

# **BAY MILLS COMMUNITY COLLEGE**

**(IN ITS CAPACITY AS A PUBLIC SCHOOL ACADEMY AUTHORIZING BODY)**

## **FREEDOM OF INFORMATION ACT POLICY/PROCEDURES/GUIDELINES**

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## BAY MILLS COMMUNITY COLLEGE

### FREEDOM OF INFORMATION POLICY/PROCEDURE/GUIDELINES

#### I. GENERAL POLICY

It is the policy of the Bay Mills Community College, when acting in its capacity as a public school academy authorizer (“BMCC”)<sup>1</sup>, to fulfill the legislative intent of the state’s Freedom of Information Act (“FOIA” or the “Act”),<sup>2</sup> MCL 15.231 *et seq.*, in providing public access to nonexempt public records/information in accordance with the Act. A FOIA request may be considered as any **written** request for records or documents, regardless of whether the request mentions the FOIA.<sup>3</sup> A FOIA request may be a part of much more extensive written communication that may not initially appear to be a formal FOIA request, in accord with the specific policy, procedure, or practice set forth in this document. There are numerous statutes or standards set forth in Michigan law that can impact whether and/or how certain information should be disclosed. If an employee has any doubt as to how a request for records/information should be handled, the employee should confer with BMCC’s FOIA Coordinator.

In general, all records/information of a public body except those specifically cited as exempt under MCL 15.243 are subject to disclosure in accordance with the FOIA. Public records/information subject to the FOIA include: correspondence (including e-mails); records maintained in databases; approved and/or draft minutes of public meetings; informal notes or formal and informal recordings; public officials voting records; staff manuals; and written or recorded statements which implement or interpret laws, rules, or policies, including, but not limited to, guidelines, manuals, and forms with instructions, adopted or used by BMCC in the discharge of its functions.

The form of the requested public record is irrelevant to the request. The FOIA, except for computer software, applies to any handwriting, typewriting, printing, photographing, photocopying, and every other means of recording. It includes letters, words, pictures, sounds, symbols, or combinations thereof; as well as papers, maps, magnetic or paper tapes, photographic films or prints,

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<sup>1</sup> For purposes of this manual, “BMCC” is intended to encompass the Bay Mills Community College Charter Schools Office, as well as the Bay Mills Community College Board of Regents (“Board of Regents”), but only when the Board of Regents is acting in its capacity as a public school academy authorizing body.

<sup>2</sup> References to FOIA in this document are intended to refer to the FOIA and any and all amendments to the FOIA.

<sup>3</sup> As discussed below, FOIA also provides that if BMCC receives a verbal request for information that it believes is available on its website that BMCC must, where practicable and to the best of the public employee’s knowledge, inform the requestor about BMCC’s pertinent website address.

microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

This manual is available on BMCC's website at <http://www.bmcc.edu> and is also available at BMCC's office located at 12217 W Lakeshore Dr, Brimley, MI 49715.

## **A. BMCC'S GENERAL FOIA OBLIGATIONS**

### **1. What Is a Public Record**

It must be a "writing" or, in other words, it must be material that has been perceived, recorded and able to be reproduced. For example: e-mail, memorandums, pictures, notes, your internet explorer cache, databases, videotape, and voicemail.

It must be prepared, owned, used, in the possession of, or retained by a public body.

It must be "prepared, owned, used...in the performance of an official function." A record that, while prepared, owned, used, in the possession of, or retained by a public body, if not done so in the performance of an official function is not a public record. If the requested record is not a public record, the analysis under FOIA ends as FOIA only applies to public records.

If the requested record is a public record, FOIA separates public records into two classes:

- Those that are exempt from disclosure under MCL 15.243,<sup>4</sup> and
- All public records that are not exempt from disclosure under MCL 15.243 and which are subject to disclosure under FOIA.

### **2. Certification**

Regarding requests for certified copies of records, or certification of non-existence, a certificate does not have to be a separate document; the certification can be made in the response. The FOIA coordinator must use language to the effect that "I certify that the public record does not exist under the name given by you or by another name reasonably known to the Department." You cannot simply "not respond" because the record does not exist.

### **3. Other Production Rules**

A public body must have in its possession or control a copy of the requested document before it can be produced, or before a court can order its production.

The FOIA requires disclosure of the fact that a requested document does not exist. A plaintiff in a FOIA action that is forced to file a lawsuit to ascertain that a document does not exist is a prevailing party entitled to an award of costs and reasonable attorney fees.

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<sup>4</sup> MCL 15.243(1)(d) provides that exemptions to the FOIA's disclosure requirements may also be found in other statutes.

#### **4. Fee Calculations and Detailed Itemization Requirements**

BMCC must, as part of its response to a FOIA request, provide a detailed itemization that clearly lists and explains all allowable charges for each of the components listed below under Section II.E. of this manual that compose the total fee used for estimating or charging purposes.

#### **B. Making a FOIA Request to BMCC**

1. **Written Requests.** Written requests may be submitted to BMCC's FOIA Coordinator at the following address:

FOIA Coordinator  
12217 W Lakeshore Drive  
Brimley, MI 49715

In the event a written FOIA request is received by an BMCC employee other than the FOIA Coordinator, a copy of this should be provided to the FOIA Coordinator the same day it is received. All written requests for production of records shall be processed by the FOIA Coordinator.

