



Locations

Toledo Office

One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office

100 E. Broad Street Ste. 600
Columbus, Ohio 43215
Telephone: 614-280-1770
Fax: 614-280-1777

Findlay Office

725 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office

28175 Haggerty Road
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

Web Site

www.eastmansmith.com

Public Records: The “Frank Communications Exception” in Michigan

by Amy J. Borman

The Freedom of Information Act (FOIA) requires public entities to disclose information to requestors. Its purpose is to keep the workings of governments transparent. However, there are exceptions to FOIA, and in Michigan one of these is the “frank communications exception.” This exemption is in place to encourage employees to speak freely concerning matters, without the fear that their opinions will become public.

The Supreme Court of Michigan ruled on the use of the frank communications exemption as a means for a public body to refuse to release a document requested under FOIA. In *Herald Company v. Eastern Michigan University Board of Regents*, the plaintiff requested a letter written by Eastern Michigan University’s Vice President of Finance, Patrick Doyle. The letter reportedly contained Doyle’s opinions concerning the actions of the University’s president in the construction of the president’s residence.

In this case, the need for meaningful internal discussion outweighed the public’s right to know. Practically, the court ordered the redaction of the exempt material, while preserving the public nature of the non-exempt material.

The Court used a balancing test which weighs the need for public disclosure against the need for a frank communications exemption. The Court ruled that if a trial court finds that a document meets the three requirements below, then it is eligible for the frank communications exception.

“(1) [The document] is a communication or note of an advisory nature made within a public body or between public bodies.

(2) [It] covers other than purely factual material.

(3) [It] is preliminary to a final agency determination of policy or action.”

In Michigan, honest and candid feedback in the governmental workplace is protected from public disclosure if it precedes the making of policy or the taking of action by the public body.

Other cases in Michigan have rested on the use of the balancing test to support frank communications (*Bukowski v. City of Detroit* and *Favors v. Dept. of Corrections*). Ohio has no law exempting internal communications in this manner. Perhaps honesty and sound policy would be enhanced with such an exception.



Ms. Borman can be contacted at our Toledo office should you want additional information on this ruling.

Disclaimer

The articles in this newsletter have been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.