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## **FREEDOM OF INFORMATION ACT PROCEDURES & GUIDELINES**

### **Introduction**

The DDA's policy with respect to FOIA requests is to comply with State law in all respects and to respond to FOIA requests in a consistent, fair, and even-handed manner.

The DDA acknowledges that it has a legal obligation to disclose all nonexempt public records in its possession pursuant to a FOIA request. The DDA acknowledges that sometimes it is necessary to invoke the exemptions identified under FOIA in order to ensure the effective operation of government and to protect the privacy of individuals.

The DDA will protect the public's interest in disclosure, while balancing the requirement to withhold or redact portions of certain records. The DDA's policy is to disclose public records consistent with and in compliance with State law.

### **Section 1: General Policies**

The DDA, acting pursuant to MCL 15.236 designates its Executive Director as the FOIA Coordinator. He or she is authorized to designate other DDA staff to act on his or her behalf to accept and process written requests for the DDA's public records and approve denials.

If a request for a public record is received by facsimile or e-mail, the request is deemed to have been received on the following business day. If a request is sent by e-mail and delivered to a DDA spam or junk-mail folder, the request is not deemed received until one day after the FOIA Coordinator first becomes aware of the request. The FOIA Coordinator shall note in the FOIA log both the date the request was delivered to the spam or junk-mail folder and the date the FOIA Coordinator became aware of the request. The FOIA Coordinator shall review DDA spam and junk-mail folders on a regular basis, which shall be no less than once a month. The FOIA Coordinator shall work with DDA Information Technology staff to develop administrative rules for handling spam and junk-mail so as to protect DDA systems from computer attacks which may be imbedded in an electronic FOIA request.

The DDA is not obligated to create a new public record or make a compilation or summary of information which does not already exist. Neither the FOIA Coordinator nor other DDA staff is obligated to provide answers to questions contained in requests for public records or regarding the content of the records themselves.

The FOIA Coordinator shall keep a copy of all written requests for public records received by the DDA on file for a period of at least one year.

## **Section 2: Requesting a Public Record**

A person requesting to inspect or obtain copies of public records prepared, owned, used, possessed or retained by DDA must do so in writing. The request must sufficiently describe a public record so as to enable DDA personnel to identify and find the requested public record.

A request from a person, other than an individual who qualifies as indigent under section 4(2)(a), must include the requesting person's complete name, address, and contact information, and if the request is made by a person other than an individual, the complete name, address, and contact information of the person's agent who is an individual.

No specific form to submit a request for a public record is required. However the FOIA Coordinator may make available a FOIA Request Form for use by the public.

Written requests for public records may be submitted in person or by mail to the DDA office. Requests may also be submitted electronically by facsimile and e-mail. Upon their receipt, requests for public records shall be promptly forwarded to the FOIA Coordinator for processing.

At the time of the request, a person may request that public records be provided on non-paper physical media, electronically mailed or other otherwise provided to him or her in lieu of paper copies. The DDA will comply with the request only if it possesses the necessary technological capability.

A person may subscribe to future issues of public records that are created, issued or disseminated by the DDA on a regular basis. A subscription is valid for up to 6 months and may be renewed by the subscriber. A subscription fee schedule shall be generated as necessary by the FOIA Coordinator, taking into account the medium, volume and frequency of issuance.

Generally, an oral request does not constitute a valid request for public records under the FOIA and the person attempting to make an oral FOIA request should be directed to make the request in writing. The exceptions to this are: (1) If a person is disabled and unable to make a written request; (2) The request is for records publicly available on a DDA web site; or (3) The request is for generally distributed public records.

If a person making an oral FOIA request is disabled, either temporarily or permanently, and unable to make the request in writing, the FOIA Coordinator contacted by the requester must make an appropriate accommodation under the Americans with Disabilities Act (for example, writing out the request for the person may be an appropriate accommodation).

A person who makes a verbal, non-written request for information believed to be available on the DDA's website, where practicable and to the best ability of the employee receiving the request, shall be informed of the pertinent website address.

A person serving a sentence of imprisonment in a local, state or federal correctional facility is not entitled to submit a request for a public record. The FOIA Coordinator will deny all such requests.

