from Bullard about law enforcement.

In response, then-Attorney General Frank Kelley issued an opinion in December 1978 declaring that county sheriff’s offices are subject to the act.

Their continued compliance is a different issue.

In this project Wayne State students visited Macomb, Oakland and Wayne sheriff's departments and asked for daily logs. All sheriff's departments asked why the students wanted the records. Only Macomb provided it.

J. Patrick Pepper, a journalism student from Dearborn, visited the Wayne County Sheriff's Office where he found two deputies in the records office. He told them he was interested in getting the previous day's log.

"They both looked at me and kind of snickered and said, 'Good luck,'" Pepper says. Then they told him he'd have to file an order of discovery, which would require an attorney. "They were unhelpful and actually almost to the point of being contemptuous," Pepper says.

The 53 separate visits to police departments produced the most varied responses in this project. Five students reported that police insisted requesters give information about themselves or the police wouldn't provide the information.

Kasey Trombley, the student who visited Grosse Pointe Woods, reported that a clerk questioned her about her purpose in asking for the log.

"She actually smirked at me and said that if I was just a nosy neighbor, they wouldn't want to give that information out," says Trombley, of St. Clair Shores.

Hertz finds such questioning at best "troubling" because it is so contrary to the purpose of FOIA laws, also known as "sunshine" laws because of the proverbial light shed on government activity.

"The point is people don't have to justify why they want this. It's their information. That's the whole point of sunshine laws. If government can intimidate, there's going to be less open government," she says. "Look at the Michigan Constitution. It says all accounting of public money shall be open for public inspection. It says nothing about having a note from your mother or a justifiable reason. It's public information."

Still, a Sterling Heights police employee met a student's request with the response, "You're not privy to that information."

An Inkster officer told a student her request "seemed suspicious."

A Pleasant Ridge officer said the request was "bullshit."

In some departments, officers questioned the wording of the requests. Utica Police Chief Michael Reaves says he initially denied the student's request for a daily log because, first, it was missing the year for the day the log was sought, and second, because with the computer system the department uses to record activity, there is not a document actually called "a daily log."

"I told her, 'We do not have this,'" Reaves says. "Our records are kept on a computer system. We don't print out these items."

The report that lists log-type activity is the "Calls for Service" log, Reaves says.

Utica uses a system called CLEMIS (Courts and Law Enforcement Management Information Systems) for dispatching, says Jamie Hess, the CLEMIS chief for Oakland County where the system is administered. Dozens of other departments in southeast Michigan use the same system, including at least 29 departments where students did receive responses to their requests for "daily logs."

While the law, according to Hertz, requires only that requests for records describe the record, not call it by its exact name, some public officials still play games like Reaves did with the “log” versus “Calls for Service” distinction.

“That’s a hard thing for the average citizen,” Hertz says. “If you legally describe the record, you should get it. That kind of attitude is inappropriate in a public official.”

Still, many students involved in this project found efficient police records clerks who politely took requests and followed up with letters notifying the students the information was ready for them to pick up or have mailed.

“Not only was the person that dealt with me extremely professional, they were also kind and, overall, helpful,” Stephen Hart, a student from Detroit, reports of Waterford.

In Romulus, Sgt. Mike Smith provided the student with the log on the spot. He said later he doesn’t always do that with FOIA requests but the request for the daily log was easy enough to provide. “A lot of it depends on what they ask for and what I’m doing at the time. It’s easier if I can do it quickly as opposed to making them come back,” he says.

Some departments, like Allen Park’s, claimed the police log was exempt from disclosure under FOIA. City Attorney David Tamsen sent a letter to Muciek, who had requested the information from Allen Park police as well as the city of Southgate, denying her request.

Sue Flynn, of Allen Park police, said she received Muciek’s request, which she forwarded to Tamsen because she had never had a request for a log before and didn’t know if it could be disclosed.

“He’s the one that exempted them,” she says. “I didn’t deny it. I questioned it. I sent it to him for advice. You’ll have to ask him.”

Tamsen did not return repeated telephone calls last week from Metro Times.

Despite such denials that a daily log should be provided, seven departments made copies of their logs — some free of charge — while the students waited.

Grosse Pointe Shores Public Safety Director Stephen Poloni was surprised to hear that happened in his station and joked that someone would be in trouble.

“Normally we require them to provide a FOIA request in writing [as the law allows] and then usually I handle them,” he says. But since it was a log of daily activities, he wasn’t too concerned. “I’m sure it wasn’t anything major,” he says.

Poloni says most of the requests for information he receives are from attorneys looking for information related to lawsuits or potential cases.

### **Dollars, no sense**

In Grosse Pointe Shores, the student auditor was not charged for the few pages of copies it took to fulfill her request. Several dozen other agencies in this project also did not charge fees.

But in other departments, municipalities and school districts, students paid a wide range of charges to get their records.

