

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF HURON**

THOMAS LAMBERT,
Plaintiffs,

Case No.: 16-105456-CZ
Honorable Gerald M. Prill

v.

REPLY

CITY OF HARBOR BEACH,
Defendant

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**REPLY IN SUPPORT OF PLAINTIFF LAMBERT'S MOTION FOR SUMMARY
DISPOSITION ONLY AS COUNT I OF THE FILED COMPLAINT**

The response of Defendant CITY OF HARBOR BEACH makes little, if any, sense. This whole case is expressly about Plaintiff THOMAS LAMBERT getting access to withheld records. In his motion, he specifically states:

the Court is requested grant summary disposition to Plaintiff Lambert as a wrongful denial case pursuant to MCL 15.240(4) and MCR 2.116(C)(10) and order the production of all response records, without redactions, immediately. The Court is also requested to award attorney fees, costs, and disbursements and order a bill of costs to be submitted. Lastly, the Court is requested to impose punitive damages in the amount of \$3,000.00 (or \$4,500.00 if the additional penalties under Section 10a apply) payable to the Plaintiff and impose civil fines in the amount of \$18,000.00 (or \$19,500.00 if the additional penalties under Section 10a apply) payable to the state treasury as provided by statute.

Motion, p. 14. The only real question before the Court via Plaintiff's motion is whether the City had its required documentation posted on its website on October 7, 2016. If it

did, it could charge a fee¹; if not, it cannot. MCL 15.234(1), (4). The City offered no evidence to support that it did fulfill its obligations (i.e. online posting) on October 7, 2016.² Therefore, there lacks any proper basis by the City to not produce the records in October 2016. After all, “a public body must disclose all public records that are not specifically exempt under the act.” *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011)(emphasis added). Because the City offers no lawful basis to withhold, Plaintiff THOMAS LAMBERT asked this Court, by his complaint, to

Enter an order determining that Defendant CITY OF HARBOR BEACH failed to actually grant the Oct 3 FOIA Requests and as such the Wrubel Response is a denial by law pursuant to MCL 15.235(3) and/or by action of not producing the records.

First Am Compl, ¶39(a). By doing so, MCL 15.240(4) then places an affirmative duty on this Court to act:

In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record.

MCL 15.240(4). The Legislature’s use of the word ‘shall’ in a statute indicates a mandatory and imperative directive. *Costa v Cmty Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006), quoting *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). By determining the City cannot demand anything to delay or halt immediate production of the requested records on October 7, 2016 (i.e. a wrongful denial by operation of law, see MCL 15.235(3)), this Court has no discretionary choice—it shall order the public body to cease withholding or to produce all or a portion

¹ Counts II and III asserts that the fee the City attempted to collect is in excess of the amounts it could demand, even if allowed to demand a fee.

² If the Court grants summary disposition on Count I, Counts II and III become moot. However, Plaintiff has not moved for summary disposition on these two counts at this time.

of a public record wrongfully withheld. This relief is required. MCL 15.240(4). And the City does not believe otherwise. See **Exhibit 20, p. 1** (“The City acknowledges that it has a legal obligation to disclose all nonexempt public records in its possession pursuant to a FOIA request.”).

Half-heartedly trying to avoid the exacting penalty the law seemingly requires, Defendant CITY OF HARBOR BEACH suggests that Plaintiff THOMAS LAMBERT never wanted an order of production, therefore is not entitled to one. Ridiculous! What are we doing here if Plaintiff THOMAS LAMBERT is not seeking actual production of records the City refuses, now almost a year, to provide? Besides, the enforcement statute (MCL 15.240) does not require that Plaintiff Lambert actually demand an order from this Court via its complaint. Instead, a case commenced under MCL 15.240 is essentially a review of the City’s actions in not producing—i.e. a review of its automatic denial under MCL 15.235(3). The burden is not on Plaintiff as he “need only make a showing in circuit court that the request was made and denied” to bring a FOIA lawsuit. *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564-565; 336 NW2d 828 (1983). The burden is on the public body to sustain “its decision to withhold the requested record from disclosure.” *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008). There must be a “particularized justification.” *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 167 (2002). Courts look to “the gravamen of plaintiff’s action is determined by considering the entire claim.” *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). Count I reads clearly that he wants the records the City still has not produce:

