



ACCIDENT INVESTIGATIONS AND THE FREEDOM OF INFORMATION ACT

Accident Investigation and the Freedom of Information Act

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Liability

Strategic Risk Management Guideline

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What every Road Commission should know about the Freedom of Information Act, and investigations conducted at the request of the Pool or its counsel.

The Pool requires that its Members investigate every accident resulting in serious injury or significant property damage. Some of our Members have expressed concern that the documents created during one of these investigations could be discoverable under the Freedom of Information Act (the “FOIA”). As discussed below, that is not the case. Any tangible documents created during an investigation conducted by a Road Commission at the request of its insurer or attorneys is protected by the work-product doctrine and, accordingly, immune from disclosure under the FOIA.

1. The FOIA: An Overview

The FOIA was enacted to allow the citizenry of our State the ability to evaluate and hold accountable its government. To that end, the Legislature set forth a statutory regime that mandates certain documents must be made available to the public. Specifically, under the FOIA, any

public body, such as a Road Commission, must produce public records if requested to do so in a specific manner. However, the disclosure of records under the FOIA is not without exception. One of those statutory exceptions immunizes from disclosure any information protected by the so-called work-product doctrine.

2. The Work-Product Doctrine

Michigan law has long protected the notes, papers, and other materials prepared by an attorney in the anticipation of a lawsuit from disclosure to another party. This protection, which was first established by common law and later codified in the Michigan Court Rules, is known as the work-product doctrine. The doctrine not only protects certain materials prepared by an attorney or a party involved in litigation – it also includes those prepared by a party’s insurer or agent.

In application, however, the work-product doctrine has at

Privileged Material is Exempt from Disclosure Under the FOIA

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(1) A public body may exempt from disclosure as a public record under this act any of the following:

(h) Information or records subject to the physician-patient privilege, the psychological-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.

MCL 15.243(1)(h)

least one exception: A party may obtain otherwise protected material by showing a substantial need for them, and an inability to obtain the same materials by other means without undue hardship. In any event, though, the mental impressions, conclusions, opinions, or legal theories of an attorney or party representative concerning litigation are always protected from disclosure.

3. The FOIA and Work-Product Doctrine

The FOIA has a broad exception to disclosure where the materials being sought are privileged. The exception applies to documents protected by the work-product doctrine. In other words, where materials are produced in conjunction with an investigation that was initiated in the anticipation of litigation, then those same materials are not discoverable under the FOIA. Not only does the plain letter of the FOIA itself exclude these materials from disclosure, but the Michigan Court of Appeals has also explicitly recognized this exception.

In *Messenger v Ingham County Prosecutor*, the Court ruled that the FOIA's privilege exception protected a public body from disclosing materials covered by the work-product doctrine. In that case, an individual sought discovery of a prosecutor's investigation file by issuing a FOIA request. The Court concluded that those materials were protected by the work-

product doctrine and, therefore, need not be produced. Even more importantly, the Court explained that a public body denying a FOIA request under this particular privilege exception was not required to take into account the need of the requesting party, even though that need is considered when otherwise undertaking a work-product analysis. Once a public body establishes that the work-product doctrine is applicable, it has no further obligation under the FOIA, and the materials need not be produced.

4. Your Takeaway

Where the Pool, or its attorneys, asks a Road Commission to conduct an accident investigation, documents prepared during the course of that investigation need not be disclosed under a FOIA request as long as the work-product doctrine applies. And, that doctrine applies to all tangible things prepared by, or at the request of, a party or its insurer in the anticipation of litigation. Therefore, whenever, based upon the occurrence of an accident or other serious event, a Road Commission anticipates that litigation is likely, the work-product doctrine covers the materials generated during any subsequent investigation, and immunizes them from disclosure under the FOIA.

In conclusion, whenever you reasonably anticipate litigation as a result of a serious accident or event, we encourage you to

investigate right away. Also, you need not be worried that the materials generated during your investigation are discoverable under the FOIA. As always, however, we are happy to consult with you, or put you in contact with one of the various professionals employed by us, to assist in any way. Your safety, as well as that of the public, is our highest priority, and we are proud to stand by your side.