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March 16, 2022

VIA HAND DELIVERY

Representative Steven Johnson
Committee Chair
Michigan House of Representatives
PO Box 30014
Lansing, MI 48909

Re: Freedom of Information/Open Meetings Acts

Dear Representative Johnson:

Our client, the Detroit Zoological Society, asked that our firm summarize the goals and history of these two acts in Michigan and what guidance they provide. These two laws, often referred to as Michigan's "sunshine laws," are designed to make government processes and information more open to the public. As you are probably aware, both laws were written in the post-Watergate, post-Vietnam war era.

Freedom of Information Act

The FOI Act, MCL 15.231 et seq., was enacted in 1977 and provides explicitly that

"It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information *regarding the affairs of government* and the official acts of *those who represent them as public officials and public employees*, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."

MCL 15.231(2) (emphasis added). Although this law, enacted in 1977 was Michigan's first official freedom of information legislation, State court rulings going as far back as 1889 express the idea that the records of government belong to the public and not to the government officials who are their custodians. The ruling in *Burton v. Tuite*, 78 Mich 363 (1989) allowed an abstract maker to review property tax and sale records of the City treasurer, stating in part, "I do not think that any common law ever obtained in this free government that would deny to the people thereof right of free access to, and public inspection of, public records." See also, *Nowack v Auditor General*, 243 Mich 200 (1928) and *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203 (1968).

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The House Legislative Analysis Section's evaluation of the bill (HB 6085) which became the FOI Act, specifically discussed that intended to clarify and harmonize the State's administrative procedures law and general statutes relating to local government records. Specifically, the evaluation stated:

"It is contended that in the interest of public participation in the governmental process, the sections of the current Administrative Procedures Act dealing with public records should be repealed and replaced by a new comprehensive 'freedom of information' act which would specify, statutorily, the public's right of access of all public records, *regardless of the level of government or bureaucracy* within the state which is involved."

(Emphasis added). It contended that the legislation should be adopted because, in part,

"Citizens have a right to *their government's* information. Without easy access to public records, citizens are unable to participate effectively *in government*, evaluate the effectiveness of its policies, and to hold *public officials* accountable for their decisions. This bill provides for effective and reasonable access public records for all citizens that allows the public to obtain as many records as are consistent with both protection of personal privacy and effective operation of agencies *at all levels of government.*"

(Emphasis added).

In this case, the Zoo employees are not elected officials and do not represent the public as public officials or public employees. Information regarding Zoo operations does not provide any information to the public to enable it more fully participate in a public process, as there is no public democratic process relating to the Zoo's operations.

Open Meetings Act

The Michigan Open Meetings Act, MCL 15.261 et seq., was first enacted in 1976. However, Michigan has a long history of governmental transparency. Michigan's first constitution, written in 1835, when speaking of the "Legislative Department" stated that "the doors of each house shall be open." This language is still found in the Michigan Constitution today. Mich Const Article IV Sec 20. This spirit of openness of government permeates the Open Meetings Act. The OMA applies to meetings of public bodies and public bodies are defined as:

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“any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 40 of the home rule city act, 1909 PA 279, MCL 117.40.”

MCL 15.262(a). The legislative history of SB 920, which became the OMA, includes a House Legislative Analysis Section evaluation which stated that this law was to clarify the prior 1968 Public Board Meetings Act which applied to the governing bodies of political subdivisions, board of education, governing bodies of state supported colleges and universities and “the governing bodies of any state or municipal authority or department created by law which has as its purpose the performance of an essential governmental function.” The analysis made clear that

“In a free, democratic society, the people endow their *elected officials* with the responsibility of administering public affairs for the people and in the people's interest. If *governmental affairs* are conducted in secret, thus denying the people the right to *oversee the actions of governmental officials and to participate in the decision-making process*, then government becomes a self-serving entity which operates according to its own best interest, not the people's. *Government authority is a power which is held in trust* and the people have the right to ensure, through access to the processes of government, that this power is not abused.”

(Emphasis added).

The Detroit Zoological Society which operates the Detroit Zoo is a domestic nonprofit corporation originally incorporated by four private individuals and not formed by any city. The Zoological Society is not empowered by the State Constitution or law to do anything and is not a lessee of a governmental body. As used in the OMA, the term “public body” connotes a collective entity and does not include an individual government official. *Herald Co v Bay City*, 463 Mich 111, 129-133 (2000); *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572, 579 (2005). OAG, 1977-1978, No 5183A, p 97 (April 18, 1977)

Nearly all of the court decisions and Attorney General opinions addressing the OMA have interpreted it liberally in favor of openness. The OMA does not apply to private, nonprofit corporations. See, e.g., Attorney General Opinion 6352, April 8, 1986. In that opinion, the Attorney General concluded that the representative council of the Michigan High School Athletic

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Association and its executive committee

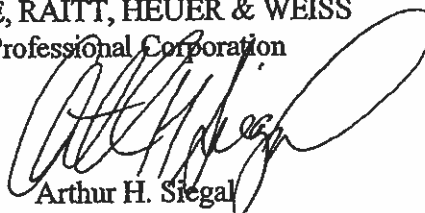
“are not state or local legislative or governing bodies. They are not empowered by the state constitution, statute, charter, ordinance, resolution or rule to exercise authority. The representative council, rather, is the board of directors of a private, nonprofit corporation which has as its members both public and private schools. *The Open Meetings Act does not purport to apply to private, nonprofit corporations.*”

Id. (emphasis added).