19. By the Wrubel Response, Defendant CITY OF HARBOR BEACH failed to grant the Oct 3 FOIA Requests.

20. By operation of law, the failure of Defendant CITY OF HARBOR BEACH to respond to the Oct 3 FOIA Requests pursuant four options outlined by subsection (2) of MCL 15.235 automatically renders the Oct 3 FOIA Requests individually denied, MCL 15.235(3).
21. To date, Defendant CITY OF HARBOR BEACH has not produced any records and has not granted any of the three Oct 3 FOIA Requests.
22. **Defendant CITY OF HARBOR BEACH has failed to grant any of the requests to produce responsive record(s) which Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC is entitled to receive under Michigan’s Freedom of Information Act, to which the law deems the inaction of Defendant CITY OF HARBOR BEACH as denials to the various requests.**
23. Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC has/have incurred and will continue to incur attorney fees, costs, and disbursements in seeking the rightful fulfillment of the requests under Michigan’s Freedom of Information Act.
24. Because there is no debatable justification for denying the requests for records pursuant to the Oct 3 FOIA Requests, Defendant CITY OF HARBOR BEACH arbitrarily and capriciously violated this act by refusing to provide copies of public records.

First Am Compl, ¶¶19-24. Upon determining that the records were wrongfully, the duty of the Court is to expressly order the City to comply with its legal obligation under the “pro disclosure”³ FOIA statute and *Hopkins*: “cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record.”⁴ Because the City’s argument is so patently ridiculous, the Court is requested

³ “FOIA is a pro disclosure statute that we are to interpret broadly to allow public access.” *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010).

⁴ To the extent that this Court could possibly somehow fault Plaintiff for not alerting this Court to the mandatory relief it must order under MCL 15.240(4) in its pleading, he did specifically request that this Court “[g]rant all other relief that is warranted and just.” First Am Compl, ¶39(h). This would easily encompass the mandatory relief this Court must order under MCL 15.240(4). But honestly, “Michigan is a notice-pleading state.” *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011). “[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim... sufficient to permit the opposite party to take a responsive position.” *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Moreover, it is well settled that we will look beyond mere procedural labels and read the complaint as a whole when ascertaining the exact nature of a plaintiff's claims. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). And lastly, even if this Court would require such in the extreme hypertechnical pleadings contrary to *Stanke*, this Court must provide

to issue maximum fine (rather than the mid-point range originally requested by Plaintiff) under MCL 15.240b for such a bad faith position.

Next, Defendant CITY OF HARBOR BEACH argues that this case is really a fee dispute case under MCL 15.240a. And it *possibly* is. Plaintiff THOMAS LAMBERT is entitled to plead alternative, even inconsistent, claims. MCR 2.111(A)(2). However, Plaintiff THOMAS LAMBERT would argue that the nature of a Section 10a cost claim (MCL 15.240a) is about the amount of a fee demanded; \$500.00 vs. \$100.00. Instead, this case, as presented by this motion, is about a public body asserting a false prerequisite for production, as a delay tactic, which was never authorized to assert to begin with.⁵ As such, Plaintiff's position in this motion is that this case is not a fee dispute case, but a wrongful denial case.

Next, Defendant CITY OF HARBOR BEACH argues that the document submitted by Plaintiff THOMAS LAMBERT contains only one FOIA request, not three. This is contrary to the facts:

Plaintiff THOMAS LAMBERT... made *Freedom of Information Act* requests seeking the following records from Defendant CITY OF HARBOR BEACH:

- a. Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, in relation to resolution# 2016-92.

Plaintiff leave to amend his complaint if summary disposition is not granted to correct any deficiency in the pleadings. See MCR 2.116(I)(5); MCR 2.118. So, the parties and this Court will be right back to where we started with this motion.

⁵ Defendant CITY OF HARBOR BEACH also argues that is later revised its original fee demand and thus is still entitled to a fee. The City has failed to point to any portion of FOIA or any case law that allows it to issue any legally-effective revised response, let alone the 4 revised demands it made. In fact, the Supreme Court has directed otherwise in that this Court reviews FOIA decisions from a discrete point of time as a public body must assert an exemption at the time of its response—which is due within five business days (or 15 business days if taking an extension) of the FOIA request. MCL 15.235(2)(b). “The denial of a FOIA request occurs at a definite point in time” and “[s]ubsequent developments are irrelevant to that FOIA inquiry” before the courts. *State News v Michigan State Univ*, 481 Mich 692, 703-704; 753 NW2d 20 (2008).