2. **Oral Requests.** All FOIA requests shall be presented in writing. FOIA, however, also provides that if BMCC receives a verbal request for information that it believes is available on its website that BMCC must, where practicable and to the best of the public employee's knowledge, inform the requestor about BMCC's pertinent website address. The FOIA Coordinator must be notified of any such request. See Section II.B. for further information.

3. **Requests to Review Records.** If a request is received to review records, facilities should be made available to inspect records during BMCC business hours and when the records can be reasonably made available. The person who wishes to inspect records shall submit a request form describing the requested documents prior to allowing the inspection of the records. See Section II.F. for further information.

4. **Requests Made by Fax, E-Mail or Other Electronic Means.** These requests shall be deemed received by the FOIA Coordinator one business day after the date the electronic transmission is made and shall be handled in the same manner as a written request in subparagraph 1 above.

5. **Requests Sent to Junk or Spam Folders.** A written request that is sent by e-mail and delivered to the public body's spam or junk mail folder is not received until one day after the public body first becomes aware of the written request. The public body must note in its records both the time the written request is delivered to the spam or junk mail folder and the time the public body first becomes aware of the request.

#### **C. BMCC's Obligation to Respond to a FOIA Request**

The FOIA Coordinator, as discussed further in Section II.A. herein, shall maintain a log of all written requests received showing the nature and date of the request, determination of disposition, date of disposition, and manner of final response to the FOIA request. Requests shall sufficiently describe the record to enable the FOIA Coordinator to identify and locate the record.

The FOIA Coordinator shall, no more than five business days after the request has been made, unless a single extension of not more than ten business days has been issued, or where the time limits have been agreed to upon in writing by the requesting person, provide one of the following responses:

1. **Grant the Request.** A copy of the request for a public record along with all of the requested documents shall be sent to the person who requested the records on a response for public records form.
2. **Deny the Request.** The FOIA Coordinator shall sign and state the reasons for denial, including an explanation of the requesting person's right to seek a non-mandatory appeal from the FOIA Coordinator's decision to the College President or a judicial review of the decision as provided under FOIA. Failure to timely respond to the request constitutes denial. Denial may be made because, among other reasons, the record does not exist, it cannot be sufficiently identified from the description contained in the request; or the record is exempt (if a record is exempt, BMCC should provide the specific statutory citation for the exemption that applies to the specific request). See Section II.G. for standardized denial language.
3. **Grant the request and issue a written notice to the requesting person denying such a request in part.** Material which is partially exempt and partially subject to disclosure shall be separated or deleted and the non-exempt material offered for inspection. A general description of the separated or deleted information shall be provided to the requesting person.
4. **Request an Extension.** BMCC may extend the response period by an additional 10 business days with a notice that specifies the reason(s) for the extension and date by which the public body does one of the above. A public body cannot issue more than one notice of extension for a particular request.

This manual provides further guidelines in responding to a FOIA request as well as the procedures by which BMCC may charge a requestor and the process by which a requestor may appeal a decision by BMCC.

## **II. POLICY/GUIDELINES**

When a BMCC employee receives a written request for information under FOIA, the request must be immediately date stamped and forwarded to the FOIA Coordinator. BMCC is required by law to respond to requests within 5 business days after receiving the request by an employee—15 business days, if BMCC properly invokes the 10-day extension period. Employees should not assume an extension shall automatically be claimed. Therefore, it is imperative that the employee provide the FOIA Coordinator with the request immediately.

BMCC is permitted to charge fees for the costs of providing requested information (see Section II.E. of this manual). The fees may include certain charges for labor, duplicating, and mailing as explained below. The FOIA Coordinator will work with staff in determining the proper costs and any fees that may be charged. Requestors will be provided with a detailed itemization of any costs, as provided herein.

#### **A. The Role of the FOIA Coordinator**

The FOIA Coordinator shall be responsible for accepting and processing requests for the BMCC's public records under the Act and shall be responsible for approving a denial. In addition, the FOIA Coordinator shall be responsible for the following activities:

- Logging FOIA requests into the method used, based on the date of receipt by any employee, calculate the response due date based on the FOIA (extended response dates can only be based on criteria set forth in the FOIA.)
- Determining whether requested records/information exist.
- Determining whether part or all of requested records is exempt, and separates exempt from nonexempt records.
- Reviewing records to be collected to determine estimated costs, if applicable to be charged; or waived due to indigency.
- Preparing necessary fee estimates based on BMCC's applicable fee schedule and forwards the estimates to the requester.
- Pursuant to internal review with appropriate staff, forwarding response to the FOIA requester within 5 business days of receipt of the request or within 15 business days, if an extension was claimed. It is noted that the FOIA requires a response within the statutory timeframes, containing any claimed FOIA (Section 13) exemptions from release of records. However, the response need not be sent with all actual records/documents. This is particularly the case where a "good faith" payment is required.
- Where applicable, upon receipt of required payments, mailing requested records.
- Consulting with BMCC's General Counsel regarding issues of concern regarding FOIA requests/responses.
- Addressing appeals of non-disclosure of requested records/information.
- Maintaining records on requests sent to spam or junk mail folders, indigent requesters, and delinquent accounts.

#### **B. FOIA Requests Must Be In Writing; Procedures for Verbal Requests**

All requests for information under the FOIA must be in writing, including facsimile or electronic mail; and requesters should provide their name, address, and date of request. This is necessary for BMCC to document that a request has been properly made, processed, and mailed (FOIA responses involving an extensive amount of records likely will need to be mailed to an actual postal address and delays will ensue if a requestor only has provided an e-mail address or phone number); and to assist BMCC in determining "excessive" requests for the same information.