## **Section 3: Processing a Request**

Unless otherwise agreed to in writing by the person making the request, within 5 business days of receipt of a FOIA request the DDA will issue a response. If a request is received by facsimile, e-mail or other electronic transmission, the request is deemed to have been received on the following business day. The DDA will respond to the request in one of the following ways:

- Grant the request.
- Issue a written notice denying the request.
- Grant the request in part and issue a written notice denying in part the request.
- Issue a notice indicating that due to the nature of the request the DDA needs an additional 10 business days to respond. Only one such extension is permitted.
- Issue a written notice indicating that the public record requested is available at no charge on the DDA's website.

If the request is granted, or granted in part, the FOIA Coordinator will require that payment be made in full for the allowable fees associated with responding to the request before the public record is made available. The FOIA Coordinator shall provide a detailed itemization of the allowable costs incurred to process the request to the person making the request. A copy of these Procedures and Guidelines shall be provided to the requestor with the response to a written request for public records, provided however, that if these Procedures and Guidelines, and its Written Public Summary are maintained on the DDA's website, then a website link to those documents may be provided in lieu of providing paper copies.

If the cost of processing a FOIA request is \$50 or less, the requester will be notified of the amount due and where the documents can be obtained.

If based on a good faith calculation by the DDA, the cost of processing a FOIA request is expected to exceed \$50, or if the requester has not fully paid for a previously granted request, the DDA will require a good-faith deposit before processing the request. In making the request for a good-faith deposit the FOIA Coordinator shall provide the requester with a detailed itemization of the allowable costs estimated to be incurred by the DDA to process the request and also provide a best efforts estimate of a time frame it will take the DDA to provide the records to the requester. The best efforts estimate shall be nonbinding on the DDA, but will be made in good faith and will strive to be reasonably accurate.

If the request is denied or denied in part, the FOIA Coordinator will issue a Notice of Denial which shall provide in the applicable circumstance:

- An explanation as to why a requested public record is exempt from disclosure; or
- A certificate that the requested record does not exist under the name or description provided by the requestor, or another name reasonably known by the DDA; or
- An explanation or description of the public record or information within a public record that is separated or deleted from the public record; and
- An explanation of the person's right to submit an appeal of the denial to either the DDA Board, which is the head of the agency, or seek judicial review in the Washtenaw County Circuit Court; and
- An explanation of the right to receive attorneys' fees, costs, and disbursements as well actual or compensatory damages, and punitive damages of \$1,000, should they prevail in Circuit Court.
- The Notice of Denial shall be signed by the FOIA Coordinator.

The DDA shall provide reasonable facilities and opportunities for persons to examine and inspect public records during normal business hours. The FOIA Coordinator is authorized to promulgate rules regulating the manner in which records may be viewed so as to protect DDA records from loss, alteration, mutilation or destruction and to prevent excessive interference with normal DDA operations.

The FOIA Coordinator shall, upon written request, furnish a certified copy of a public record at no additional cost to the person requesting the public record.

#### **Section 4: Fee Deposits**

If the fee estimate is expected to exceed \$50.00 based on a good-faith calculation by the DDA, the requestor will be asked to provide a deposit not exceeding one-half of the total estimated fee. To preserve public resources, the DDA generally requires a deposit when permitted under the FOIA. The FOIA Coordinator should determine as soon as possible whether a request requires a deposit. The notice requiring a deposit must be included in the DDA's initial response or in the 10-day extension.

When a deposit is required, the FOIA Coordinator shall send a deposit letter containing:

- the total estimated fee in the standard form for detailed itemization costs
- that  $\frac{1}{2}$  the total estimated fee is required as deposit
- that the request will not be processed until the deposit is received
- that the balance of actual final fee must be paid after processing before the records will be released
- that the actual final fee may be greater or less than the estimate

The period of time to produce records is tolled from the date the deposit notice is sent until the deposit is paid.

If a request for public records is from a person who has not fully paid the DDA for copies of public records made in fulfillment of a previously granted written request, the FOIA Coordinator will require a deposit of 100% of the estimated processing fee before beginning to search for a public record for any subsequent written request by that person when all of the following conditions exist:

- the final fee for the prior written request is not more than 105% of the estimated fee;
- the public records made available contained the information sought in the prior written request and remain in the DDA's possession;
- the public records were made available to the individual, subject to payment, within the time frame estimated by the DDA to provide the records;
- 90 days have passed since the FOIA Coordinator notified the individual in writing that the public records were available for pickup or mailing;
- the individual is unable to show proof of prior payment to the DDA; and
- the FOIA Coordinator has calculated a detailed itemization that is the basis for the current written request's increased estimated fee deposit.

