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From: Ann Arbor Chronicle editor Dave Askins and publisher Mary Morgan

Re: This document contains feedback on the city of Ann Arbor's draft administrative policy on requests under the Michigan Freedom of Information Act. We've organized our thoughts according to the section headings in the draft policy.

6.2.3 Exemptions

The basic position in the draft policy is not to release any records to which FOIA exemptions apply. From the draft policy:

The FOIA permits a public body to exempt public records from disclosure under certain statutory criteria. (See Exhibit 1.) The general policy of the City is to not release information that is exempt from disclosure under the FOIA or other law.

Under such a policy, the city's fundamental position appears to be:

(1) The city of Ann Arbor will produce no requested records, except those that the city is required by the FOIA to produce.

The impact of this draft policy is to convert optional exemptions specified in the FOIA – which can be applied by a public body at its discretion – into mandatory denials for records under the policy. For example, while a public body *may*, under the FOIA, withhold a communication internal to a public body that is non-factual and preliminary to a final decision, the FOIA *does not require* that a public body withhold such records.

It's possible to contemplate a fundamentally different policy, which eliminates optional exemptions:

(2) The city of Ann Arbor will produce all requested records, except those records that the city is expressly prohibited from producing, by some federal, state or local law.

We think that the city should consider (2) as the overarching guiding principle governing its administrative FOIA administrative policy. The choice of (1) compared to (2) as the fundamental principle guiding the city's administrative FOIA policy should at least be tempered in the crucible of public conversation and debate, and weighed explicitly by the governing body of the city of Ann Arbor – the city council.

Put simply, we would request that any choice of (1) over (2) be made by a vote of the city council after public input consistent with community expectations in Ann Arbor.

The draft policy also refers to a balancing test. From the draft policy:

Some exemptions require a balancing test. If a service area is unsure whether a public record or a portion of the public record is exempt, the service area should consult with the City Attorney's Office.

Here it's not clear who should apply the balancing test – although the implication appears to be that if a balancing test is required, then it should be the city attorney's office that applies the test. Is the intent of the policy to discourage non-attorney staff from applying the balancing test themselves? If that's not the intent, then we think that to the extent that the policy identifies some individual as the agent applying the test, then it should more appropriately identify the FOIA officer or their designee as that agent.

However, we think if the city adopted as its FOIA policy the principle in (2), it would eliminate many of the occasions when balancing tests would need to be applied. For example, if the only judgement to be made under the policy is whether disclosure would break some federal, state or local law, then it would not be necessary to balance public interest in disclosure against an organizational interest in frank communication. It's only if the city desires to maximally withhold records under the FOIA that such a balancing test would be required. If the city were to adopt (2), then the city's policy would not require that kind of balancing test. To the extent that a balancing test might be required, then we would suggest it's best for the public body – in the form of its governing entity, the city council – to apply the balancing test.

Further, we would suggest that when the city is confronted with a choice between disclosing attorney-client privileged records or withholding such records, then the most transparent approach is to identify the client and then to ask that the client explicitly assert privilege or not. In the vast majority of cases, we think, this would entail that the city council, as the governing entity of the public body, would routinely vote on the question of asserting privilege.

6.2.3.1 Exemptions - Process When Copies of Public Records Requested

The draft policy sketches an implausible sequence of first estimating copying costs then locating records:

When a FOIA request is for copies, the service area shall first provide the FOIA Coordinator with an estimate of costs. The service area shall then locate and copy the requested public records and determine whether any exemptions apply.

We're interested in hearing what the rationale is for estimating costs, and only then locating records.

6.2.3.3 Exemptions - Process When Inspection of Public Records Requested

The city's draft policy on inspection of records is fairly elaborate. A number of questions arise. What is the city's legal basis for inspection fees? With respect to a staff member's required presence to protect the integrity of city records, it's not clear that such a staff member's entire attention would need to be devoted to this monitoring task. Why would it be necessary to charge a requestor for this monitoring activity, when most plausibly the staff person could be productively engaged in work for the city at the same time as the monitoring. The city has also established a two-week time frame for record inspection.