As noted above though, FOIA also requires a public body to respond to a verbal request for information if the public employee to which the verbal request is made believes that the requested material is available on its website where practicable and to the best of the public employee's knowledge. If a BMCC employee receives such a request, the employee shall: (1) request that the requester fully identify themselves by full name and agency represented; and (2) if the request is made to an employee other than the FOIA Coordinator, the request and response shall be noted by the employee and sent to the FOIA Coordinator. If the BMCC employee does not believe that the requested material is available on BMCC's website, then the employee should direct the requestor to make his or her request in writing.

### **C. Addressing Verbally Requested Personal Information**

From time to time, BMCC staff receives verbal requests from other public bodies or individuals (public, private, etc.) for personal information regarding BMCC employees or students. Typically, the requests seek information regarding social security number, date of birth, and/or home address/phone number. As you are aware, such information, regardless of the requester, is still subject to state/federal privacy statutes/regulations; and certain information may not be released without a signed release authorization from the individual(s), or a court order.

Upon the receipt of a verbal request for personal information, employees should:

- A. Request that the requester fully identify themselves by full name and agency represented; and inform the requester that such a request must be made in writing or via email so that it can be determined whether the request comes from a legitimate source; or refer the requester to the BMCC's FOIA Coordinator.
- B. If/when a written request for personal information is received by BMCC staff other than its FOIA Coordinator, refer the request to and/or coordinate with the BMCC's FOIA Coordinator to:
  - Determine whether the requested personal information is releasable without a signed release authorization or court order.
  - Assure that BMCC is in compliance with the appropriate state/federal statutes/regulations regarding personal information/privacy such as the FERPA, HIPPA, the state/federal statutes protecting social security numbers, Employee Right-to-Know Act, etc.

The above is not intended to diminish or question the authority of a public body or individual to request personal, protected information, but rather to address the manner in which such verbal requests are addressed and processed by BMCC.

## D. FOIA and Open Meetings Act (“OMA”) Response Timelines

The purpose of this section is to inform/remind the BMCC FOIA Coordinator of the interrelationship and the differences in response timeline requirements between the Open Meetings Act (“OMA”)<sup>5</sup> and the FOIA regarding requests made for copies of minutes of BMCC boards, commissions, authorities, councils:

### 1. FOIA Response Time (MCL 15.233)

If a request for copies of a public body minutes is made under the FOIA, unless otherwise agreed to in writing, a written response must be made within 5 business days, with the option to take an additional 10 business days.

Section 5 of the FOIA requires that, unless otherwise agreed to in writing, a public body must respond to a written request for a public record within 5 business days after receiving the request and issue a written response that either:

- Grants the request
- Denies the request
- Partially grants and partially denies the request
- Extends the response period an additional 10 business days with a notice that specifies the reason(s) for the extension and date by which the public body does one of the above.

### 2. OMA Response Time (MCL 15.269)

If a request is made under the OMA for copies of a nonexempt public body’s **draft minutes**, the draft minutes must be made available not more than 8 business days after the meeting. **Approved minutes** must be made available not more than 5 business days after their approval by the public body.

Section 9 of the OMA provides that:

- A public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. The public body shall make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. The public body shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the corrections.
- Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public

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<sup>5</sup> Only the Board of Regents, solely when acting in its capacity as a public school academy authorizing body, is subject to the Open Meetings Act.

notices pursuant to MCL 15.264. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

- A public body shall make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer. The public body shall make approved minutes available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.
- A public body shall not include in or with its minutes any personally identifiable information that, if released, would prevent the public body from complying with section 444 of subpart 4 of part C of the general education provisions act, 20 US 1232g, commonly referred to as the family educational rights and privacy act of 1974 (“FERPA”).

### **3. Attorney General Opinion No. 7244 (March 3, 2010)**

On March 3, 2010, the State Attorney General issued Opinion No. 7244 regarding public access to minutes of a public body’s open meetings which opined the following:

“After receiving a request, a public body must make open meeting minutes available for inspection within the time periods specified in the Open Meetings Act, MCL 15.261 et seq. The public body may, under rules established and recorded by the public body, request advance notice of and require supervision of any inspection of the public body’s record copy of open meeting minutes to protect the record from “loss, mutilation, or destruction.” MCL 15.233(3). Generally, neither advance notice nor supervision should be required for the inspection of copies of open meeting minutes.”

Further, Opinion 7244 provided guidance as related to response timelines and record protections under the OMA and to the FOIA, including the following excerpts:

- Section 9(1) of the OMA, MCL 15.269(1), requires that corrected minutes be “available at or before the next subsequent meeting after correction.” Thus, the public has a right to inspect minutes of open meetings. On the other hand, closed session minutes shall only be disclosed to the public if required in a civil action filed under sections 10, 11, or 13 of the OMA.
- The OMA contains no provisions requiring an appointment to inspect minutes or restricting the inspection to copies of minutes nor does it address how a public body is to accommodate a request to inspect minutes or copies of minutes. In applying the provisions of a statute, consideration must be given to the statute’s purpose or intent, and then apply a reasonable construction that best accomplishes the purpose or intent.
- Minutes of open meetings also are subject to disclosure as public records under the Freedom of Information Act (FOIA), MCL 15.231 et seq. *Hubka v Pennfield Twp*, 197 Mich App 117, 123; 494 NW2d 800 (1992). Because the OMA and FOIA share a similar purpose—to make governmental

functions transparent—the FOIA disclosure provisions provide guidance in answering these questions.

