

**Village of Empire Deputy Clerk**

VC  
Communication Handout 10/12/23

**From:** Terry Bacon <trbacon48@gmail.com>  
**Sent:** Tuesday, October 10, 2023 8:34 AM  
**To:** Sue Palmer; Bacon Maggie; Tom Rademache; m.walton@villageofempire.com; l.chase@villageofempire.com; c.webb@villageofempire.com; m.dye@villageofempire.com  
**Cc:** Derith Smith; Clerk Deputy  
**Subject:** July 25, 2023 FOIA Request directed to Village and Office of Village President  
**Attachments:** 07252023 FOIA .pdf; Untitled attachment 00038.htm; Doc 56-58.pdf; Untitled attachment 00041.htm; Doc 60.pdf; Untitled attachment 00044.htm; Redacted Excerpt from 06082023 FOIA request.pdf; Untitled attachment 00047.htm; Doc 001 (redacted).pdf; Untitled attachment 00050.htm

Council Members,

I do not request that this be read at a meeting of the Village Council, but I do not object to it being read. (If a summary were to be read, it could be: "Council has received an email from Terry Bacon for the purpose of informing the entire Council of the reasons a lawsuit may be filed against the Village and the Office of the Village President for violation of Michigan's Freedom of Information Act, with respect to a July 25, 2023 FOIA request. Mr. Bacon's email explains why FOIA was violated by President Palmer not producing electronic records relating to documents she prepared in connection with Council meetings on March 28, 2023 and December 2, 2022. That is: President Palmer has not certified—as required by FOIA—that such electronic records do not exist; neither President Palmer nor the village's then attorney asserted that such electronic records are exempt from production; neither President Palmer nor the village's then attorney disputed that FOIA clearly applies to electronic records; and, based on President Palmer's own earlier statements and documents she previously produced, neither President Palmer nor the village's then attorney disputed (or could dispute) that the requested electronic records were prepared in the course of performance of President Palmer's duties as President.")

No decision has been made as to filing a lawsuit based on violation of Michigan's Freedom of Information Act by President Palmer and the Village. Before a lawsuit is commenced, I want to be sure that ALL Council members are aware of the circumstances with respect to the failure to properly respond to my 7/25/2023 FOIA request to the Village and to the Office of Village President. **The responsibility for this failure rests solely on President Palmer**, as explained below. The requests were only for electronic records and the Village produced the only requested records not within the President's sole control.

Following this message is a copy of an 8/1/2023 message from the then Village attorney to President Palmer, to which I will refer in this message. For the especially curious among you, I have also attached a copy of the 7/25/2023 FOIA request, copies of some documents provided by President Palmer in response to an earlier 6/8/23 FOIA request (as described in ¶¶ 5 and 6 of this message), and the limitation on the scope of what was requested in that 6/8/23 FOIA request (described in ¶6 of this message).

1. **Electronic records are subject to a FOIA request and the then village attorney did not opine otherwise.** FOIA defines "**Writing**" as "... every other means of recording, and includes ... discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content." MCL 15.232(1). A written request to review an electronic public record of the Office of Village President gives the the person making the request the right to inspect the requested public record. MCL 15.233(1).

2. The Village's **FOIA Coordinator (not the President) is be the person who decides whether to approve a denial of a request.** MCL 15.236(1) ("The FOIA coordinator ...shall be responsible for approving a denial under section [MCL

15.235](4) and (5).”) The village attorney wrote that a FOIA request directed to the Office of Village President is no different than a FOIA request to the Village and that the Office of President need not designate a separate FOIA Coordinator.

3. The FOIA Coordinator did not issue a written notice denying the request, **because neither the President nor the then village attorney instructed the FOIA Coordinator to do so.** As the then village attorney wrote, the FOIA request must be granted, granted in part and denied in part or denied within 5 business days of receipt. Here, that was not done, except that the FOIA Coordinator stated that the recordings of two meetings would be produced (and those were produced).