Student Bowdeya Tweh, of Detroit, was charged about \$9 for three pages at the Madison Heights Police Department for “copying, time searching, examining, separating and deleting exempt information,” according to records.

Muciek’s request to the Taylor police resulted in a charge of \$48.23 for the 77 pages of copies of one day’s log at 25 cents a page and the hourly wage of \$28.98 for the clerk who compiled it.

Detroit Public Schools told student Kevin Bunch they would charge a \$12 minimum for any records.

Bloomfield Hills Schools charged \$1.53 for a nine-page copy of the motion extending the superintendent’s contract and the actual contract and its memo of understanding in responding to the request. Each page was 10 cents and the postage was 63 cents, according to correspondence between the student and the district.

According to state law, public bodies may charge fees for searching, copying and providing public records. They may only charge fees for redacting information that is exempt from disclosure when the action causes an “unreasonably high cost” to the public body. The state does not set the fees, but a recent court case found \$60 for three hours of work not to be unreasonable.

Fink wishes the Legislature would clarify what fees can be charged so public bodies won’t set fees prohibitively high. “That’s certainly done to hopefully dissuade the news organization or the requester from pursuing the information,” he says. “Any simple task that can be responded to in a matter of minutes, even an hour, in my view, doesn’t meet that statutory barrier” for high fees.

### **Missing in action**

When some of the students learned the records they were asking for didn’t exist and they couldn’t turn them in to fulfill their assignments, they were worried. Would they fail?

No. The point of the audit was to measure public agency compliance with the requests. If the agency denies a record exists and that’s true, it is fulfilling the law’s requirements.

Some 41 agencies — mostly suburban governments where students sought performance evaluations of city managers or other top officials — reported the records requested did not exist. (Madison Heights schools have an interim superintendent who is not under a superintendent’s contract, district officials told the student auditor.)

But the remainder of the nonexistent records were from cities, villages, townships and counties where officials said no written performance evaluations are done or kept for their top administrators.

“It’s just not the way the city does it,” says Sherry Ball, the city manager in Pleasant Ridge who has held that position since 1998. “We do it in a casual setting in closed session.”

Hertz believes performance evaluations—like other records—are not kept in some cases to avoid disclosing them if they are requested. “They’ll clean out the personnel files. They just won’t keep them. That’s really been true. We’ve seen this consistently,” she says. “The idea that they clean out these files I think is very shortsighted.”

But Bill Matthewson, general counsel for the Michigan Municipal League, an association of more than 500 of the state’s cities and villages, wasn’t concerned about the lack of written reports of city manager job performance. “I’m a little bit skeptical of written sorts of reviews in the sense they can get too detailed, too complicated,” he says.

Many municipalities, like Pleasant Ridge, discuss employee performances in closed meetings so there is communication between employer and employee. And that process is OK by Matthewson.

“I think the electorate can get a sense if the services aren’t what they want. Then they need to raise that with the elected officials or with the management, with the administration of the cities as well.”

Kathleen Bogas, a Bloomfield Hills attorney who is currently president of the National Employment Lawyers Association, says municipalities are like the private sector in regards to the lack of performance evaluation of a top manager.

“The higher up you go in the food chain, the higher up you have to go to have the person do the evaluation or a board of people have to do the evaluation and they don’t want to get involved in that kind of work,” she says. “Many people argue that a performance evaluation for a higher-up person is done by the recognition in the money they get.”

But legally, she says, not having written records of job performance can be problematic. It’s just good business sense to do them.

“It protects the employer for litigation, and if it’s the municipality, it permits the electorate to determine whether or not the people they’re electing are doing an adequate job in the supervising of the people who run the day-to-day operation of the government,” she says.

### **Work in progress**

Metro Times is publishing this report in this issue because it’s Sunshine Week, a two-year-old national effort to promote open government and freedom of information. Coordinated by the American Society of Newspaper Editors, this year’s Sunshine Week has Ben Bradlee of The Washington Post, Tom Brokaw of NBC News, and Judy Woodruff of PBS’ The NewsHour with Jim Lehrer, as honorary chairs.

Around the country, media organizations are publishing results of compliance audits, teachers at all levels are focusing on FOIA laws and civic groups are promoting open government, says Debra Gersh Hernandez, the ASNE coordinator.

Hernandez finds the same compliance issues nationally that the Wayne State students found in southeast Michigan.

“That makes a strong case that there’s training needed” for government workers, she says.

While journalism organizations have led many of the efforts for open government, she stresses that the laws are for all citizens.

“One of the things we try and do when we do an audit is to step back and look at it and say, ‘If I were an average person off the street and I needed information, can I get it?’” she says. “We journalists, we go in and we know the law. ... I think that for someone who doesn’t have that foundation, that background, I think it can be very intimidating. I think most people, when they’re met with that, will walk away. They’ll choose not to fight.”