- In complying with its obligations under the OMA to provide the public access to meeting minutes, the public body must also discharge its other public functions and duties. To that end, a rule of reasonableness is applicable in providing a public body an adequate opportunity to meet the request to inspect minutes. A public body must make at least a copy of its minutes available for inspection as provided in MCL 15.269(2) of OMA. A public body must avoid undue delay in meeting a request, and is obligated to comply with the response periods of the FOIA, and the specific provisions of the OMA, such as section 9(3) for proposed and approved minutes. But to protect the integrity of its official records, and to allow sufficient time to retrieve such records, if necessary, it may be reasonable for a public body to require advance notice of, and supervision of, the inspection of a record copy of meeting minutes.

The minutes of a closed city council meeting, held in violation of the Open Meetings Act, are public records and are available upon request under the FOIA.

## **E. FOIA Processing Costs**

### **1. General Information**

BMCC does not have the authority, nor is required, to extend credit to FOIA requesters. Fees/costs related to processing FOIA requests estimated to exceed \$25.00, therefore, should be collected **prior** to conducting an intensive record search, record examination, separation of exempt from nonexempt material, etc.

Section 4(4) of the FOIA provides that BMCC, in particular instances, may charge fees/costs of processing FOIA requests when the failure to charge for labor incurred for search, examination, review, the deletion and separation of exempt from nonexempt information, duplication, mailing, and related costs that would result in unreasonably high costs to the BMCC. Some factors related to unreasonably high costs include, but are not limited to, the following:

- Amount of labor/time needed to locate and search for requested records;
- The volume of files that have to be reviewed in order to locate the requested records;
- Amount of labor time needed to examine records to separate/redact exempt from nonexempt material;
- Amount of labor/time and costs to comply with requests for audio taped files, CDs, photos, etc.;
- Amount of paper records that need to be copied;
- Amount of postage required to mail requested records;
- Amount of internal supplies, electricity, copy equipment usage, and other internal costs not budgeted for FOIA related issues.

Further, the above may require employees to divert substantial time from their regular funding source assignments to process FOIA requests, causing BMCC to accrue the costs of affected employee(s) wages and benefits to process FOIA requests that may not be covered by a particular fund source.

Section 4 of the FOIA also provides that BMCC may charge for actual costs for public records searches, copying for inspection, or providing copies. The fees allowable include costs for actual mailing; actual cost for copying or publications; and certain costs associated with labor related to the cost of search, examination, review, and deletion and separation of exempt from non-exempt information. As discussed below, BMCC also may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used to account for benefits in the detailed itemization form. If BMCC provides the requestor with a late response that is either willful or intentional OR the written request contained clear references to FOIA within the first 250 words of the request (or on an envelope/email subject line or fax cover), BMCC must reduce the charge for labor costs by 5% for each day the public body exceeds the time permitted for a response. The detailed itemization must reflect any charge reductions.

## **2. Good Faith Deposits**

For costs that are estimated to exceed \$50.00, Section 4(2) of the FOIA allows BMCC to require, in its initial response or a subsequent response, a “good faith” deposit, not to exceed one-half (1/2) of the total of estimated fee. If a requester is notified that a deposit is required, BMCC should not proceed with further processing (making copies, redacting, etc.) until the requester pays the deposit. The request for a deposit must also include a detailed itemization as required by Section 4 of the FOIA.

If requesting a good faith deposit, BMCC’s response must also contain a best efforts estimate by it regarding the time frame it will take BMCC to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon BMCC, but BMCC will provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state’s public policy under the FOIA and the nature of the request in the particular instance. If BMCC does not respond in a timely manner as described in Section II.D., it is not relieved from its obligation to provide proper fee calculations and time frame estimates in any tardy responses. Providing an estimated time frame does not relieve a public body from any of the other requirements of the FOIA.

## **3. FOIA Request Logs**

The FOIA Coordinator should maintain an updated log, containing a record of all FOIA requests, to include: the date a request is received, the name of the requestor, and the general subject matter (case name, licensee name, etc.) of the request, the date of the response, and any extension dates.

Also, the FOIA Coordinator, per Section 3(2) of the FOIA, must maintain records of all FOIA requests and copies of responses to each request for a minimum of one calendar year.

#### 4. Unreasonably High Costs Threshold

BMCC's policy, per Section 4(3) of the FOIA, regarding the determination of "unreasonably high costs" to process certain FOIA requests is that all BMCC units shall charge a requester for any costs exceeding \$25.00 of labor costs to search for records; to examine/review records; to separate/redact exempt material, and mail records. As the FOIA requires that fees/rates not be dependent upon the identity of the requester, this policy provides uniform and consistent guidelines regarding BMCC costs to process FOIA requests.

#### 5. Accessible Format and Costs

The requestor may stipulate that the public records be provided on non-paper physical media, electronically mailed, or otherwise electronically provided to him or her in lieu of paper copies. BMCC will provide the responsive records and/or information, if any, on the requested media so long as it has the technological capability necessary to provide records on the particular non-paper physical media stipulated in the particular instance.

As regards to FOIA requests from disabled persons that specifically request that the public records be sent to them in "an accessible format," BMCC may be required to absorb certain charges to comply with requests in accordance with the ADA Title III Technical Assistance Manual, which indicates: "III-4.1400 Surcharges. Although compliance may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."

