

**From:** smbisio@gmail.com  
**Sent:** Sunday, August 29, 2021 8:47 PM  
**To:** speaglej@villageofclarkston.org; smithj@villageofclarkston.org  
**Subject:** FOIA appeals  
**Attachments:** 6-14-21 FOIA request.pdf; 6-15-2021 'FOIA received'.pdf; 7-13-21 Speagle's unilateral two-day extension.pdf; 7-15-21 Speagle email with invoice but without a FOIA response.pdf; 7-15-21 FOIA invoice.pdf; 7-20-2021 Speagle 'friendly reminder'.pdf; 8-2-2021 Bisio email re lack of response and deficient invoice.pdf; 8-3-2021 FOIA request.pdf; 8-10-2021 'FOIA received'.pdf

Dear FOIA Coordinator and Clarkston City Manager:

As noted below, I was not provided with a copy of your Procedures and Guidelines (or a Summary of Procedures and Guidelines) with each written response as required by MCL 15.234(4). Therefore, I would ask you to promptly forward these FOIA appeals to the city council or as your procedures and guidelines otherwise require. I would also appreciate it if you would acknowledge receipt of these appeals.

**Background and facts, 6/14/21 and 8/3/21 FOIA requests:**

On June 14, 2021, I submitted a nine-part FOIA request to the City of the Village of Clarkston by email (attached). The bulk of my request pertained to the city's decision to accept a \$10,000 payment from an anonymous donor to extinguish part of a city debt. That payment was funneled through Attorney Mark Peyser of Howard & Howard in a manner that was deliberately designed to hide the identity of the payee from Clarkston taxpayers, leaving taxpayers to wonder whether the undisclosed payor was receiving any advantage in exchange for such a large, publicly untraceable contribution (given that the payor was "anonymous" to the taxpayers but not to city officials).

My FOIA request expressly stated that I expected that the city would comply with the timeframes in the FOIA statute. I felt this was necessary because it took well over a year (and two separate FOIA requests) to obtain copies of city council meeting recordings, and I wanted to make sure that it was clear to the FOIA Coordinator (Jennifer Speagle) that I wouldn't be waiving any timelines within the FOIA statute for this request.

On June 15, 2021, I received an email from Ms. Speagle advising me only that my request had been received (attached). Though the FOIA statute requires either a final written response or an extension letter within five business days after receiving a written request for public records, I received no further communication from Ms. Speagle until July 13<sup>th</sup>, when she sent an email claiming that the response was due on July 13<sup>th</sup> (it wasn't) and asserting that she was unilaterally extending the time to respond by two days because she needed to "organize (weening out all dupes) and scan the paperwork." A copy of that email is attached.

On July 15, 2021, I received an email from Ms. Speagle that included only an invoice requesting payment of \$777.25 (attached). Not only did the invoice fail to comply with

the FOIA statute in a number of ways described in the fee appeal below, Ms. Speagle also did not include any response to my FOIA request as required by the FOIA statute. On July 20, 2021, I received a "friendly reminder" from Ms. Speagle that my "FOIA request [was] complete" and she was still awaiting payment with an additional copy of the invoice attached. (Email attached; duplicate copy of the invoice omitted.)

On August 2, 2021, with the hope of resolving things informally, I sent an extensive email to Ms. Speagle explaining why her lack of response was noncompliant with the FOIA statute (and why her invoice was deficient). I included citations to the FOIA statute to make it easier for her to confirm that my objections were consistent with the statute. Though I asked Ms. Speagle for a formal response to my FOIA request, a corrected invoice, and an allocation of the amount of fees to each request (to avoid having to send nine separate FOIA requests to obtain that information), I've received no response. A copy of my August 2<sup>nd</sup> email is attached.

On August 3, 2021, as a direct result of the questionably high labor hour charges in the invoice Ms. Speagle provided in response to my June 14, 2021 FOIA request, I submitted a FOIA request asking for time logs to support the number of hours ostensibly expended to fulfill my request (3.75 hours of copying time, 41 hours of retrieval time, and \$14.50 in redaction time). I also requested a record that supported the \$17.00 labor rate that Ms. Speagle charged and a corrected invoice if she agreed that the \$17.00 charge was not supported by the FOIA statute (attached). As before, I advised the city that I expected compliance with the timelines in the FOIA statute. On August 10, 2021, Ms. Speagle emailed me to advise that she was "in receipt of [my] FOIA request" (attached). Once again, I haven't received the required final written response or an extension letter within five business days of receipt of my FOIA request. In fact, there has been no further response.

### **FOIA Appeal, Statutory Denial of June 14, 2021 FOIA Request**

Unless I agreed otherwise (and I expressly did not), the FOIA statute required that Ms. Speagle respond to my written FOIA request within five business days of receipt. MCL 15.235(2).