We'd suggest reviewing the Ann Arbor general city charter provision on inspection of city records:

City Records to be Public

SECTION 18.2. All records of the City shall be public, shall be kept in City offices except when required for official reasons or for purposes of safekeeping to be elsewhere, and shall be available for inspection at all reasonable times. No person shall dispose of, mutilate, or destroy any record of the City, except as provided by law, and any person who shall do so contrary to law shall be guilty of a violation of this charter.

How does this Ann Arbor city charter provision relate to Michigan's two main laws on transparency and openness of government? The Open Meetings Act clearly aims to occupy the field with respect to the way public bodies hold their meetings [emphasis added]:

[OMA] 15.261 Short title; effect of act on certain charter provisions, ordinances, or resolutions.

Sec. 1. (1) This act shall be known and may be cited as the "Open meetings act".

(2) *This act shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public.*

(3) After the effective date of this act, nothing in this act shall prohibit a public body from adopting an ordinance, resolution, rule, or charter provision which would require a greater degree of openness relative to meetings of public bodies than the standards provided for in this act.

However, Michigan's Freedom of Information Act does not similarly explicitly assert the

occupation of the field with respect to required disclosure:

[FOIA] 15.231 Short title; public policy.

Sec. 1. (1) This act shall be known and may be cited as the “freedom of information act”.

(2) It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

So we think we should look to the Ann Arbor city charter for guidance on records requests, because it predates the Freedom of Information Act and the FOIA does not occupy the field. To see how this might unfold, let’s imagine a petitioner approached the city under the city charter provision, asking to inspect records, without citing the Michigan FOIA. Suppose that the petitioner explicitly stated, “This request is not being made under Michigan’s FOIA, but rather under the Ann Arbor city charter.” How would the city handle this petitioner? Surely the city would not and could not reasonably force the petitioner to make his request under the FOIA instead.

Yet the city does not appear to have a policy for dealing with requests for records under its city charter. And the charter does not provide for the imposition of fees of any kind for copying, monitoring and the like. Nor does it include any provisions for redaction of records.

6.4 Civil Action Pending/Suspected

The city’s draft policy seems based on a provision in the Michigan FOIA that allows for a public body to withhold records “relating to a civil action in which the requesting party and the public body are parties.” We think that recent case law establishes that a public body cannot extend that exemption to a proxy for the requesting party. So we wonder what the point is of this part of the policy? It’s worth noting that if the city adopted the basic policy on disclosure in (2) above, this exemption would not be claimed.

Further, the city’s draft policy asks city staff to contemplate the motivation and rationale for a FOIA request – by requiring staff to convey suspicions of possible civil action to the city attorney’s office. The purpose of the FOIA is to ensure public access to records of a public body, not to provide the city with a tool for intelligence gathering about potential civil suits that might be filed against it. While the city has a legitimate interest in knowing about civil lawsuits and in taking action to correct any problems giving rise to legal liability, it strikes us as an improper use of the FOIA response process to serve this

interest. The administrative policy on response to FOIA requests should, we think, confine itself to providing excellent customer service to requestors and meeting all legal requirements.

7.2 Final Response

Under the draft policy, the following passage is required to be included in every final response to a request:

The City does not warrant or guarantee the accuracy of the information provided, but provides these public records only to comply in good faith with the Michigan Freedom of Information Act, and not for any other purpose.

We wonder why the city believes that this passage is necessary. On its face it seems meant to discourage people from reporting on public records as reflected in documents provided through FOIA requests – because they might contain inaccurate information. Requestors who are not familiar with the fair report privilege might, based on the inclusion of this language in the city's response, incorrectly believe that they cannot pass along to others the information they receive through a FOIA request without incurring legal liability.

We'd suggest eliminating the language about not warranting or guaranteeing the accuracy of the information, in favor of an assurance that the documents provided to a requestor do accurately portray the public record, and as such a requestor would enjoy the fair report privilege in connection to the documents.

7.2 Final Response

The city's draft policy is consistent with the old policy with respect to a required description of the exempted records:

If denied, a description of the public records or portions of public records exempted from disclosure (without revealing the contents of the exempt information) and an explanation of the basis for the exemptions.

In our experience, the city has not followed this policy, which is actually based on the statutory language. We understand the city's position to be that if an email has a body that contains frank, preliminary communication within the city and is deemed eligible for exemption, then the date/time stamp for that email is itself eligible for exemption, even though the statute specifically extends the exemption only to non-factual information. If that is *not* the city's position, then we think some explanation of the city's actual position on this should be provided.