#### 6. Cost Estimate and Charge Computation

Except as otherwise provided in the FOIA, if BMCC estimates or charges a fee in accordance with the FOIA, the total fee shall not exceed the sum of the following components:

- (a) **Labor Costs Associated with Searching/Locating/Examining Records:** BMCC may charge that portion of labor costs directly associated with the necessary searching for, locating, and examining of public records in conjunction with receiving and fulfilling a granted written request. The public body shall not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor. Such labor costs must be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.
- (b) **Labor Costs Associated with Separating and Deleting Exempt Information:** BMCC may charge that portion of labor costs, including necessary review, if any, directly associated with the separating and deleting of exempt information from nonexempt information as provided in MCL 15.244. For services performed by an employee of BMCC, BMCC shall not charge more than the hourly wage of its lowest-paid employee capable of separating and

deleting exempt information from nonexempt information in the particular instance as provided in MCL 15.244, regardless of whether that person is available or who actually performs the labor. If BMCC does not employ a person capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in MCL 15.244 as determined by the FOIA Coordinator on a case-by-case basis, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs when calculating charges under this subdivision if it clearly notes the name of the contracted person or firm on the detailed itemization. Total labor costs calculated for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate determined under section 4 of the workforce opportunity wage act, 2014 PA 138, MCL 408.411 to 408.424. Such labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. BMCC shall not charge for labor directly associated with redaction under MCL 15.244 if it knows or has reason to know that it previously redacted the public record in question and the redacted version is still in the BMCC's possession.

BMCC cannot charge for such labor if any public record requested is available on BMCC's website. If the FOIA Coordinator knows or has reason to know that all or a portion of the requested information is available on its website, BMCC shall notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable in the specific instance, shall include a specific webpage address where the requested information is available.

On the detailed itemization described below, BMCC shall separate the requested public records that are available on its website from those that are not available on the website and shall inform the requestor of the additional charge to receive copies of the public records that are available on its website. If BMCC has included the website address for a record in its written response to the requestor and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or other form, BMCC shall provide the public records in the specified format but may use a fringe benefit multiplier greater than the 50% limitation under FOIA, not to exceed the actual costs of providing the information in the specified format.

- (c) **Actual Cost for Non-Paper Physical Media:** For public records provided to the requestor on non-paper physical media, BMCC may charge the actual and most reasonably economical cost of the



computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that the public records be provided on non-paper physical media, electronically mailed, or otherwise electronically provided to him or her in lieu of paper copies. This subdivision does not apply if BMCC lacks the technological capability necessary to provide records on the particular non-paper physical media stipulated in the particular instance.

- (d) **Actual Cost for Duplication or Publication:** For paper copies of public records provided to the requestor, BMCC may charge the actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper and shall be itemized and noted in a manner that expresses both the cost per sheet and the number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. BMCC shall utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.
- (e) **Labor Costs Associated with Duplication or Publication:** BMCC may charge the cost of labor directly associated with duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on non-paper physical media or through the internet or other electronic means as stipulated by the requestor. BMCC cannot charge more than the hourly wage of its lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor. Such labor costs may be estimated and charged in time increments at BMCC's discretion; however, all partial time increments shall be rounded down.
- (f) **Actual Cost of Mailing:** BMCC may charge the actual cost of mailing, if any, for sending the public records in a reasonably economical and justifiable manner. BMCC cannot charge more for expedited shipping or insurance unless specifically stipulated by the requestor, but may otherwise charge for the least expensive form of postal delivery confirmation when mailing public records.

The FOIA requires BMCC, when calculating labor costs described above, to itemize the fee components in a manner that expresses both the hourly wage and the number of hours charged. BMCC may also add up to 50% of the applicable labor charge amount to cover or partially cover the cost of fringe benefits if BMCC clearly notes the percentage multiplier used to account for benefits in the detailed itemization described in section 4 of the FOIA. Subject to the 50% limitation, BMCC cannot charge more than the actual cost of fringe benefits, and overtime wages cannot be used in calculating the cost of fringe benefits. Overtime wages cannot be included in



the calculation of labor costs unless overtime is specifically stipulated to by the requestor and clearly noted on the detailed itemization.

## **7. Waiver of FOIA Costs Guidelines**

Section 4(2) of the FOIA provides that individuals who submit an affidavit or other proof showing that they are indigent and receiving public assistance, or, if not receiving public assistance, show an inability to pay costs because of indigency shall not be charged for the first \$20.00 of the fee for each request. Determination of eligibility for fee waivers or fee reductions shall be made by BMCC, but must be based on a written determination that such a waiver or fee reduction is in the public interest. An individual is ineligible for this fee reduction if any of the following apply: (i) the individual has previously received discounted copies of public records from BMCC twice during that calendar year; or (ii) the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. BMCC may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

A nonprofit organization formally designated by the State of Michigan to carry out activities under subtitle C of the 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, shall also not be charged for the first \$20.00 of the fee for each request if the request meets all of the following requirements. First, the request must be made directly on behalf of the organization or its clients. Second, the request must be 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. And third, the request is accompanied by documentation of its designation by the state, if requested by BMCC.