- b. Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, from August 1st, 2016 through today October 3rd, 2016, in relation to the City's policy on firearms carried by employees.
- c. Any and all documentation obtained by or provided by the Harbor Beach City Council or one of its members, or the City Director, relating to how the City's policy on firearms carried by employees may affect the City's insurance rates.

First Am Compl, ¶8. These are three separate classes of public records being sought—being of different types, nature, and likely locations in the City's files. In support of its odd argument of one 'super request' rather than three individual requests, Defendant CITY OF HARBOR BEACH cites a federal, not state, regulation from a single federal agency: 28 CFR § 165(d). Under federal law, federal agencies can write their own regulations about how it will treat and process FOIA requests. Michigan law does not give public bodies the same latitude. As such, Defendant CITY OF HARBOR BEACH fails to point to any law or provision under Michigan's FOIA recognizing the same under Michigan transparency law. Moreover, its own policy and procedures do not assert this similar rule. See Exhibit 20. The blatantly argument is meritless. See *Peden v City of Detroit*, 470 Mich 195, 217; 680 NW2d 857 (2004) (“federal laws and regulations are not binding authority on a Michigan court interpreting a Michigan statute” and courts and parties are caution in assuming that federal and state statutes of similar subject matter will “invariably parallel.”). This argument is nothing more than a blatant attempt to reduce the penalty required under FOIA. MCL 15.240b (“the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence”).

Lastly, Defendant CITY OF HARBOR BEACH claims that any fee challenge is moot because “he failed to bring his fee challenge within the statute of limitations.”

Again, the City is misleading this Court. MCL 15.240a(1)(b) requires that the action “must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body.” Plaintiff THOMAS LAMBERT filed his administrative appeal on October 17, 2016. **Motion, Exhibit 10.** The City Council has not yet ruled on the appeal and refuses to do so. First Am Compl, ¶17. As such, it is still timely.

RELIEF REQUESTED

WHEREFORE, the Court is requested grant summary disposition to Plaintiff THOMAS LAMBERT on Count I as a wrongful denial case pursuant to MCL 15.240(4) and MCR 2.116(C)(10) and order the production of all response records, without redactions, immediately as required by the statute. The Court is also requested to award attorney fees, costs, and disbursements and order a bill of costs to be submitted. Lastly, the Court is requested to impose punitive damages in the amount of \$3,000.00 (or \$4,500.00 if the additional penalties under Section 10a apply) payable to the Plaintiff THOMAS LAMBERT and impose civil fines in the amount consisting of at least \$18,000.00 (or \$19,500.00 if the additional penalties under Section 10a apply) payable to the state treasury as provided by statute.

Date: September 4, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by 1.) emailing the same to the email addresses or record and 2.) mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

4th day of September, 2017.

Philip L Ellison

PHILIP L. ELLISON
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RESPECTFULLY SUBMITTED:

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**Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)

CITY OF HARBOR BEACH

FOIA Procedures and Guidelines

Preamble: Statement of Principles

It is the policy of the City of Harbor Beach that all persons, except those incarcerated, consistent with the Michigan Freedom of Information Act (FOIA), 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 employees. The people shall be informed so that they fully participate in the democratic process.

The City'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 regardless of who makes such a request.

The City acknowledges that it has a legal obligation to disclose all nonexempt public records in its possession pursuant to a FOIA request. The City 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 City of Harbor Beach will protect the public's interest in disclosure, while balancing the requirement to withhold or redact portions of certain records. The City's policy is to disclose public records consistent with and in compliance with State law.

The City Council has established the following written procedures and guidelines to implement the FOIA and will create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary will be written in a manner so as to be easily understood by the general public.

Section 1: General Policies

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

If a request for a public record is received by fax or email, the request is deemed to have been received on the following business day. If a request is sent by email and delivered to a City 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 City spam and junk-mail folders on a regular basis, which shall be no less than once a month. The FOIA Coordinator shall work with City Information Technology staff to develop administrative rules for handling spam and junk-mail so as to protect City systems from computer attacks which may be imbedded in an electronic FOIA request.