If that *is* the city's position, we'd encourage the city to consider changing its position to one that is in harmony with its view on factual exchanges as they relate to interactions between councilmembers at work sessions. At work sessions, it's the city's position that councilmembers are supposed to be engaged in purely factual exchanges of information, not in the advocacy of any particular position. On that theory of factual communication, it's difficult to see how an email date/timestamp – or a map depicting fire response times – could be analyzed as “non-factual.”

As a side note, we'd observe that councilmembers at work sessions routinely engage in communication that is uncontroversially “deliberative,” which involves back and forth and the advocacy of a position. The work session on the Ann Arbor Housing Commission on Feb. 11, 2013 was a good example of that, with Stephen Kunselman saying he'd vote no, and Sabra Briere and Christopher Taylor responding by urging consideration of executive director Jennifer Hall's proposal. This is exactly what constituents expect councilmembers to do at working sessions and there's nothing improper per se about that kind of deliberation. But the routinely deliberative content of work sessions means that their purpose appears to be not just for the council to sit passively and receive information, but rather for the council to deliberate toward a decision, which makes the “work sessions” into “meetings” under the Michigan Open Meetings Act.

The only thing the city needs to do to square things up with the OMA is to allow for the public to address the council during working sessions. This is the view that the Michigan ACLU has previously conveyed to the city attorney, but this suggestion has to date been ignored. The city already meets all other OMA requirements with respect to working sessions. I don't think it's an accident that every other public body covered by The Chronicle allows for public comment during its working sessions.

7.5 Consolidated Response to Multiple Requests

The draft policy addresses a situation where overlapping requests are made and allows for a common sense approach:

Where a requestor or associated group of requestors submits two or more simultaneous, proximate, or overlapping requests, the City may, in the interest of efficiently using and conserving City staff and resources, combine its responses to such requests.

In our experience, however, the city has used this approach to undercut a requestor's ability to obtain the information desired by the requestor. Consolidating responses to

multiple requests should not relieve the city of the responsibility to break down the response based on each request. While it's common sense to respond to multiple requests with, for example, a single cover letter, a single scanned .pdf file of records and the like, we think the city should, in its combined response, treat each separate request individually.

10.0 Costs

The city's draft policy is that if a fee associated with a prior FOIA request has not been paid, then the city can not only deny a request, but also may prevent a requestor from submitting a request. From the draft policy:

A requestor who has previously failed to pay costs for a FOIA request shall not be permitted to make any additional FOIA request until the previous costs have been paid or waived where appropriate.

This approach contradicts Attorney General Opinion No. 6977, p. 131, April 1, 1998, which establishes a public body may not refuse to process a subsequent FOIA request on the ground that the requestor failed to pay fees charged for a prior FOIA request. So we wonder if the city is basing this part of the draft policy on a published Michigan Court of Appeals case that is squarely on point, and overturns the AG opinion? If not, then we'd suggest that the city remove it from the policy. If so, we'd suggest that the AG opinion stood for at least a decade as good law and served the people of Michigan well. We'd suggest that Ann Arbor follow the logic and reasoning of the AG opinion and remove this language from the policy.

We'd also point out that this feature of the policy has an easy workaround – finding a proxy to file the request. The Chronicle might, for example, be willing to stand as a proxy for a person who was denied access to records under this provision of the draft policy. A more common sense approach, we think, would be to eliminate this language from the policy, rather than causing more work for everyone.

10.3.5 Public Interest Waiver

We support the inclusion in the draft policy of a provision that's consistent with the statutory provision for fee waivers when disclosure of the records is in the public interest. And we think that the discretion is appropriately assigned to the FOIA coordinator, not the service unit that has the records:

The FOIA Coordinator may waive some or all of the costs if the FOIA Coordinator determines that it is in the public interest because searching for or furnishing copies of the public record(s) primarily benefits the general public.

It's important that this not be included in the policy merely as a formality, but that the intent is for it to be granted, at least on occasion. If the intent of the policy is that the public interest waiver will sometimes be granted, we wonder what kind of guidance will be offered to the FOIA coordinator on the factors to weigh in granting the public interest fee waiver.