Similarly, **neither the President nor the then village attorney instructed/advised the FOIA Coordinator to assert an exemption.** As the then village attorney wrote, if it was intended to assert an exemption, such an assertion needed to include an explanation of the statutory basis for determining that the requested public record is exempt from disclosure, MCL 15.235(5)(a). At this point, **the President is not entitled to rely on any supposed exemption.**

4. The Village and Office of Village President (each being public bodies on which a FOIA request was served) are **required to expressly certify that no public records, as requested, exist, if that is the position of those public bodies.** MCL 15.235(5)(b). The President has not provided, to the FOIA Coordinator, a written statement that one or more (or all) of the requested electronic records **do not exist, now, and did not exist on July 25, when the FOIA requests were served.** Because **the President did not clearly state to the FOIA Coordinator that the requested electronic records did not exist, the FOIA Coordinator obviously could not do so.** Because neither the President nor the FOIA Coordinator has certified that the requested electronic records do not exist, neither the Village nor President can make such an assertion now. Nevertheless, such a certification may obviate a lawsuit.

5. Based on the printed copies of documents previously produced in response to an earlier FOIA request, there can be no doubt that at least 2 or 3 of the requested electronic records **did exist, at one time.** Among the “around 70 pages of documents provided in response to the June 8, 2023 request” (the words of the then village attorney as to what he was provided to him by President Palmer) were doc ## 56-58, and 60. President Palmer created the second of those electronic records from which she printed a page (doc #60) she then submitted to the village office **the day after the 3/28/2023 VC meeting**---after refusing to turn over to the Clerk the document President Palmer had already printed before and used at the 3/28 VC meeting (doc ##56-58 in one form or another). See Minutes of March 28, 2023 Village Council Regular Meeting, p 2 (“PRESIDENT APPOINTMENT TO THE WASTEWATER STUDY TASK FORCE—Palmer read from notes (not provided as handout)”).

The other electronic record appears to have existed on December 8, 2022, based on the recording of the VC meeting of that date which recorded the President reading her endorsement of Mr. Webb for appointment to the vacant trustee position.

Those electronic records, **from the time they were created,** were public records subject to disclosure under FOIA (and the GLVA). (See the definition the then village attorney quoted in his 8/1/2023 message.) The FOIA Coordinator has not asserted that these electronic records are not public records subject to disclosure and neither the President nor the then Village attorney asserted that anyone other than the FOIA Coordinator is entitled to make that decision.

6. Furthermore, President Palmer clearly conceded that the work she did in preparing to nominate/endorse nominations was done in performance of her official function as President. In document #1 (from the President’s response to the June 8 FOIA request--that was directed to only things the President did "pertaining to performance of an official function of the President of the Village"), President Palmer stated: [as to communications re potential appointees to a Citizens Task Force] "All communications to appointees were made by phone calls, except for the ZBA" and [as to the process for selecting appointments to the Citizens Task Force] “Review of applications, phone calls to confirm interest, talks on the street with potential members; questioned persons on the last WW Study Task Force” and [as to the appointment as Village Trustee] “I called and talked to [Mr. Webb] and he agreed to consider a council seat.” **All of that activity** occurred even earlier than the preparation of the electronic documents requested in the 7/25/2023 FOIA Request.

7. It would be nonsense to suggest that a President only performs the official functions of President when **speaking** at Council. Indeed, it is my understanding that the President has recently reiterated her expansive view of her duties as President in addition to chairing meetings of Council.

Each member of the Village Council now has the opportunity to be on record—before a lawsuit is commenced—suggesting that President Palmer come to her senses and either produce the requested electronic records or (belatedly) certify that such records do not exist and did not exist on July 25, 2023. Although the misconduct in violating FOIA is that of President Palmer, it will be the Village that is subject to a damage award for violations. Of course, President Palmer remains at personal risk of being the subject of a court order to produce the electronic records and any sanctions (e.g., contempt of court) thereafter imposed for noncompliance.

If there is a dispute as to any of the above, please feel free to have the village's attorney contact me to discuss this, or, in the alternative inform me as to whether the attorney will accept service of process. (My assumption is that the President would prefer not to have a process server come to her home to make service. That, of course, is a choice for President Palmer.)