The FOIA Coordinator will not require an increased estimated fee deposit if any of the following apply:

- the person making the request is able to show proof of prior payment in full to the DDA;
- the DDA is subsequently paid in full for the applicable prior written request; or
- 365 days have passed since the person made the request for which full payment was not remitted to the DDA.

If a deposit that is required is not received by the public body within 45 days from receipt by the requesting person of the notice that a deposit is required, and if the requesting person has not filed an appeal of the deposit amount, the request shall be considered abandoned by the requesting person and the public body is no longer required to fulfill the request. Notice of a deposit requirement is considered received 3 days after it is sent, regardless of the means of transmission. Notice of a deposit requirement must include notice of the date by which the deposit must be received, which date is 48 days after the date the notice is sent.

## **Section 5: Calculation of Fees**

A fee will not be charged for the cost of search, examination, review and the deletion and separation of exempt from nonexempt information unless failure to charge a fee would result in unreasonably high costs to the DDA because of the nature of the request in the particular instance, and the DDA specifically identifies the nature of the unreasonably high costs.

The following factors shall be used to determine an unreasonably high cost to the DDA:

- The particular request incurs costs greater than incurred from the typical or usual request received by the DDA. *See Bloch v Davison Community Schools, 2011 Mich App Lexis 771, 2011 WL 1564645*
- Volume of the public record requested
- Amount of time spent to search for, examine, review and separate exempt from non-exempt information in the record requested.
- The available staffing to respond to the request.
- A request that entails any staff time over 1 hour
- Any other similar factors identified by the FOIA Coordinator in responding to the particular request.

The FOIA Coordinator shall use a standard form for detailed itemization of fees that clearly lists and explains the allowable charges for each of the 6 fee components that compromise the total fee used for estimating or charging purposes.

Based on the volume and complexity of requests that the DDA receives, the expense of training staff to perform certain FOIA-related tasks, and to preserve public resources and recover costs, the DDA shall charge a fee composed of the following:

- Labor costs directly associated with searching for, locating and examining a requested public record.

- Labor costs associated with a review of a record to separate and delete information exempt from disclosure of information which is disclosed.
- The actual cost of computer discs, computer tapes or other digital or similar media.
- The cost of duplication or publication, not including labor, of paper copies of public records.
- The cost of labor associated with duplication or publication, including making paper copies, making digital copies or transferring digital public records to non-paper physical media or through the Internet or other electronic means.
- The actual cost of mailing or sending a public record.

Labor costs will be calculated based on the following requirements:

- All labor costs will be estimated and charged in 15 minute increments with all partial time increments rounded down. The cost of labor directly associated with duplication, publication or transferring records to nonpaper physical media can be charged in time increments of the public body's choosing with all partial increments rounded down.
- Labor costs will be charged at the hourly wage of the lowest-paid DDA employee capable of doing the work in the specific fee category, regardless of who actually performs work. If using contract or outside labor to separate and delete exempt material from non-exempt material, the public body must clearly note the name of person or firm who does the work and the total labor cost may not exceed an amount 6 times the state minimum hourly wage, which is currently \$8.15.
- Labor costs will also include a charge to cover or partially cover the cost of fringe benefits. The DDA may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits, but in no case may it exceed the actual cost of fringe benefits.
- Overtime wages, if any, will not be included in labor costs until agreed to by the requestor; overtime costs will not be used to calculate the fringe benefit cost.

The cost to provide records on non-paper physical media when so requested will be based on the following requirements:

- Computer disks, computer tapes or other digital or similar media will be at the actual and most reasonably economical cost for the non-paper media.
- This cost will only be assessed if the DDA has the technological capability necessary to provide the public record in the requested non-paper physical media format.
- In order to ensure the integrity and security of the DDA's technological infrastructure, the DDA will procure any requested non-paper media and will not accept non-paper media from the requestor

The cost to provide paper copies of records will be based on the following requirements:

- Paper copies of public records made on standard letter (8 ½ x 11) or legal (8 ½ x 14) sized paper will not exceed \$.10 per sheet of paper. Copies for non-standard sized sheets of paper will reflect the actual cost of reproduction.