The FOIA Coordinator may, in his or her discretion, implement administrative rules, consistent with State law and these Procedures and Guidelines to administer the acceptance and processing of FOIA requests.

The City 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 City Staff are 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 City on file for a period of at least one year.

The City will make this Procedures and Guidelines document and the Written Public Summary publicly available without charge. If it does not, the City cannot require deposits or charge fees otherwise permitted under the FOIA until it is in compliance.

A copy of this Procedures and Guidelines document and the City's Written Public Summary must be publicly available by providing free copies both in the City's response to a written request and upon request by visitors at the City's office.

This Procedures and Guidelines document and the City's Written Public Summary will be maintained on the City's website at: www.harborbeach.com, so a link to those documents will be provided in lieu of providing paper copies of those documents.

Section 2: Requesting a Public Record

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.

Requests to inspect or obtain copies of public records prepared, owned, used, possessed or retained by the City may be submitted on the City's FOIA Request Form, in any other form of writing (letter, fax, email, etc.), or by verbal request.

Verbal requests for records may be documented by the City on the City's FOIA Request Form.

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

A request must sufficiently describe a public record so as to enable City personnel to identify and find the requested public record.

Written requests for public records may be submitted in person or by mail to any City office. Requests may also be submitted electronically by fax and email. Upon their receipt, requests for public records shall be promptly forwarded to the FOIA Coordinator for processing.

A person may request that public records be provided on non-paper physical media, emailed or otherwise provided to him or her in digital form in lieu of paper copies. The City will comply with the request only if it possesses the necessary technological capability to provide records in the requested non-paper physical media format.

A person may subscribe to future issues of public records that are created, issued or disseminated by the City of Harbor Beach on a regular basis. A subscription is valid for up to 6 months and may be renewed by the subscriber.

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, the City will issue a response within 5 business days of receipt of a FOIA request. If a request is received by fax, email or other electronic transmission, the request is deemed to have been received on the following business day.

The City will respond to a 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 City needs an additional 10 business days to respond for a total of no more than 15 business days. Only one such extension is permitted.
- Issue a written notice indicating that the public record requested is available at no charge on the City's website.

When a request is granted:

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 and the Written Public Summary will be provided to the requestor free of charge with the response to a written request for public records, provided however, that because these Procedures and Guidelines, and the Written Public Summary are maintained on the City's website at: www.harborbeach.com, a link to the Procedures and Guidelines and the Written Public Summary will be provided in lieu of providing paper copies of those documents.

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 the cost of processing a FOIA request is expected to exceed \$50 based on a good-faith calculation, or if the requestor has not paid in full for a previously granted request, the City will require a good-faith deposit pursuant to Section 4 of this policy before processing the request.

In making the request for a good-faith deposit the FOIA Coordinator shall provide the requestor with a detailed itemization of the allowable costs estimated to be incurred by the City to process the request and also provide a best efforts estimate of a time frame it will take the City to provide the records to the requestor. The best efforts estimate shall be nonbinding on the City, but will be made in good faith and will strive to be reasonably accurate, given the nature of the request in the particular instance, so as to provide the requested records in a manner based on the public policy expressed by Section 1 of the FOIA.

When a request is denied or denied in part:

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 City; 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 office of the City Director or seek judicial review in the Huron County Circuit Court;
- 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.

If a request does not sufficiently describe a public record, the FOIA Coordinator may, in lieu of issuing a Notice of Denial indicating that the request is deficient, seek clarification or amendment of the request by the person making the request. Any clarification or amendment will be considered a new request subject to the timelines described in this Section.

Requests to inspect public records:

The City 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 City records from loss, alteration, mutilation or destruction and to prevent excessive interference with normal City operations.

Requests for certified copies:

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, the requestor will be asked to provide a deposit not exceeding one-half of the total estimated fees.

If a request for public records is from a person who has not paid the City in full 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 City's possession;
- The public records were made available to the individual, subject to payment, within the time frame estimated by the City to provide the records;
- Ninety (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 City; 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 City;
- The City is subsequently paid in full for the applicable prior written request; or
- Three hundred sixty five (365) days have passed since the person made the request for which full payment was not remitted to the City.

