



# CITY OF EAST LANSING

The Home of Michigan State University

To: Alice Dreger  
621 Sunset Lane  
East Lansing, MI 48823

Re: Appeal of FOIA requests 18-137

Dear Ms. Dreger,

The following constitutes my ruling on your November 20, 2018 appeal of the denial of the above referenced Freedom of Information Act (FOIA) request.

### FACTS:

1. On November 8, 2018, Appellant submitted a FOIA request seeking a copy of the most recent quarterly litigation status report submitted to City Council by the City Attorney.
2. On November 14, 2018, the City of East Lansing, through Assistant City Clerk Katherine Gardner, denied the FOIA request on the basis that the document was subject to attorney-client privilege.
3. The denial was timely issued.
4. On November 20, 2018, Appellant filed a timely appeal of the denial of the request asserting that the requested document is not wholly subject to the attorney-client privilege. Appellant also asserted that the state statute involved, MCL 15.231-246, required the appeal to be determined by the City Council and cited to an appellate case that allegedly supported that claim.
5. In ruling on this appeal, I have reviewed copies of the requested document, the denial, the appeal, and a copy of *Ann Anklam v Delta College District and Delta College Board of Trustees*, (Unpublished per curiam opinion of the Michigan Court of Appeals decided June 26, 2014), among other things

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## APPLICABLE LAW:

### A. HEAD OF PUBLIC BODY:

1. Appellant cites to *Anklam*, supra as ruling that a City Council is the head of a City for purposes of an appeal of a denial of a FOIA request.
2. *Anklam*, is an unpublished opinion of the Michigan Court of Appeals. Such opinions have no precedential value and are not binding except to the parties to that litigation. They are limited to the specific facts of the case. MCR 7.215(C)(1). Such, decisions can, however, be informative.
3. *Anklam*, provides, in pertinent part:  
“Under the Community College Act of 1966 (‘the CCA’), MCL 389.1 et seq., it is abundantly clear that the head of the Delta College District is the Delta College District Board of Trustees. See, eg., MCL 389.14(1) (‘a community college district is directed and governed by a board of trustees[.]’)”
4. MCL 15.240 (1) (a) provides:  
“If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:  
(a) Submit to the head of the public body a written appeal that specifically states the word appeal and identifies the reason or reasons for reversal of the denial...”
5. Chapter 4, Section 4.5.a. of the City Charter Provides, in pertinent part:  
“Insofar as required by law, and for all ceremonial purposes, the Mayor shall be recognized as the chief executive of the City.”
6. Chapter 4, Section 4.1 of the City Charter provides, in pertinent part: “All powers of the City shall be vested in...the City Council, which shall be the legislative and governing body for all purposes required or permitted by law.”

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7. MCL 15.240 (2) provides, in pertinent part: “Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of the public body shall do 1 of the following :

- (a) Reverse the disclosure denial
- (b) Issue a written notice to the requesting person upholding the disclosure denial
- (c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part....”

8. MCL 15.232(h)(iii) defines “public body” as : “A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board , department, commission, council, or agency thereof”

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## **B. ATTORNEY-CLIENT PRIVILEGE AND FOIA**

11. MCL 15.233 (1) provides in pertinent part: “Except as expressly provided in section 13, 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. “

12. MCL 15.243 (1) (d), (g), (h) and (m) provide: “(1) a public body may exempt from disclosure under this act any of the following: ...

(d) Records or information specifically described and exempted from disclosure by statute.

(g) Records or information covered by the attorney-client privilege.”

(h) Information or records subject to...other privilege recognized by statute or court rule.”

(m) Communications and notes within a public body...of an advisory nature to the extent they cover other than purely factual information and are preliminary to a final agency determination of policy or action...”



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13. Michigan law recognizes an attorney-client privilege that encourages full and frank communication between a lawyer and his or her client. See, eg., MRPC 1.6(b); *Leibel v GM Corp.*, 250 Mich. App. 229 (2002); *Parker v Associated Die Corp.*, 44 Mich App 302 (1973)

14. The attorney-client privilege attaches to communications made by a client to his or her attorney acting as legal advisor and made for the purpose of obtaining legal advice on some right or obligation. The privilege also applies to the advice given. See, eg., *Taylor v BCBM*, 205 Mich App 644,654 (1994).

15. The attorney-client privilege extends to all employees of a governmental unit who are authorized to speak for the organization. See, eg., *Hubka v Pennfield Twp.*, 197 Mich App 117, 121 (1992).

16. The attorney-client privilege encompasses the attorney work product doctrine. The Work product doctrine covers “Any notes, working papers, memoranda or similar materials prepared by an attorney in anticipation of litigation...” *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 636-637 (1998)

17. The Work Product doctrine applies to litigation files. *Koster v Michigan Mutual Insurance Co*, 244 Mich App 162, 168 (2000). The doctrine requires the materials subject to the doctrine pertain to more than just objective facts. *Great Lakes Concrete Pole Co v Eash*, 148 Mich App 649,

18. The parameters of the Work Product Doctrine were examined in *US v Davis*, 636 F3rd 1028 (5<sup>th</sup> Cir, 1981): “It is generally understood that litigation need not actually been commenced or threatened, before it may be stated that materials were prepared in anticipation of litigation, It is generally sufficient if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have arisen.” *Davis*, p 1032.

