

STATE OF MICHIGAN

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FREEDOM OF INFORMATION
ACT:

Public body's time for fulfilling
request for public records.

Subsection 4(8), MCL 15.234(8), of the Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq.*, does not impose a specific time by which a public body must fulfill a request for public records that it has granted. Instead, the public body is guided by, but is not bound by, the "best efforts estimate" the public body must provide in its response required by subsection 5(2), MCL 15.235(2).

A public body's "best efforts estimate" under subsection 4(8), MCL 15.234(8), of the Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq.*, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), MCL 15.234(8), the "best efforts estimate" must be made in "good faith," that is, it must be made honestly and without the intention to defraud or delay the requestor.

In calculating its "best efforts estimate" for fulfilling a request for public records under subsection 4(8), MCL 15.234(8), of the Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq.*, a public body may take into consideration events or factors affecting its ability to produce requested records.

Opinion No. 7300

December 12, 2017

The Honorable Gary Glenn
State Representative
The Capitol
Lansing, MI 48909

You have asked several questions relating to the time within which a public body must fulfill a request to produce public records under the Freedom of Information Act (FOIA or Act), 1976 PA 442, MCL 15.231 *et seq.*

FOIA regulates and sets requirements for the disclosure of public records by all public bodies in the State.¹ The core purpose of FOIA is stated in subsection 1(2), MCL 15.231(2), which provides in pertinent part:

It is the public policy of this state that all persons . . . 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.

Under subsection 3(1), MCL 15.233(1), of FOIA, “upon providing a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.” Subsection 5(1), MCL 15.235(1), provides that the request must be in writing but also addresses receipt of electronic requests.

After receiving a request for records, subsection 5(2), MCL 15.235(2), requires the public body to respond to the requestor in one of four ways within five business days of receiving the request:

(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

(a) Granting the request.

(b) Issuing a written notice to the requesting person denying the request.

¹ FOIA includes comprehensive definitions of the terms “public body” and “public records” at MCL 15.232(d) and 15.232(e), respectively.

(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.

(d) Issuing a notice extending for not more than 10 business days² the period during which the public body shall respond to the request. . . . [MCL 15.235(2).]

In the required response under subsection 5(2), MCL 15.235(2), if the public body grants the request in whole or in part, it must also provide an estimate as to how long it will take the public body to produce the requested records. This requirement is set forth in section 4 of FOIA, MCL 15.234. Subsection 4(8), MCL 15.234(8), states in relevant part:

The response [under section 5, MCL 15.235] shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance. If a public body does not respond in a timely manner as described under section 5(2), it is not relieved from its requirements to provide proper fee calculations and time frame estimates in any tardy responses. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act. [Emphasis added.]

Subsection 4(8), MCL 15.234(8), was added to FOIA by Public Act 563 of 2014. The amendment took effect July 1, 2015. Under subsection 4(8), a public body must make a “best efforts estimate” as to how long it will take to provide the records, and that estimate must be made in “good faith.” MCL 15.234(8). The public body must “strive” to be “reasonably accurate” and to provide records

² If the extension is invoked, the public body must specify the reasons for the extension and the date by which it will respond. MCL 15.235(7).

consistent with the “public policy” of FOIA, but also with the “nature” of the “particular” request. *Id.*

You ask how long a public body has to fulfill a request for records after the public body had granted the request.³

“The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most reliable evidence of that intent, the language of the statute itself.” *Fairley v Dep’t of Corrections*, 497 Mich 290, 296–97 (2015). If the legislative intent can be gleaned from the statutory language, further construction is neither necessary nor permissible. *Id.* at 297. In addition, “nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.” *Michigan Education Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 218 (2011) (quotation marks and citations omitted).

As noted above, under section 5 of FOIA, a public body must initially respond to a request for public records by the fifth business day, or by the fifteenth business day if an extension is invoked, with information as to whether the request is granted or denied in whole or in part. MCL 15.235(2). These are fixed deadlines. If a public body fails to timely comply with subsection 5(2), under certain circumstances, the public body must reduce the charges for labor costs that it is permitted to charge a requestor. MCL 15.234(1), (9)(a)–(b). Also, the failure to

³ This opinion assumes the requestor has properly paid any fee deposit required by the public body under subsections 4(1) and (8), MCL 15.234(1) and (8).

timely comply may constitute a “final determination to deny the request” under certain circumstances, MCL 15.235(3),⁴ and provide a basis for the commencement of a civil action by the requestor against the public body, MCL 15.240(1)(b).⁵

But if the public body timely grants a request for records, the public body’s time for fulfilling the request is guided by the estimate it provided in its subsection 5(2), MCL 15.235(2), response to the requestor. Again, under subsection 4(8), MCL 15.234(8), the public body is required to give a “best efforts estimate” as to the time it will take it to fulfill the request. But the public body’s best efforts estimate is “nonbinding.” MCL 15.234(8). Thus, there is no fixed deadline imposed under subsection 4(8) by which a public body must fulfill a request for records.