Section 5: Calculation of Fees

A fee may be charged for the labor cost of copying/duplication.

A fee will *not* be charged for the labor 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 City because of the nature of the request in the particular instance, and the City specifically identifies the nature of the unreasonably high costs.

Costs for the search, examination review, and deletion and separation of exempt from non-exempt information are “unreasonably high” when they are excessive and beyond the normal or usual amount for those services (Attorney General Opinion 7083 of 2001) compared to the costs of the City’s usual FOIA requests, not compared to the City’s operating budget. (*Bloch v. Davison Community Schools*, Michigan Court of Appeals, Unpublished, April 26, 2011)

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

- 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.
- Whether the public records are from more than one City department or whether various City offices are necessary to respond to the request.
- The available staffing to respond to the request.
- Any other similar factors identified by the FOIA Coordinator in responding to the particular request.

The Michigan FOIA statute permits the City to charge for the following costs associated with processing a request:

- Labor costs associated with copying or duplication, which includes making paper copies, making digital copies, or transferring digital public records to non-paper physical media or through the Internet.
- Labor costs associated with searching for, locating and examining a requested public record, when failure to charge a fee will result in unreasonably high costs to the City.
- Labor costs associated with a review of a record to separate and delete information exempt from disclosure, when failure to charge a fee will result in unreasonably high costs to the City.
- The cost of copying or duplication, not including labor, of paper copies of public records. This may include the cost for copies of records already on the City’s website if you ask for the City to make copies.
- The cost of computer discs, computer tapes or other digital or similar media when the requester asks for records in non-paper physical media. This may include the cost for copies of records already on the City’s website if you ask for the City to make copies.
- The cost to mail or send a public record to a requestor.

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. If the time involved is less than 15 minutes, there will be no charge.
- Labor costs will be charged at the hourly wage of the lowest-paid City employee capable of doing the work in the specific fee category, regardless of who actually performs work.
- Labor costs will also include a charge to cover or partially cover the cost of fringe benefits.
- The City 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 will not be included in labor costs unless agreed to by the requestor; overtime costs will not be used to calculate the fringe benefit cost.
- Contracted labor costs will be charged at the hourly rate of \$48.90 (6 times the state minimum hourly wage).

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 City has the technological capability necessary to provide the public record in the requested non-paper physical media format.
- The City will procure any non-paper media and will not accept media from the requestor in order to ensure integrity of the City's technology infrastructure.

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 City will provide records using double-sided printing, if it is 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 City may charge for the least expensive form of postal delivery confirmation.
- No cost will be made for expedited shipping or insurance unless specified by the requestor.

If the FOIA Coordinator does not respond to a written request in a timely manner, the City must:

- Reduce the labor costs by 5% for each day the City exceeds the time permitted under FOIA up to a 50% maximum reduction, if **any** of the following applies:
 - The City's late response was willful and intentional,
 - The written request conveyed a request for information within the first 250 words of the body of a letter facsimile, email or email attachment, or
 - 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 email, letter or facsimile cover page.
- Fully note the charge reduction in the Detailed Itemization of Costs Form.

Section 6: Waiver of Fees

The cost of the search for and copying of a public record may be waived or reduced if in the sole judgment of the FOIA Coordinator a waiver or reduced fee is in the public interest because it can be considered as primarily benefitting the general public. The City Council may identify specific records or types of records it deems should be made available for no charge or at a reduced cost.

Section 7: Discounted Fees

Indigence

The FOIA Coordinator will discount 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 indigence.

An individual is not eligible to receive the waiver if:

- The requestor has previously received discounted copies of public records from the City twice during the calendar year; or
- The requestor 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.

Nonprofit organization advocating for developmentally disabled or mentally ill individuals

The FOIA Coordinator will discount the first \$20.00 of the processing fee for a request from:

- A nonprofit organization formally designated by the state to carry out activities under subtitle C of the federal developmental disabilities assistance and bill of rights act of 2000, Public Law 106-402, and the protection and advocacy for individuals with mental illness act, Public Law 99-319, 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, 1974 PA 258, MCL 330.1931.
 - Is accompanied by documentation of its designation by the state, if requested by the public body.

Section 8: Appeal of a Denial of a Public Record

When a requestor 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 appeal to the City Council by filing an appeal of the denial with the office of the City Director.