Respectfully,  
Terry Bacon  
[trbacon48@gmail.com](mailto:trbacon48@gmail.com)  
616-634-4586

From: Tim Figura <[tfigura@figuralaw.com](mailto:tfigura@figuralaw.com)>  
To: Sue Palmer <[s.palmer@villageofempire.com](mailto:s.palmer@villageofempire.com)>  
Cc: Derith Smith <[clerk@villageofempire.com](mailto:clerk@villageofempire.com)>, Alacia Acton <[deputyclerk@villageofempire.com](mailto:deputyclerk@villageofempire.com)>  
Date: 08/01/2023 9:45 AM  
Subject: Village FOIA

Sue,

Yesterday, you provided me with a copy of a FOIA request received on July 25, 2023, related emails received on July 25, 2023, and a FOIA request received on June 8, 2023 along with around 70 pages of documents provided in response to the June 8, 2023 request. To assist the Village in its response to the July 25, 2023 FOIA, I offer the following comments.

1. **The Village FOIA Coordinator is responsible for answering all FOIA requests** submitted to the Village, regardless of whether the request is addressed to a particular official or department head. This is standard practice throughout the state and there is no case law or other authority that would suggest that a FOIA policy would need to identify and incorporate the various officials and department heads of the Village. Also, it is likely how all prior FOIA requests have been handled by the Village in the past.
2. **A FOIA request must be granted, granted in part and denied in part, or denied within 5 business days** of receipt.
3. A public body is not required to make a “a compilation, summary, or report of information” or to “create a new public record” in response to a FOIA request.
4. A FOIA coordinator may issue “a notice extending for not more than 10 business days the period during which the public body shall respond to the request”. A notice of extension does not require agreement of the requestor.
5. As mentioned in my correspondence dated May 15, 2023, MCL 65.5(4) repeats the definition of “public record” in the Michigan FOIA (“a **writing prepared, owned, used, in the possession of,**

**or retained by a public body in the performance of an official function, from the time it is created”)** and does not expand the set of public records which are otherwise subject to disclosure under the FOIA.

6. Public records may be exempt from disclosure under the criteria provided in MCL 15.243. **Any exemption must describe the exempt public record along with the statutory basis for exemption.**

Please let me know if I can assist further,

Tim

Timothy J. Figura, Esq.

**FIGURA LAW**

March 28, 2023 - personal notes during meeting - Sue

<b>A. CALL MEETING TO ORDER AND PLEDGE OF ALLEGIANCE</b>	
<b>B. ROLL CALL</b>	
<b>C. CHANGES OR ADDITIONS TO THE AGENDA</b>	
	Remove Sidewalk Repair from the Agenda
<b>D. ADOPTION OF THE AGENDA</b>	
<b>E. PUBLIC COMMENTS ON AGENDA ITEMS</b>	
	Mary Sharry: Request crosswalks. 4way stop?
<b>F. CONSENT AGENDA</b>	
	Approve 2023 Street Closures
	Empire Chamber of Commerce requests Council approval of street closures for Asparagus Festival, Empire Hill Climb and the Hopps Festival.
	Approve Minutes
	Council approval of the minutes from March 9, 2023 Work Session
	Approve March Bills
	Council Approval of March Bills that total \$ 582219
<b>G. COMMUNICATIONS</b>	
	John Ludlow - Short Term Rentals
	Terry Bacon - Appointment of Task Force and Stated Purpose
<b>H. DEPARTMENT HEAD REPORTS</b>	
	President
	I appreciate the public comments made during our last meeting. Mary Sharry re: rescinding the Point of Sale Ordinance. Wendy Peplinski - I think we are on the right path to involving our residents and tax payers. Until we get the ball rolling on our Public Engagement process, we are still here to hear. Please feel free to contact any council member if you have any questions regarding Council process.
	Shawn Gray, the Retail Manager for Blarney Castle stopped in to the office to introduce himself. He said that the BP Build is moving forward as planned. They are hoping to shut the current station down the week of April 9th. This is a tentative date. Once they begin, it will take 8 weeks before the new station will open.
	* A reminder to council to prepare your lists of ideas to talk about at our Work Session regarding Community Engagement.
	* I would like to remind the Council and the Planning Commission that there will be OMA and FOIA training on the 29th at 6PM. This training is open to the public.
	I will be adding the Rules of Procedure to our April Work Session. I would like to have all council members review the document and determine changes we should discuss.
	Department of Public Works - John Friend
	Street Administrator - Maggie Bacon
	Zoning Administrator - Bob Hall