19. In Michigan, the doctrine is set forth in MCR 2.302(B)(3)(a).

20. The doctrine is also established by 5 USC 552(b)(5).

21. MCL 15.244 (1) provides:

“If a public record contains material which is not exempt under section 13 as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and non-exempt material and make the non-exempt material available for examination and copying.

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22. Exemptions to disclosure of public documents are to be interpreted narrowly. See, *Evening News, supra; State News v MSU*, 274 Mich App 55 (2007).

## C. Statutory Construction

1. In interpreting statutes, ordinances, city charters and other legislative directives, certain rules apply. MCL 8.3 provides: “All words and phrases shall be construed and understood according to the common and approved usage of the language...”

2. Where a statute is unambiguous on its face, no interpretation is necessary. See, eg., *People v Love*, 425 Mich 691, 701 (1986).

3. Where an ambiguity is present, the task is to give effect to the intent of the legislature. See, eg., *Lawrence v Dept of Treasury*, 140 Mich App 490, 496 (1985).

4. When interpreting statutes, the express mention of one thing, implies the exclusion of similar things. See, eg., *People v Lange*, 105 Mich App 263, 266 (1981).

5. Where a statute expressly provides a definition of words and phrases utilized, such definitions are binding. See, eg., *Tryc v Michigan Veterans Facility*, 451 Mich 129, 133 (1996).

6. Statutes are to be read as a whole. See, eg., *Bailey v Oakwood Hospital*, 472 Mich 685, 693 (2005).

7. State statutes supersede contrary provisions of local ordinances or Charters. See, eg., *Gefstos v City of Lincoln Park*, 39 Mich App 644, 654 (1972).

## DECISION:

### 1. HEAD OF PUBLIC BODY

Applying statutory construction principles to this appeal, Appellant has misconstrued *Anklam*. The language from *Anklam* Appellant cited for the proposition that a City Council is in all instances the “head” of a City for purposes of a FOIA appeal, does not support Appellant’s position. The *Anklam* court turned to a state statute specific to the operation of community colleges in determining a community college board of trustees is the “head” of a community college for the purpose of a FOIA appeal. To do so, the court first determined that the phrase “head of the public body” did not have a common definition and was consequently ambiguous.

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The assignment of specific tasks by FOIA to the undefined position of “head of the public body” can only mean that the legislature intended that when interpreting that phrase, specific law relating to each governmental unit be examined to determine who that individual will be. The *Anklam* decision supports this conclusion as does the use of the word “the” instead of “a” in FOIA’s use of the phrase.

Thus, to answer the question regarding “head of the public body” raised by the Appellant, the interplay between FOIA and East Lansing’s City Charter controls the outcome.

In East Lansing, the Charter identifies the City Council as the “legislative and governing” body of the City of East Lansing. FOIA declares the City Council as the “public body” for FOIA purposes and imposes the duty on City Council to appoint a FOIA coordinator. FOIA does not require a city council or any other “public body” to determine a FOIA appeal. Instead, the duty is placed on the “head of the public body.”

The East Lansing City Charter provides for the organization of the Council by establishing a process to elect a Mayor and Mayor Pro Tem to lead the Council. Therefore, by Charter, the City Council decides who the “head” of the public body is. In East Lansing, that person is the Mayor.

The method of transmitting an appeal to the “head” of the public body is not defined in FOIA, only that the appeal be submitted to the “head” of the public body. See MCL 15.240(1)(a). Filing or submitting an appeal with the City Manager and counting it as submitted does not violate this provision of FOIA. The appeal must be determined by the head of the public body. As long as the appeal is actually determined by the head of the public body it does not matter who the appeal is initially filed with or submitted to.

Insofar as Appellant’s appeal is based on her assertion that the City’s denial of her request is deficient because the notice of denial, in providing that an appeal be directed to the City Manager is contrary to law, the appeal is denied.

Insofar as Appellant’s appeal is based on an assertion that the City Council must determine the appeal, the appeal is also denied.

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## 2. REMAINDER OF APPEAL

As to that part of Appellant's appeal that specifically relates to denial of Appellant's request for the East Lansing City Attorney's quarterly report, I grant the appeal in part and deny it in part.

The report itself, insofar as it simply identifies pending cases and the status of the pleadings of those cases, is not subject to the attorney-client privilege, the work product doctrine or the communication and notes exception set forth in FOIA. All of those exceptions are limited and do not protect purely factual information. Especially where that information is readily available from the record keeper in each court or agency mentioned.

While FOIA does not require the preparation of a report upon request by a citizen, once the report is prepared and submitted to the Council it is subject to FOIA.

Consequently, I order the release of a redacted copy of the quarterly report. The redaction shall be limited to that portion of the report which consists of suggested Strategy related to the matters identified in the report, language specific to questions raised by Council Members or other City employees relative to the specific cases identified or any other matter that is not purely factual.

So Ordered,

Mark S. Meadows

Mayor, City of East Lansing

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