The appeal must be in writing, specifically state the word "appeal" and identify the reason or reasons the requestor is seeking a reversal of the denial. The City FOIA Appeal Form (To Appeal a Denial of Records), may be used. The City Council is not considered to have received a written appeal until the first regularly scheduled City Council meeting following submission of the written appeal.

Within 10 business days of receiving the appeal the City Council will respond in writing by:

- Reversing the disclosure denial;
- Upholding the disclosure denial; or
- Reverse the disclosure denial in part and uphold the disclosure denial in part; or
- Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the City Council shall respond to the written appeal. The City Council shall not issue more than 1 notice of extension for a particular written appeal.

If the City Council fails to respond to a written appeal, or if the City Council upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action in Circuit Court.

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

If a court that determines a public record is not exempt from disclosure, it shall order the City to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Failure to comply with an order of the court may be punished as contempt of court.

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in such an action, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or City prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

If the court determines that the City has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the City to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Section 9: Appeal of an Excessive FOIA Processing Fee

"Fee" means the total fee or any component of the total fee calculated under section 4 of the FOIA, including any deposit.

If a requestor believes that the fee charged by the City to process a FOIA request exceeds the amount permitted by state law or under this policy, he or she must first appeal to the City Council by submitting a written appeal for a fee reduction to the office of the City Director.

The appeal must be in writing, specifically state the word "appeal" and identify how the required fee exceeds the amount permitted. The City FOIA Appeal Form (To Appeal an Excess Fee) may be used.

The City Council is not considered to have received a written appeal until the first regularly scheduled City Council meeting following submission of the written appeal.

Within 10 business days after receiving the appeal, the City Council will respond in writing by:

- Waiving the fee;
- Reducing the fee and issuing a written determination indicating the specific basis that supports the remaining fee;
- Upholding the fee and issuing a written determination indicating the specific basis that supports the required fee; or
- Issuing a notice detailing the reason or reasons for extending for not more than 10 business days the period during which the City Council will respond to the written appeal. The City Council shall not issue more than 1 notice of extension for a particular written appeal.

Where the City Council reduces or upholds the fee, the determination must include a certification from the City Council that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and Section 4 of the FOIA.

Within 45 days after receiving notice of the City Council's determination of an appeal, the requesting person may commence a civil action in Huron County Circuit Court for a fee reduction.

If a civil action is commenced against the City for an excess fee, the City is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute.

An action shall not be filed in circuit court unless *one* of the following applies:

- The City does not provide for appeals of fees,
- The City Council failed to respond to a written appeal as required, or
- The City Council issued a determination to a written appeal.

If a court determines that the City required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or Section 4 of the FOIA, the court shall reduce the fee to a permissible amount. Failure to comply with an order of the court may be punished as contempt of court.

If the requesting person prevails in court by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages.

If the court determines that the City has arbitrarily and capriciously violated the FOIA by charging an excessive fee, the court shall order the City to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

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

To the extent that these Procedures and Guidelines conflict with previous FOIA policies promulgated by City Council or the City Administration these Procedures and Guidelines are controlling. To the extent that any administrative rule promulgated by the FOIA Coordinator subsequent to the adoption of this resolution is found to be in conflict with any previous policy promulgated by the City Council or the City Administration, the administrative rule promulgated by the FOIA Coordinator is controlling.

To the extent that any provision of these Procedures and Guidelines or any administrative rule promulgated by the FOIA Coordinator pertaining to the release of public records is found to be in conflict with any State statute, the applicable statute shall control. The FOIA Coordinator is authorized to modify this policy and all previous policies adopted by the City Council or the City Administration, and to adopt such administrative rules as he or she may deem necessary, to facilitate the legal review and processing of requests for public records made pursuant to Michigan's FOIA statute, provided that such modifications and rules are consistent with State law. The FOIA Coordinator shall inform the City Council of any change these Policies and Guidelines.

These FOIA Policies and Guidelines become effective July 1, 2015.

Section 11: Appendix of City of Harbor Beach FOIA Forms

- Request for Public Records Form
- Notice to Extend Response Time Form
- Notice of Denial Form
- Detailed Cost Itemization Form
- Appeal of Denial of Records Form
- Appeal of Excess Fee Form