Section 4(2) of the FOIA also provides that a public body, at its discretion, may waive or reduce the costs for processing a FOIA request if the public body determines that the requested records/information is in the general public interest. Based on the BMCC's uniform cost threshold of charging for estimated costs at or above \$25.00, the following guidelines are applicable regarding waivers or charge reductions:

- (a) Exceptions to the \$25.00 charge assessment or fee reduction include:
  - Indigent Requesters. Charges above \$25.00 shall be reduced by \$20.00 for requesters/individuals submitting proof of receiving public assistance or determined unable to pay the cost due to indigency, unemployment, etc.
  - Regular/Statutory Fee Charges. Agencies that have regulatory/statutory established fee charges for certain facets of providing mailings/publications are to maintain current practices.
  - Requests from recognized local, state, federal and foreign government agencies and bodies shall be responded to

without charge, except in unusual circumstances, as determined by the FOIA Coordinator.

- (b) Non-Exceptions. Generally, on a case-by-case basis, costs are not waived or reduced for:
- Requesters from private sector and non-profit organizations and media sources that claim that records/information requested can be considered as benefitting the public.
  - Requesters who indicate that they are requesting records for graduate or other type academic related reasons.
  - Requesters that submit subpoenas that require the same labor efforts/costs to process the subpoenaed records/information.
  - Requests from elected officials on behalf of constituents.
  - Fee schedules established by statute (e.g. Business Corporation Act)

## 8. Cost Justification Examples and Detailed Itemization

Each cost determination and the reason(s) justifying the costs must be based on a case-by-case basis depending on the particular FOIA request; and must specifically identify the nature of the costs. For example, a response notice that includes a FOIA processing charge at or above \$25.00 could include statements like:

*“Your request is granted as to existing, nonexempt records in BMCC’s possession falling within the scope of the request. However, BMCC must retrieve, review, and examine files contained in various sources, segregate nonexempt from exempt material (if any), and review, examine and segregate any other types of records described in the request.*

*The failure to charge for labor costs in this particular instance would result in unreasonably high costs to BMCC because of the number of files that must be searched for, reviewed to separate/redact exempt from nonexempt material, and the amount of material that must be produced. Therefore, pursuant to MCL 15.234 of the FOIA, BMCC has calculated the estimated allowable costs to process this request as illustrated in the attached detailed itemization form.”*

(Or)

*“BMCC must retrieve and examine all of its files which contained 50 banker boxes and 200 drawer lateral file cabinets; and segregate any exempt from nonexempt material, if any, and retrieve, examine, and segregate the other types of records described in the request. The failure to charge for labor costs, in this particular instance, would result in unreasonably high costs to BMCC because of the number of files that must be searched for; reviewed to separate/redact exempt from nonexempt material; and the amount of that must be produced. Therefore, pursuant to MCL 15.234 of the FOIA, BMCC has calculated the estimated allowable costs to process this request as illustrated in the attached detailed itemization form.”*

The FOIA requires BMCC to use a standard form, or adopt a form created by the Department of Technology, Management, and Budget, for detailed itemization of any fee amount in its responses to written requests under the FOIA. The detailed itemization must clearly list and explain the allowable charges for each of the fee components listed under Section II.E. above that compose the total fee used for estimating or charging purposes. BMCC hereby adopts and incorporates by reference the form created by the Department of Technology, Management, and Budget, which will be used to provide requesters with a detailed itemization of any amount associated with the requestor's request in accordance with FOIA. An itemization form must accompany BMCC's response to a FOIA request.

## **9. Recommended Charges/Instructions**

The following may be used in logging invoices issued and charges applicable to requests for records/information provided under the Act costing \$25.00 or more to process.

**Invoices:** A FOIA log should include an updated tally of all FOIA charges per FOIA requester. An invoice may be generated and forwarded to a FOIA requester at the time that the charges meet or exceed \$25.00. Invoices shall be prepared on a form developed by the Department, or generally used by the affected agency.

**Delinquent Payments:** The FOIA Coordinator should develop and maintain a list of all FOIA requesters who are currently delinquent on FOIA invoice payments. Once developed, the FOIA Coordinator shall reference this list prior to responding to a FOIA request from the same requester for the same information. Requests for different information or materials shall continue to be filled, even though a requester's delinquent account is not current (OAG, 1998, No. 6977). All new responses, however, shall notify the requester of the delinquent payment. Further, compliance with a new FOIA request, when a delinquent payment exists, shall not be considered a waiver by the Department of its right to collect fees for the delinquent payment through all means permitted under the law.

After BMCC has granted and fulfilled a written request from an individual under the FOIA, if BMCC has not been paid in full the total amount for the copies of public records that BMCC made available to the individual as a result of that written request, BMCC may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent written request from that individual if all of the following apply:

- (a) The final fee for the prior written request was not more than 105% of the estimated fee.
- (b) The public records made available contained the information being sought in the prior written request and are still in BMCC's possession.
- (c) The public records were made available to the individual, subject to payment, within the time frame estimate described under the FOIA.
- (d) Ninety days have passed since BMCC notified the individual in writing that the public records were available for pickup or mailing.

- (e) The individual is unable to show proof of prior payment to BMCC.
- (f) BMCC calculates a detailed itemization, as required under the FOIA, that is the basis for the current written request's increased estimated fee deposit.

BMCC, however, cannot require an increased estimated fee deposit from an individual as described above if any of the following apply: (1) the individual is able to show proof of prior payment in full to the public body; (2) BMCC is subsequently paid in full for the applicable prior written request; or (3) three hundred sixty-five days have passed since the individual made the written request for which full payment was not remitted to BMCC.

