

From: smbisio@gmail.com <smbisio@gmail.com>

Sent: Thursday, March 9, 2023 1:13 PM

To: HavenE@Villageofclarkston.org; WylieS@VillageofClarkston.org; CaseyG@VillageofClarkston.org; ForteA@VillageofClarkston.org; FullerB@VillageofClarkston.org; Lamphierm@VillageofClarkston.org; RodgersL@VillageofClarkston.org

Cc: smithj@villageofclarkston.org; sylvanlaw@aol.com; bisiolaw@gmail.com;

ClarkstonNews@gmail.com; DontRushDon@gmail.com; delorgek@villageofclarkston.org

Subject: Late FOIA Responses

Dear Clarkston City Council Members:

I'm writing to let you know that I'm getting ready to file another FOIA lawsuit against the COVOC, something that I never thought would be necessary given our relatively recent shared trip to the Michigan Supreme Court involving the FOIA. Though I've always personally endorsed filing an administrative appeal to the governing body as a way of informally resolving things between a FOIA requester and a public body before going to court, such an attempt would be futile in this circumstance since the city council neither acknowledged nor acted on my previous administrative appeal (made in connection with a different FOIA request). Since a FOIA requester who files an administrative appeal is barred from suing the public body until the administrative appeals period has passed, filing an administrative appeal on these requests would only serve to delay my ability to file a lawsuit. For that reason, **this email should not be construed in any way as an administrative appeal.** Instead, the purpose of this email is merely intended to inform you of the conduct of your administrative officers and about facts you may not be aware of.

The subject of the two FOIA requests at issue here is the city's attempt to close down the Millpond Inn on what appears to be a questionable legal basis and for which the city attorney recommended there be no public discussion, including any discussion with the inn owner. I will be sending the attachments in two emails, since they are too large to send in on email.

I've gathered the attached correspondence for use as lawsuit complaint exhibits. If you take the time to read the attachments, you'll note that city attorney Tom Ryan and city manager Johnathan Smith were copied on a lot of these communications. You'll also note that based on the documents I've been provided so far, these two administrative officers apparently have some of the responsive records that have inexplicably not been provided to me – even though they are both aware of the request and the deficient response. Given that the city manager and city attorney report directly to you and serve at your pleasure, and the city manager will undoubtedly be asking you for a compensation increase with the 2023-2024 budget, I wanted to make you aware of this.

The FOIA statute requires that the city reply to a FOIA request within five business days by granting the request, denying the request, granting/denying the request in part, or taking a 10 business-day extension of time that includes an explanation why an extension of time is necessary. If a request is denied, in whole or in part, then the city is required to explain why. If records do not exist, the city must provide a certificate that the record does not exist. If records are withheld under a claim of exemption, the city must say so and provide a citation to the FOIA statute of the claimed exemption. Denial letters are also supposed to include language that explain a FOIA requester's right to file an administrative appeal or a lawsuit. All of this is spelled out clearly in the FOIA statute in easy to understand language, but I have yet to receive a response to a FOIA request from the city that complies with the statute from any of the three clerks that I've worked with in response to any FOIA request. The last response I received from our new clerk alleged that the city was simply too busy to meet its legal obligations because the city manager was out of the office, though that doesn't explain the city's failure to provide a complete response to my first request (or any response at all to my second request) before - or after - his absence. (Please note that in addition to the outstanding requests, I made a few other rather simple requests for information since the beginning of the year - a copy of a city council meeting recording [or a link] - the city had no records; signed copies of the EV charging contracts - provided, but additional follow up was necessary to get a fully signed copy of one of the contracts; and records concerning a large tree that was removed from private property by the owner - no records. These basic requests weren't handled in a compliant way either.)

Please be advised that based on what I know, I place very little blame for the current situation on our new city clerk as she may not yet know where to search for records, and the city manager and city attorney have apparently not provided her with up-to-date FOIA training. On the other hand, Ryan and Smith (and in one case mayor Eric Haven) were copied on correspondence between the clerk and me. It's clear from the records that I have been provided (requiring multiple follow ups to receive), that Smith and Ryan have copies of some of the records I'm asking for, yet these records have inexplicably not been provided. The city attorney also should have ensured that the clerk's FOIA responses were compliant with the statute before they were mailed.

I'm providing you with copies of the extensive correspondence involved with these requests. The city has not responded completely to the first request (due 1/27/2023) and has ignored the second request entirely (due 2/13/2023). This delay is inexcusable. As you can see, I have been more than patient with regard to these requests, given that I could have filed a lawsuit

over the city's late responses immediately after their due dates passed. Instead, I tried to work with the clerk and to explain what was missing and why. Unfortunately, this approach has allowed city officials to take advantage of that generosity and inexcusably delay the responses.