March

my comments listed meeting

Treasurer - Alacia Acton
Clerk - Derith Smith

<b>I. COMMITTEE REPORTS</b>
Parks
Water
Streets
Personnel
Request the Personnel Committee meet
**Job posting for the DPW Summer Worker
**Cross training for Office personnel
**Prioritize and work on Job Descriptions
Planning Commission
Tree Assessment Group
Beautification Committee

<b>K. OLD BUSINESS</b>
Front and Union Street Crosswalks and Fog Line Quote - Bacon
<i>not to exceed \$1500. adding.</i>
Sidewalks Bid REMOVED
Approve Updates to Snow Plow Ordinance #147 and Snow Plow Policy - Bacon
Approve Updates to the FEMA Ordinance - Palmer
I am requesting Approval to move this to a Public Hearing prior to the April Regular Meeting at 7PM

<b>L. NEW BUSINESS</b>
Signage for Shalda Park - Dye
Approve Union and Florence Street Tar and Chip Quote - Bacon
<i>Co to Union and Chip not to exceed 14K</i>
County Public Hearing Regarding FEMA Mitigation Plan - Palmer
I would like to have someone from the Council attend this meeting on April 13 @ Noon in Suttons Bay.
Move Norway Spruce Trees at Shalda Park - Dye <i>not to exceed \$1500</i>

Schedule a Public Hearing - Palmer

✓	Council requests a Public Hearing prior to our April Regular Meeting on April 25, 2023 at 7PM. The purpose is to publicly review and comment on the Snow Plow Policy, Snow Plow Ordinance #147 and the FEMA Ordinance #152.
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Appointment to the Waste Water Study Task Force


From the Village Council Motion on January 24, 2023, this Task Force will be composed of (5) five Village residents.

1. Appointed by the President –

a. I was contacted by several Village residents interested in participating in this Task Force. I would like to appoint the following:

- i. **Marc Oberschulte** – Marc is a resident of the Village and lives on Lake Michigan Drive. Marc approached me with great interest regarding the Task Force and how he may add value to this Study program. Marc worked in Lansing with a former Governor of Michigan where he was responsible for research and funding options. He is looking forward to helping the Village with research and grant opportunities that may be available.