**Costs Greater Than \$50.00:** When costs are expected to exceed fifty dollars, an initial good faith deposit of 50% or the full amount of the estimated costs shall be required and received prior to commencement of processing the FOIA request. The balance of any deposit payment shall be collected prior to release or delivery of record copies or other materials.

**Request for Onsite Inspection of Records:** A request to personally inspect and/or review a public record, or a part thereof, shall be promptly responded to by the FOIA Coordinator or his/her designee. See Section II.F., Inspection and Protection of Records, of this manual for further guidance.

**Online Records:** If the FOIA Coordinator knows or has reason to know that all or a portion of the requested information is available on its website, BMCC shall notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable in the specific instance, shall include a specific webpage address where the requested information is available. On the detailed itemization, BMCC shall separate the requested public records that are available on its website from those that are not available on the website and shall inform the requestor of the additional charge to receive copies of the public records that are available on its website. If BMCC has included the website address for a record in its written response to the requestor and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or other form, BMCC shall provide the public records in the specified format but may use a fringe benefit multiplier greater than the 50% limitation, not to exceed the actual costs of providing the information in the specified format.

## **F. Inspection and Protection of Records**

MCL 15.233, Section 3(3) of the state's Freedom of Information Act (FOIA) provides that:

“A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.”<sup>4</sup>

The following provides guidelines regarding the onsite inspection, examination, and protection of BMCC's original public records.

### **1. Inspection of Records and Appointments**

Any person or persons making a request (by letter, facsimile, or electronic mail), via the FOIA, to inspect BMCC records must make an appointment with the FOIA Coordinator (or assignee) during BMCC's regular business hours. After the issuance of written notice in response to a request to inspect records, appointments should usually occur no less than ten business days after the appointment request to allow the unit(s) to make appropriate arrangements to:

- Find and gather the requested information, if available;
- Provide reasonable, secure facilities for inspection and examination;
- Provide adequate protection of original public records; and
- Coordinate regular functions while the inspection occurs.

### **2. Chargeable Fees/Costs**

The FOIA provides that a public body may charge the costs for providing copies and protecting public records. Except as may be provided in another Act, the total fee shall not exceed the sum of the following components:

- Labor costs directly associated with searching for, locating, and examining public records in response to written request
- Labor costs, including necessary review, directly associated with separating and deleting exempt information from nonexempt information
- For public records provided in non-physical paper media, the actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media
- For paper copies, the actual total incremental cost of necessary duplication, not including labor
- The cost of labor directly associated with duplication or publication (including making paper or digital copies or transferring digital records).
- Actual Mailing Cost

See Section II.E. for further information on permissible costs, good faith deposits, and waivers.

### **3. Facilities**

BMCC shall prepare/provide an appropriate space at the agreed site for the requester to inspect the requested records.

### **4. Record Preparation**

BMCC shall:

- Gather from all BMCC sources the requested records to first review to determine whether there is exempt information that needs to be segregated and/or redacted prior to inspection.
- Take the appropriately reviewed records to the designated secure location where the requester will be allowed to inspect them.

### **5. Inspection of Original Records**

A staff member must be present at all time during the inspection of BMCC records if any original records are involved. Requester are allowed to review/identify the records desired to be copied by placing a yellow “post-it” sticker or paper clip on each page. Note: Wait until all pages are identified prior to making any copies; and dependent upon the number of copies to be made, advise the requester that the copies may have to be mailed the next business day.

In order that records/documents remain together as filed, do not allow the requester to un-staple/un-clip records without supervision. The requester is not allowed to remove documents from files or from the premises unless those documents are copied specifically for the requester by the FOIA Coordinator or BMCC’s General Counsel.

A public body is only required to make the records available for inspection and/or copying. It is not required to explain or interpret the contents of the records. Thusly, the staff assigned to secure the records should not engage in discussions with the requester regarding the content or interpretation of the records being inspected. If the requester has questions, tell him/her to submit the questions in writing back to the FOIA Coordinator. Finally, a public body is not required to create, summarize, or make a compilation of voluminous documents.

### **G. Appeals**

If BMCC makes a final determination to deny all or a portion of a request, the requesting person may do one of the following at his or her option:

(1) Submit to the President of Bay Mills Community College (the “College President”) a written appeal at 12217 W Lakeshore Dr, Brimley, MI 49715 that specifically states the word “appeal” and identifies the reason or reasons for reversal of the denial.

(2) Seek judicial review of the denial under section 10 of the FOIA.

**1. Standardized Denial/Appeal Response for a Denial**

BMCC’s Denial/Appeal notice language has been standardized to read as follows:

“Under the FOIA (MCL 15.240), (1) you may submit a written appeal regarding the denial of any portion of your FOIA request to President of Bay Mills Community College, 12217 W Lakeshore Dr, Brimley, MI 49715. Your appeal must include the word “appeal” and state the reason or reasons for reversal of the denial(s); or (2) you may also seek judicial review in circuit court within 180 days after BMCC’s notice of final determination. If you prevail in such action, the court shall award reasonable attorney fees, costs, and disbursements. If the court finds BMCC’s action(s) to be arbitrary and capricious, the court shall, in addition to any actual or compensatory damages, award punitive damages in the amount of \$1000.00.”