- The DDA may provide records using double-sided printing, if cost-saving and available.

The cost to mail records to a requestor will be based on the following requirements:

- The actual cost to mail public records using a reasonably economical and justified means.
- The DDA may charge for the least expensive form of postal delivery confirmation.
- No cost will be made for expedited shipping or insurance unless requested.

#### Inspection Costs:

Inspection and examination of public records must be conducted in the presence of a DDA employee under conditions which protect the public records and prevent excessive and unreasonable interference with the discharge of municipal functions. The fees set forth in this policy and permitted under the FOIA for copying, publication, search, examination, review and the deletion and separation of exempt from nonexempt information may be charged for preparing a public record for inspection. Additional fees may be charged for the presence of staff during an inspection.

If the FOIA Coordinator does not respond to a written request in a timely manner, the following shall be required:

- Reduce the labor costs by 5% for each day the DDA exceeds the time permitted under FOIA up to a 50% maximum reduction, if any of the following applies:
  - The late response was willful and intentional.
  - The written request, within the first 250 words of the body of a letter facsimile, e-mail or e-mail attachment conveyed a request for information
  - The written request included the words, characters, or abbreviations for “freedom of information”, “information”, “FOIA”, “copy” or a recognizable misspelling of such, or legal code reference to MCL 15. 231 et seq or 1976 Public Act 442 on the front of an envelope or in the subject line of an e-mail, letter or facsimile cover page.
- Fully note the charge reduction in the Detailed Itemization of Costs Form

#### **Payment of Costs:**

Copies of public records shall not be released until the DDA has received payment of all fees. Where inspection of public records has been requested, the inspection shall not be permitted until the DDA has received payment for the associated costs for preparing the documents for inspection. Costs for staff time in monitoring an inspection shall be computed and charged after the inspection is complete.

#### **Combination of Requests:**

When a requester or associated group of requestors submits two or more simultaneous, proximate, or overlapping requests, the DDA may, in the interest of efficiently using and conserving DDA resources, combine its responses to such requests for the purpose of calculating fees. Requests submitted on the same day by the same person or group will generally be combined.

**Requests Less than \$1.00:**

In the interest of cost effectiveness, FOIA requests that cost \$1.00 or less to process will be provided at no charge.

**Costs Set By Law:**

The FOIA provides that the cost calculations described in this policy do not apply to public records prepared under an act or state specifically authorizing the sale of those records to the public or for which a specific fee is authorized under Michigan or federal law. Such records shall be sold at the cost provided for by the law.

**Section 6: Waiver of Fees**

The FOIA Coordinator will waive the first \$20.00 of the processing fee for a request if the person requesting a public record submits an affidavit stating that they are:

- indigent and receiving specific public assistance; or
- if not receiving public assistance stating facts demonstrating an inability to pay because of indigency.

An individual is not eligible to receive the waiver if:

- the requester has previously received discounted copies of public records from the DDA twice during the calendar year; or
- the requester requests information in connection with other persons who are offering or providing payment to make the request.

An affidavit is sworn statement. The FOIA Coordinator may make a Fee Waiver Affidavit Form available for use by the public.

A nonprofit organization designated to by the State to carry out activities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the Protection and Advocacy for Individuals with Mental Illness Act, or their successors, if the request meets all of the following requirements:

- is made directly on behalf of the organization or its clients;
- is made for a reason wholly consistent with the mission and provisions of those laws under Section 931 of the Mental Health Code, MCL 330.1931;
- is accompanied by documentation of its designation by the State.

**Section 7: Appeal of a Denial of a Public Record**

When a requester believes that all or a portion of a public record has not been disclosed or has been improperly exempted from disclosure, he or she may file an appeal of the denial with the DDA Board, which is the head of the agency. If the head of the public body is a board or commission, it is not considered to have received a written appeal of either a denial or a fee amount until its first regularly scheduled meeting following the submission of the appeal. It then has 10 business days to respond to the appeal. The appeal must be in writing, specifically state the word "appeal" and identify the reason or reasons the requester is seeking a reversal of the denial.