It is my opinion, therefore, that subsection 4(8) of FOIA does not impose a specific time by which a public body must fulfill a request for public records that it has granted. Instead, the public body is guided by, but is not bound by, the “best efforts estimate” the public body must provide in its response required by subsection 5(2), MCL 15.235(2).

You further ask whether a “reasonableness” standard applies to determining the time by which a public body should fulfill a request for records.

⁴ Subsection 5(3) provides that the “[f]ailure to respond to a request pursuant to subsection (2) constitutes a public body’s final determination to deny the request” if the “failure was willful and intentional,” or if the written request plainly includes language conveying the fact that it is a request for public records under FOIA. MCL 15.235(3)(a) and (b).

⁵ FOIA also provides a requestor with a cause of action to challenge excessive fees imposed by a public body. See MCL 15.240a.

The term “best efforts estimate” is not defined within FOIA. Unless defined in the statute, each word or phrase in a statute should be given its plain meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008). “A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning.” *Id.* The term “estimate” may be understood to mean to “calculate approximately[.]” Webster’s New World Dictionary (3rd ed., 1988). As a technical or legal term, the phrase “best efforts” “must be construed in accordance with its peculiar and appropriate legal meaning.” *Brackett*, 482 Mich at 276, citing MCL 8.3a; *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 7 (2005). The phrase may be understood to mean “[d]iligent attempts to carry out an obligation.” *Black’s Law Dictionary* (10th ed. 2014). Applying these definitions to subsection 4(8), MCL 15.234(8), the time calculation provided by a public body for completion must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor.

Notably, best efforts “are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take.” *Black’s Law Dictionary* (10th ed. 2014). Thus, in making its “best efforts estimate” under subsection 4(8), a public body should look to whether, assuming diligent effort, a reasonable person in the same circumstances as the public body would provide a similar estimate as to the time for fulfilling a similar public records request.

In addition, under subsection 4(8) the public body must make the best efforts estimate in “good faith.” FOIA does not define the phrase “good-faith.” But it too has a “peculiar and appropriate legal meaning.” *Brackett*, 482 Mich at 276. “In common usage [the] term [good-faith] is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” *Black’s Law Dictionary* (10th ed. 2014). See also *Miller v Riverwood Recreation Ctr, Inc*, 215 Mich App 561, 570-571 (1996) (similarly interpreting the phrase “good faith” for purposes of MCL 600.2925d). Thus, a public body’s “best efforts estimate” must be made with honest intent to fulfil the public body’s duty to provide public records in keeping with the purpose of FOIA. See MCL 15.231(2) (“It is the public policy of this state that all persons . . . 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[.]”).

This understanding of the terms “best efforts” and “good faith” is supported by the language that directly follows those terms, which requires the public body to “strive to be reasonably accurate and to provide the public records in a manner based on this state’s public policy under section 1 and the nature of the request in the particular instance.” MCL 15.234(8).

In using the language that it did in subsection 4(8), the Legislature gave public bodies significant latitude regarding the time for fulfilling a public records request. You suggest, given that latitude, public bodies may delay in fulfilling

requests. But it is presumed that a public officer will perform his or her duties properly. *State Racing Comm'r v Wayne Circuit Judge*, 377 Mich 31, 36 (1966), citing *Leach v Racing Comm'r*, 340 Mich 202 (1954); see also 3A Mich Pleading & Practice, Performance of Duty, § 36:89 (2d ed.) (“[I]t is presumed that a public officer has performed his or her duty and has performed it properly, which is to say fairly, faithfully, honestly, legally, and regularly.”) (citations omitted).

It is my opinion, therefore, that a public body’s “best efforts estimate” under subsection 4(8) of FOIA, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), the best efforts estimate must be made in “good faith,” that is, it must be made honestly and without the intention to defraud or delay the requestor.

Finally, you ask whether extenuating circumstances could extend the time for a public body to fulfill a request, either before or after a best efforts estimate has been provided, and request examples of such circumstances.

As to these questions, FOIA provides few answers. Given the language of subsection 4(8), it is reasonable to assume that a public body, in making its good-faith, best efforts estimate, may take into consideration events or factors affecting its ability to produce the requested records. For instance, a technological

disruption, an unexpected loss of personnel, or even an unexpectedly high volume of requests may impact the time within which a public body can fulfill a request. A public body may factor such events into its calculation of its best efforts estimate. FOIA provides no express guidance, however, if an unexpected event affecting a public body's ability to produce requested documents occurs after its estimate was calculated and provided to the requestor. In those circumstances, a public body may wish to consult with its legal counsel to determine the best course of action.⁶

It is my opinion, therefore, that in calculating its "best efforts estimate" for fulfilling a request for public records under subsection 4(8), MCL 15.234(8), of FOIA, a public body may take into consideration events or factors affecting its ability to produce requested records.



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⁶ You also ask whether a public body must advise the requestor as to any delay due to extenuating circumstances in fulfilling a request. Subsection 4(8), MCL 15.234(8), does not require that notice be given, but it may be prudent for a public body to do so.