
Michigan Supreme Court Decision Broadens FOIA Definition of Public Body

By Mark W. McInerney / Aug 03, 2020

Michigan's Freedom of Information Act ("FOIA") requires production (absent statutory exemption) of a "public record," defined as "a writing prepared, owned, used, in the possession of or retained by a 'public body'." In *Bisio v City of the Village of Clarkston*, decided by the Michigan Supreme Court on July 24, 2020, the plaintiff sought from the city documents contained in the files of the city attorney, a private attorney who contracts with the city to serve as city attorney. Plaintiff's request was denied on the basis that the city attorney was not a "public body," and thus documents in his files (but not elsewhere in the city's files) were not subject to FOIA. Both the Circuit Court and the Court of Appeals upheld the denial. In an unusual opinion, written by Justice Markman joined by four other justices, the Supreme Court reversed the denial, holding that the city attorney occupied the "office of city attorney," and that the office of city attorney was a public body subject to FOIA. This decision, as the dissenting Justice pointed out, amounts to a broad expansion of the coverage of FOIA to individual public officers never thought to be subject to FOIA.

The argument that ultimately prevailed in the Court was not one raised or argued by either of the parties but was proposed by a media organization participating as *amicus curiae* (friend of the court). Ordinarily, courts confine themselves to arguments and positions of the parties, but the Court expressly chose not to apply that general procedure here. Beyond that, in a 2000 case arising under the Open Meetings Act, the Court had recognized that "public body" consists of a "collective entity," that is, a group of individuals, as opposed to a single individual. While citing and not overruling the 2000 case, the Court largely ignored it. The Court concluded that where the City Charter had explicitly provided for the appointment of a city attorney and given the city attorney specific responsibilities, the charter had effectively created an "office of city attorney," even though the charter contained no such provision. According to the Court, because the city attorney is designated as an "officer," he must necessarily occupy an "office;" and because documents created, retained or in the possession of an office are subject to FOIA, the documents in the file of the city attorney are subject to FOIA. The Court emphasized that it was not determining that the city attorney himself is a public body, but only that the "office of city attorney" implicitly created when the charter provided for a city attorney is a public body.

Concurring in the result, Chief Justice McCormick was troubled by the Court basing its decision on an argument not presented by the parties but would have held that the documents were subject to FOIA because the city attorney is an agent of the city. Her opinion ran counter to a previous Supreme Court decision that had rejected the argument that FOIA applies to agents of public bodies, as opposed to the public body itself.

Dissenting, Justice Viviano strongly criticized the majority's basing its determination on arguments not raised by the parties or litigated in the lower courts, and on the determination that what he calls a "fictional office of city attorney" was created by a charter provision providing for a city attorney. He concluded that "the majority's mangling of the meaning of 'body' and 'office' will . . . have many serious consequences beyond this case," adding that the Court's holding "portends a radical expansion of the definition of 'public body' under FOIA such that it will now include many other public officers."

As Justice Viviano recognizes, if any public "officer" necessarily holds an "office," many more public employees would seem to be subject to FOIA. In the municipal area, it would seem to bring under FOIA the records of individual Council members and a variety of other individual officers. In the school realm, most school districts retain legal counsel pursuant to provisions in their bylaws similar to the Clarkston charter provisions in *Bisio*. This decision would seem to apply equally to school lawyers, and perhaps even to Board of Education members.

This broad decision, finally, resulted from a fact situation that is relatively uncommon. The documents requested consisted of correspondence and related documents between the city attorney and a developer, not shared with other city employees. They were therefore not documents subject to the attorney-client privilege, or the FOIA exemption [MCL §15.243(1)(g)] for documents protected by the attorney-client privilege. The Court acknowledged in a footnote that it was not addressing that exemption in its decision. For municipal and school attorneys, most of the documents they generate should be protected by the attorney-client privilege and exemption, and for that reason, the decision may have relatively little effect on those attorneys' practices. But, for other public officers newly subject to FOIA under *Bisio* and who are not attorneys, the attorney-client privilege exemption will often not be applicable, and unless another exemption applies those officers may have to produce documents previously thought not to be governed by FOIA.

If you have questions about this or other issues related to FOIA, please contact Mark McInerney at (313) 965-8383, mmcinerney@clarkhill.com, or another member of Clark Hill's Education or Municipal Law groups.