Within 10 business days of receiving the appeal the DDA Board will consider the appeal, and make a decision:

- reversing the disclosure denial;
- upholding the disclosure denial; or
- reverse the disclosure denial in part and uphold the disclosure denial in part.
- Under unusual circumstances, such as the need to examine or review a voluminous amount of separate and distinct public records or the need to collect the requested records from numerous facilities located apart from the office receiving or processing the request, the DDA Board may issue not more than 1 notice of extension for not more than 10 business days to respond to the appeal

Whether or not a requestor submitted an appeal of a denial to the DDA Board, he or she may file a civil action in Washtenaw County Circuit Court within 180 days after the DDA's final determination to deny the request.

If the court determines that the public record is not exempt from disclosure, the court will award the appellant reasonable attorneys' fees, cost and disbursements. If the court determines that the appellant prevails only in part, the court in its discretion may award all or an appropriate portion of reasonable attorneys' fees, costs and disbursements.

If the court determines that the DDA arbitrarily and capriciously violated the FOIA by refusing or delaying the disclosure of copies of a public record, it shall award the appellant punitive damages in the \$1,000 and shall also order that the public body pay a civil fine of \$1000 to the general fund of the State treasury.

### **Section 8: Appeal of an Excessive FOIA Processing Fee**

If a requestor believes that the fee charged by the DDA to process a FOIA request exceeds the amount permitted by state law, he or she must first submit a written appeal for a fee reduction to the DDA Board which is the head of the agency. If the head of the public body is a board or commission, it is not considered to have received a written appeal of either a denial or a fee amount until its first regularly scheduled meeting following the submission of the appeal. It then has 10 business days to respond to the appeal. The appeal must be in writing, specifically state the word "appeal" and identify how the required fee exceeds the amount permitted.

Within 10 business days of receiving the appeal the DDA Board will make a decision to:

- waive the fee;
- reduce the fee and issue a written determination indicating the specific basis that supports the remaining fee, accompanied by a certification by the DDA Board that the statements in the determination are accurate and the reduced fee amount complies with these Procedures and Guidelines and Section 4 of the FOIA;
- uphold the fee and issue a written determination indicating the specific basis under Section 4 of the FOIA that supports the required fee, accompanied by a certification by the DDA Board that the statements in the determination are accurate and the fee amount complies with these Procedures and Guidelines and Section 4 of the FOIA; or

- issue a notice detailing the reason or reasons for extending for not more than 10 business days the period during which the DDA Board will respond to the written appeal.

Within 45 days after receiving notice of the DDA's determination of a fee appeal, a requestor may commence a civil action in Washtenaw County Circuit Court for a fee reduction. If a civil action is filed appealing the fee, the DDA is not obligated to process the request for the public record until the Court resolves the fee dispute.

If the court determines that the DDA required a fee that exceeds the amount permitted, it shall reduce the fee to a permissible amount. If the appellant in the civil action prevails by receiving a reduction of 50% or more of the total fee, the court may award all or appropriate amount of reasonable attorneys' fees, costs and disbursements.

If the court determines that DDA has acted arbitrarily and capriciously by charging an excessive fee, the court shall also award the appellant punitive damages in the amount of \$500.

### **Section 9: Penalty for Violation of the Act**

If the court determines in either an appeal of a denial of a public record, or the appeal of an excessive fee, that the public body willfully and intentionally failed to comply with the FOIA or otherwise acted in bad faith, then in addition to any another award or sanction, the court shall impose a civil fine of not less than \$2500 or more than \$7500 for each occurrence.

The court is required to consider the budget of the public body and whether the public body has been previously been assessed penalties for violations of the FOIA.

The civil fine is to be deposited to the general fund of the State treasury.

### **Section 10: Conflict with Prior FOIA Policies and Procedures; Effective Date; Changes**

To the extent that these Procedures and Guidelines conflict with previous FOIA policies promulgated by DDA these Procedures and Guidelines are controlling.

To the extent that any provision of these Procedures and Guidelines pertaining to the release of public records is found to be in conflict with any State statute, the applicable statute shall control.

These FOIA Policies and Guidelines become effective February 1, 2016.

The DDA Board or the DDA Executive Director may amend this policy and fee schedule as necessary.

### **Section 11: Appendix of DDA Forms**

- FOIA Request Form
- Detailed Itemization of Fees Form
- Affidavit of Indigency