In short, it has been said that for government to be “of the people, by the people, and for the people,” it must be open to the people. The concept behind both of these laws is that the public has a right to see, and read what is going on with their government so that they can participate in the electoral process and the process of decision-making as included in the operations of government bodies. This is as it should be. However, these “sunshine” laws were not intended to abrogate the privacy rights of private entities, whether for profit or non-profit as they are not part of the process of government – their officers are not publicly elected and they are not public employees under the direction and control of such elected officials.

Very truly yours,

JAFFE, RAITT, HEUER & WEISS
Professional Corporation



Arthur H. Siegal

AHS/sb

cc: Ms. Hayley Murphy
Mr. Kirk Profit
John Decker, Esq.



The DIA consistently demonstrates a high level of financial responsibility and transparency. This is shown by the following:

- All financial statements, Form 990, millage reports and community engagement reports are posted to the DIA's website.
- The DIA has an agreement for services and specified programs with Wayne, Oakland and Macomb counties that is reviewed annually by Plante Moran. Reports are published on DIA's website.
- Arts Institute Authority members and county leaders are invited to two Board of Directors meetings each year.
- Each county Art Institute Authority appoints two voting members to serve on the DIA's Board of Directors.
- Board of Directors meeting minutes are posted on the DIA's website.
- The DIA operates with a balanced budget, has no debt and has a fully funded pension plan.
- The DIA has achieved "clean" unqualified financial audits from an independent accountant for its annual financial statements and employee benefit plans.
- The DIA's investment management performance is top quartile in the endowment and foundation universe.
- The DIA invests in its building and grounds so there is no deferred maintenance.
- Charity Navigator has awarded the DIA an exceptional/four-star rating, including a 93/100 for Accountability and Transparency.
- The DIA reports to each county's Art Institute Authority three times per year. All Art Institute Authority meetings are subject to the Open Meeting Acts, with agendas, minutes and schedules posted online:

[Home | Wayne County Art Institute Authority](#)

[Boards and Commissions - Macomb Art Institute Authority | Macomb County \(macombgov.org\)](#)

[Regional Authorities | Committees & Authorities \(oakgov.com\)](#)

- The DIA reports up to three times per year to the Board of Commissioners of each county. These meetings are also subject to the Open Meetings Act.
- The DIA presents annually to the Detroit City Council at their spring budget meeting.

Detroit Zoological Society

Board Appointees

- 13 board members are government appointees
 - 5 commissioners appointed by City of Detroit mayor
 - 2 members appointed by City Council
 - 6 appointed by County Authorities (2 each from Wayne, Oakland, and Macomb)

County Zoological Authorities

- Public meetings are held quarterly
- Meeting minutes are available to the public, posted on county websites
- DZS has contracts with each county authority, with obligations around reporting and board seats
 - DZS is required to submit audited financial statements to the County Zoological Authorities annually, as well as other information as (reasonably) requested by each Authority.
 - As noted above, 2 board seats are appointed by each County Authority (6 in total)

City of Detroit

- The DZS has an operating agreement with the City of Detroit
 - DZS is required to provide quarterly internal financial statements and annual audited financial statements
 - City of Detroit Zoo Commission monitors all financial reporting requirements and may (reasonably) request additional information concerning the operations and management of the Institute (Zoo).
 - Zoo Commission is entitled to annual operational audits, annual facilities inspections, and evaluation of services provided by the DZS.
 - As noted above, there are 5 commissioners on the DZS Board of Directors (as appointed by the mayor) and 2 City Council appointees.

Financial Transparency

- Form 990 posted to the website annually
- Audited Financial Statement posted to the website annually
- Highest-possible rating from Charity Navigator (4-stars, for 10-straight years), including a 100% score for "Accountability and Transparency" metrics
 - Financial statements are independently audited and shared publicly on website.
 - Form 990 distributed to the board before filing and shares the 990 publicly on website.
 - Board is independent from management and receives no compensation
 - Has policies around conflicts of interest, whistleblower, records retention, CEO compensation, and donor privacy
 - Lists CEO comp on the Form 990
- GuideStar Gold rating, which is only given to organizations who demonstrate a commitment to transparency