Here is a summary of the attached correspondence:

Document #1 - FOIA #1 sent 1/19/23. The response was due on 1/27/2023.

Document #2 - The clerk advised that FOIA #1 was received on 1/24/23. Saying that a request is "received" does not extend the time to respond; the FOIA statute determines when a request is legally received by the city.

Document #3 - 2/2/2023 letter from my attorney regarding the city's late responses.

Document #4 - The city provided its first response to FOIA #1 on 2/3/2023. The response was late, incomplete, incorrect about the nonexistence of records, and failed to comply with the statute. Smith and Ryan were copied.

Document #5 - I followed up on 2/3/2023, explaining that there are records that haven't been provided and attached a copy of Ryan's and Stacey Kingsbury's invoices showing that they should have responsive records. Smith and Ryan were copied.

Document #6 - FOIA #2 sent 2/4/2023. Response was due on 2/13/2023. This was a follow up because the city failed to provide the purported agreement between the city and the Millpond Inn that has been referenced in public meetings. Instead, the city sent me a copy of one of the two court of appeals opinions involving the Millpond Inn, both of which ordered the ZBA to resolve the zoning dispute. Neither court opinion established any terms under which the Millpond Inn is required to operate with regard to its nonconforming use.

Document #7 - On 2/6/2023, the clerk advised that she is now checking Jennifer Speagle's emails and searching for other records. Smith and Ryan were copied.

Document #8 - I requested a more thorough search on 2/7/2023. Smith and Ryan were copied.

Document #9 - On 2/9/2023, the clerk sent a more detailed response, though it was still incomplete. Smith, Haven, and Ryan were copied.

Document #10 – On 2/12/2023, I advised that using the records provided on 2/9/2023, it was obvious that the city’s response was still incomplete. I asked for the balance of the records.

Document #11 – On 2/17/2023, the clerk unilaterally extended the time to respond to my requests, without providing a date when the city would commit that a response would be made, alleging that she can’t respond to my requests “without unduly burdening or interfering with the City of the Village of Clarkston’s operations,” referencing the long-past five day response requirement, and using Smith’s vacation as the excuse for the non-response. Please note that the reason provided is not legally sufficient to justify a failure to respond to a FOIA request. The FOIA statute only authorizes the requester to extend the FOIA response time, and I wasn’t ever asked if I would agree to provide more time for the city to respond to the overdue requests.

Document #12 – I voluntarily agreed to extend the time to respond to both requests to Friday, 2/24/2023. The city has provided no additional response to these two FOIA requests.

As you may recall, the city attorney was solely responsible for my five-year FOIA lawsuit, successfully convincing the city council that he was entitled to keep nonprivileged, nonexempt records concerning Clarkston city business in his off-site office files and claim these documents were not public records, hiding them from his client (the city council) and from me. In the end, the Michigan Supreme Court did not support the city’s claim that the city attorney could lawfully keep these public records a secret. My legal fees and costs were paid by the city’s insurer, city treasury, and city attorney’s malpractice carrier, and Clarkston is forever associated with hiding public records from the public.

I extended the city’s time to respond to my requests only until 2/24/2023. Since that date has now passed, I am entitled to file a FOIA lawsuit whenever I choose within the 180-day statutory limitations period. Should the city “beat me to the courthouse” and provide me with all the requested records in response to my two outstanding FOIA requests, then it won’t have to pay my attorneys’ fees and legal costs – in addition to providing the records that it should have already provided. I suggest that before the city council allows the city attorney to drag the city into a lawsuit involving the Millpond Inn (in addition to a lawsuit involving these inexcusably delayed FOIA responses), city council members may want to inform themselves about the Millpond Inn matter by reviewing the attached information that has been provided to me so far. Council members should be asking more pointed questions of the city attorney regarding whether or not the city has an adequate legal basis to pursue the Millpond Inn and also to ask why the city’s “investigation” of this small business must continue outside of the public’s view, in line with the city

attorney's recommendation that the Millpond Inn's managing partner should not be allowed to interact with the city council during a public meeting.

Public bodies with nothing to hide don't have a problem promptly providing public records. In this case, I can't help but wonder if the reason for the delay in releasing all the records I seek is because the records would expose what I believe is the city's flimsy foundation for trying to run the Millpond Inn out of existence. Given the strong public interest in this matter, and the ongoing expense to the taxpayers, it's sad that the city is choosing secrecy over transparency yet again.

Kindest regards,
Susan Bisio