In addition to the information contained above, a written notice denying a request for a public record, in whole or in part, must also contain (a) an explanation of the basis under the FOIA or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request; (b) a certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request; and (c) a description of a public record or information on a public record that is separated or deleted pursuant to section 14 of the FOIA, if a separation or deletion is made. The FOIA Coordinator, or his or her designee, must sign the written notice of denial.

**2. Appeal Process for a Denial**

If a requestor opts to appeal a denial by submitting an appeal to the College President, then the FOIA Coordinator shall immediately, upon receipt, refer all written FOIA appeals to the College President. The College President shall then review any materials submitted by the appellant, any written comments received from the FOIA Coordinator or his or her designee(s), and any other information that the College President deems necessary.

The College President has ten business days, absent compelling reasons for an extension of time, to take any of the following actions in response to the filing of an appeal of a FOIA request denial:

- Reverse the disclosure denial;
- Issue a written notice to the requesting person upholding the disclosure denial;
- Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.



### 3. Appeal Process for an Excessive Fee

If BMCC requires a fee that a requestor believes to exceed the amount permitted under the FOIA and this manual, then the requesting person may either (1) submit to the College President a written appeal for a fee reduction that specifically states the word “appeal” and identifies how the required fee exceeds the amount permitted under the FOIA or this manual or (2) seek judicial review as provided in Section 10a of the FOIA if the College President does not respond to a written appeal as required under the FOIA or if the College President issues a determination to the written appeal as discussed below.

If the requesting person submits a written appeal to the College President, then the College President has ten business days after receiving a written appeal to take any of the following action:

- Waive the fee;
- Reduce the fee and issue a written determination to the requesting person indicating the specific basis under the FOIA that supports the remaining fee, including a certification from the President that the statements in the determination are accurate and that the reduced fee amount complies with the FOIA and this manual;
- Uphold the fee and issue a written determination to the requesting person indicating the specific basis under the FOIA that supports the required fee. The determination shall include a certification from the President that the statements in the determination are accurate and that the fee amount complies with the FOIA and this manual.
- Issue a notice extending for not more than 10 business days the period during which the College President must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The College President shall not issue more than one notice of extension for a particular written appeal.

### H. Processing Requests for Personnel Records/Information

The following is intended to provide guidance regarding the release of personnel related information requested under the FOIA and the Bullard-Plawecki Employees Right-to-Know Act, 1978 PA 397.

Please note that any requests for personnel related information on employees should be **directed to BMCC’s Office of General Counsel. No employee information in BMCC’s possession should be provided or released to anyone without first contacting the Office of General Counsel.**

#### 1. Non-Releasable Information

BMCC may exempt from disclosure certain personnel related information/records unless:

- Pursuant to a signed and dated court; or



- After the informed written consent has been obtained from the person whom the requested information/records are about.
- When a valid subpoena (signed by lawyer or judge) is received by a BMCC employee for access/copying of public records, unless otherwise arranged, it should immediately be sent/faxed to the Office of General Counsel for processing.

Generally, without the informed written consent of the person involved, DO NOT RELEASE:

- Any information of a personal nature that would constitute a clearly unwarranted invasion of an individual's privacy. MCL 15.243(1)(a).
- Any records/information specifically described and exempted from disclosure by another statute or regulation. MCL 15.243(1)(d).
- Any information/records subject to the physician-patient privilege, psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule, e.g. attorney work products. MCL 15.243(1)(h).
- Test or interview questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure outweighs the public interest in nondisclosure. MCL 15.243(1)(k).
- Medical, counseling, or psychological facts or evaluations concerning an individual, if the individual's identify would be revealed by a disclosure of those facts or evaluation. MCL 15.243(1)(l).
- Information or records that would disclose the social security number of any individual. MCL 15.243(1)(w).
- Certain investigative records compiled for enforcement purposes, such as documents gathered regarding a sexual harassment investigation or illegal discrimination. MCL 15.243(1)(b).
- Any school transcripts and related educational records covered under the FERPA. MCL 15.243(2).

Note: Indicate appropriate statutory provision as reasons for denial in response letter.

## **2. Examples of Releasable Information**

- Relevant correspondence/memos.
- Successful candidate's resume with personal info redacted.

### **I. Handling FOIA Requests from Media and Other Particular Sources**

BMCC's Office of General Counsel should be sent copies of FOIA requests regarding pending or threatened litigation or received from the following sources:

- Media (newspaper, TV, etc.)

- Union or union representative
- Political organization
- Hot/sensitive issue in the employees' department
- Form letter
- Request pertains to memos from the President's Office

This is necessary so that the General Counsel's office may be kept timely informed and/or aware of possible sensitive issues regarding BMCC activities. The procedure to follow is:

- A. Written Requests — Copies should be immediately sent to the Office of General Counsel.
- B. Verbal Requests — The media requester is to be informed that all requests for copies of public records must be in writing; and/or refer the media requester to the Office of General Counsel. If the employee believes that the verbally requested material is available on its website then the employee, where practicable and to the best of the employee's knowledge, shall inform the requestor about the public body's pertinent website address. The request should be noted for posterity and forwarded to the Office of General Counsel.

#### **J. Processing Subpoenas**

If a BMCC employee receives a subpoena, the subpoena should be immediately given to the Office of General Counsel who will work with the FOIA Coordinator to respond. A subpoena is a legal document requiring a person to appear in court to give testimony or to produce specified records. A subpoena may also require a person to deliver specified records to a court or to an attorney. A subpoena should have a witness fee check attached to be valid. A subpoena has the same impact as an order from the court.