There are only four permissible ways to respond to a FOIA request: granting the request (MCL 15.235(2)(a)), denying the request (MCL 15.235(2)(b)), granting the request in part and denying the request in part (MCL 15.235(2)(c)), or extending the time to respond to the request by no more than ten business days (MCL 15.235(2)(d)). Extension letters must also contain an explanation regarding why an additional ten days to respond is necessary (MCL 15.235(7)). Failing to respond to a FOIA request constitutes a final determination to deny the request if the failure was willful or intentional (MCL 15.235(3)(a)) **or** if the FOIA request conveyed a request for information within the first 250 words of the request, including using a reference to "FOIA" (MCL 15.235(3)(b)). Even if the city asserts that failing to timely respond to my FOIA request (after expressly being asked to do so) does not constitute willful or intentional conduct, my June 14, 2021 FOIA request for information included the phrase "FOIA request" in the subject line and therefore complied with MCL 15.235(3)(b).

An email acknowledging receipt of a request does not fall within one of the four permissible responses to a FOIA request. Despite my follow up, the city has never responded to my June 14, 2021 FOIA request.

Therefore, I am appealing the city's statutory denial of my June 14, 2021 FOIA request and ask that the city properly respond by indicating which of the nine requests were granted, which requests were denied (if applicable), and which requests were granted in part or denied in part (if applicable). Should the city claim that any records do not exist, then I ask that the city determine and certify that to be the case as required by MCL 15.235(5)(b). If the city has redacted information from the requested records – including removal of entire pages – then I request an explanation why and a reference to the applicable statutory exemption(s) as required by MCL 15.235(5)(a) so that I can determine whether I agree that any exemption taken is appropriate and whether I want to seek judicial review of that decision. I also ask that the city either provide me with a copy of its Procedures and Guidelines and the Summary of Procedures and Guidelines or a web address where these documents can be found. MCL 15.234(4) requires that this information be provided with each written response.

### **FOIA Fee Appeal, June 14, 2021 FOIA Request**

Charging excessive fees is one of the myriad ways that a public body can put roadblocks in the way of a FOIA requester. I asked Ms. Speagle if she could itemize the costs for each of my requests so I could discern which requests required so much time, since several of them should have taken little or no time to retrieve. As Ms. Speagle has failed to respond to my request for itemization, ignored my request for a corrected invoice, and refused to properly respond to my follow up FOIA request on August 3, 2021 asking for copies of time records to support the labor fees and charges she demanded, I can only assume that the high charge is being used as an artifice to avoid providing the requested records. And, for the following reasons, the \$775.25 requested charge is both excessive and unjustified by the FOIA statute.

First, the invoice fails to reduce fees as required when there is a late response. My request was sent electronically on June 14, 2021 and was deemed "received" by Clarkston on June 15, 2021 per MCL 15.235(1). As explained above, the city failed to provide either an extension letter explaining why more time was necessary or send a final response within five business days as required by MCL 15.235(2). Since I expressly stated that I expected that the city would comply with the timeframes within the FOIA statute, there should have been no confusion. My written permission was required for any changes to the statutory timelines, and my permission was neither requested nor given. The response to my FOIA request was unquestionably late.

Even if the invoice sent on July 15, 2021 could possibly be construed as a response – and it can't because it doesn't grant the request, deny the request, or grant the request in part and deny the request in part – it was sixteen business days late (even after taking the Independence Day holiday into consideration). Ms. Speagle's July 13<sup>th</sup> email unilaterally and improperly extending the city's time to respond by an additional two days does not cure this defect. The FOIA statute requires that a public body reduce its labor charges by 5% per day for each day the response is late, up to a maximum of 50%. The

city made no deduction for a late response as required by MCL 15.234(9)(a). Late fees should be subtracted from the invoice.

Second, despite my express request that documents be provided to me electronically in lieu of paper copies as permitted by MCL 15.234(1)(c), the invoice includes a \$.10 per page charge for copies. MCL 15.234(1)(d) authorizes a charge of the actual incremental cost of paper copies of records that are provided to the requester. Electronic records have no physical, per page form. The invoice indicates a labor charge for copying time, and that's all that's permissible where electronic records are involved. Charging a per page fee for electronic records is an excessive charge, and the \$14.50 charge for paper copies should be removed from the invoice. (There was a \$14.50 charge on line 3a of the "Subtotal Fees Before Waivers, Discounts or Deposits." This line corresponds to the labor cost to redact records. It's not clear if this charge was inadvertently put on line 3a rather than line 4, which corresponds to "copying/duplication cost." If this was an error, then a corrected invoice should be issued.)

Third, if the invoice includes any time for a contractor to search for records (such as the city attorney or Attorney Mark Peyser) – even if this time was charged at a lower, city employee rate - it must be removed from the total labor hours for retrieval time. MCL 15.234(1)(b) only authorizes charges for the work of a contractor if that person is separating and deleting information that is exempt from that which is nonexempt, no employee is capable of performing the work in that particular instance, the contractor is identified, and the work is specifically authorized. There is no statutory authorization for charging any time spent for retrieval work by a contractor.

Fourth, if the invoice includes any time for "organiz[ing] (weening out all dupes)," that time must be removed from the invoice. Time spent organizing records is not one of the six permissible areas for which a public body may charge when responding to a FOIA request. MCL 15.234.

Fifth, a \$17.00 hourly labor rate is excessive. MCL 15.234 requires that the city charge the labor rate of the least paid employee capable of performing the work in the particular instance, whether or not that person is available or actually performs the work. Using the numbers from the city manager's May budget presentation for 2021/2022, the least paid office employee is Ms. Biehl (your administrative assistant), her hourly rate is \$14.42, and no employee makes \$17.00 per hour. The hourly rate for retrieval and copying should be adjusted to reflect Ms. Biehl's rate, even if she did not perform any of the retrieval or copying work.

Finally, the invoice fails to provide any justification for fees as required by MCL 15.234(3).

I am appealing the city's fee request in connection with my June 14, 2021 FOIA request and expect that the city's response will fully comply with MCL 15.240a(2).

### **FOIA Appeal, Statutory Denial of August 3, 2021 FOIA Request**

The reasons supporting this appeal are the same those described above in connection with the city's statutory denial of my June 14, 2021 FOIA request. The city has simply failed and refused to respond to this request in any of the four permissible ways outlined in MCL

15.235(2), and Ms. Speagle's acknowledgment that she'd received the FOIA request one week after the request was sent is inadequate to comply with the statute.

I am appealing the city's statutory denial of my August 3, 2021 FOIA request and ask that the city properly respond by indicating which of the requests are granted, which requests are denied (if applicable), and which requests are granted in part or denied in part (if applicable). Should the city claim that any records do not exist, then I ask that the city determine and certify that to be the case as required by MCL 15.235(5)(b). If the city has redacted information from the requested records – including removal of entire pages – then I request an explanation why and a reference to the applicable statutory exemption(s) as required by MCL 15.235(5)(a) so that I can determine whether I agree that any exemption taken is appropriate and whether I want to seek judicial review of that decision. I also ask that the city provide either a copy of its Procedures and Guidelines and the Summary of Procedures and Guidelines or a web address where these documents can be found as required by MCL 15.234(4).

### **Conclusion:**

I'm disappointed (but not surprised) that the city continues to ignore its legal obligations under the FOIA, though I do find it rather shocking that the city would do this to me personally. After all, it hasn't even been a year since our five-plus year FOIA litigation concluded after the city's loss in the Michigan Supreme Court.

My lawsuit was started and maintained because the city relied on legal advice from the city attorney who bizarrely believed that he was entitled to create and receive records pertaining to city business and hide them in his off-site office, refusing to provide them to his own client (the city council) or to me. He also told the city council that my costs and legal fees would be covered by the city's insurer when he admittedly knew that the insurer had objected to paying them right after the case was filed. When the case finally concluded, the city attorney's malpractice carrier contributed to the settlement. Malpractice carriers aren't in the business of paying malpractice claims unless there has been actual malpractice.

Our city manager has repeatedly bemoaned the amount of legal fees and costs that the city incurred in that lawsuit, so one would think that the city would go out of its way to ensure punctilious compliance with the FOIA statute and to make decisions that favor the FOIA requester over the city when there are close calls to be made. After all, on April 26<sup>th</sup>, the city manager told the public that the city had learned a lesson from my lawsuit and that he wanted to emphasize that the city is open to addressing all questions and to being as transparent as possible.

The city's lack of response to my June 14<sup>th</sup> and August 3<sup>rd</sup> FOIA requests fails to rise to the standard that the city manager established. The FOIA lawsuit that I filed in 2015 was my first, but if the city wants to continue to flout the FOIA statute, please be advised that I have no qualms about suing the city again and pursuing that lawsuit to a favorable conclusion no matter how long it takes. And, though my attorney and I drastically reduced the amount of attorneys' fees the city was responsible for when resolving my lawsuit, if I'm forced to sue the city again over a FOIA matter, my lawyer and I won't be so generous

next time. In case it's not immediately obvious to city officials, the reason that I'm appealing these denials is because I would prefer to obtain the public records that I'm entitled to receive without having to sue Clarkston again – and I hope that Clarkston government also prefers that approach.

Should the city decide to seek legal counsel in connection with these FOIA appeals (and I sincerely hope it does), I would encourage the city to choose someone who actually understands the FOIA statute and who will not be forced to ask for help from his/her malpractice carrier at the end of any lawsuit.

I look forward to your favorable response to these appeals.

Sincerely,

Susan Bisio  
P.O. Box 1303  
Clarkston, Michigan 48347