\* handdelivered  
to the office on  
3/29/2023



June 8, 2023

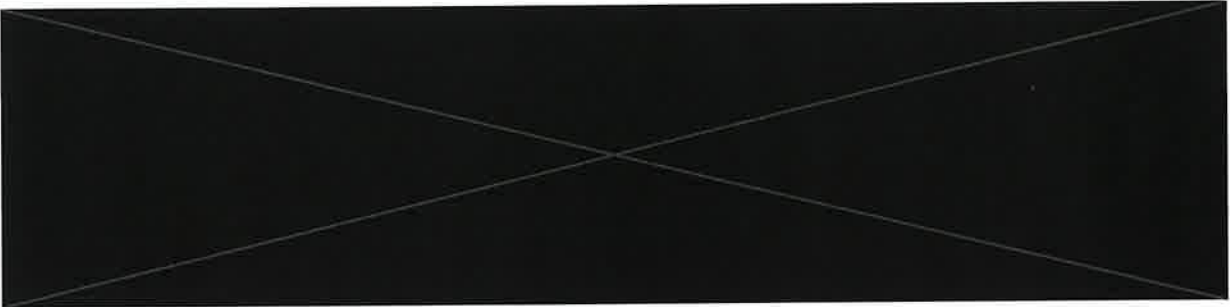
Freedom Of Information Act Request

HAND DELIVERED and by email

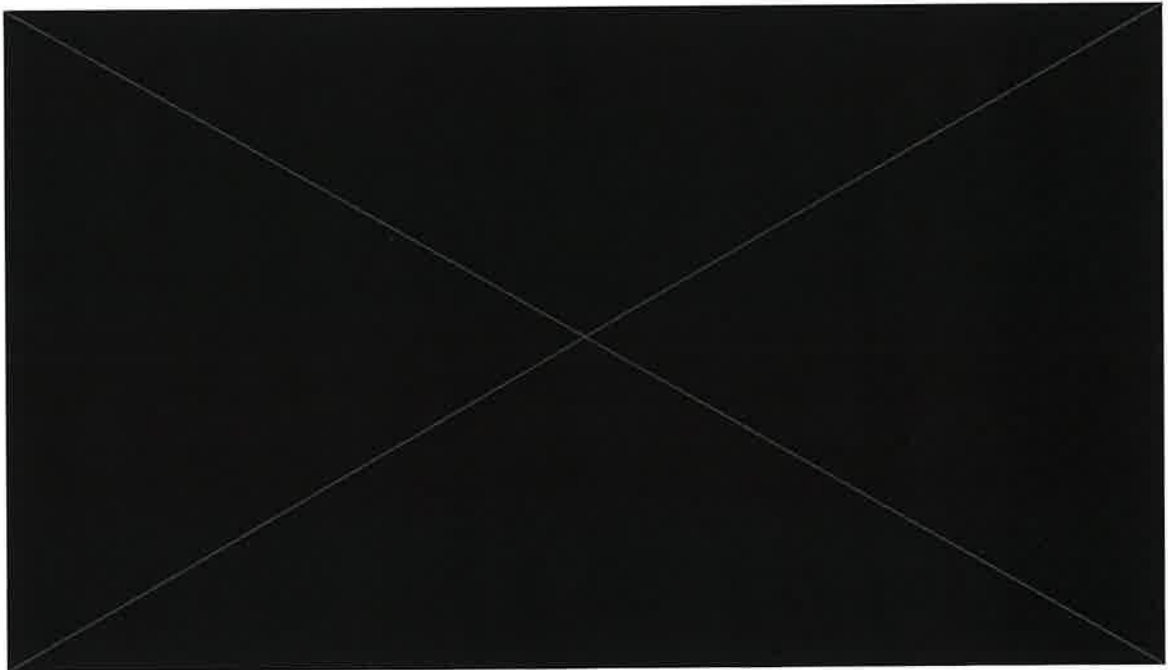
To: **Office of President of the Village of Empire**

Village of Empire Deputy Clerk/Clerk (If designated as FOIA Coordinator for the office of Village President)

Re: FOIA REQUEST TO REVIEW RECORDS.



All documents in whatever form (hard copy or electronic), including but not limited to notes, spreadsheets, memoranda, messages, emails (official or personal), texts, other electronic messaging records, and recordings **by, to, from, used by or retained by you, as President of the Village, pertaining to performance of an official function of the President of the Village, relating to:**



Responses per FOIA request.  
from Sue to Terry

1. **Communications RE; Possible Appointees to:**

- a. Citizens Task Force
- b. Committee of the Village Council
- c. Planning Commission
- d. Zoning Board of Appeals
- e. Village Trustee

1.a **Response** – All communications to appointees were made by phone calls, except for the ZBA, see attached.

2. **Process for selecting appointments to**

- a. Citizens Task Force
- b. Committee of the Village Council
- c. Planning Commission
- d. Zoning Board of Appeals
- e. Village Trustee

2.a **Response** –

a. Review of applications, phone calls to confirm interest, talks on the street with potential members; questioned persons on the last WW Study Task Force; Referenced the GLV Handbook - 2017 - Recommendation under - "Appoint Citizen Boards and Commissions recommendation.

b. Many of these committees were selected without prior communication.

c. Reviewed the Village Process for selecting new PC members; identified logistical and deficiency; reviewed applications submitted; talked to some candidates on the street.

d. Called and talked to expiring members and they committed to stay an additional term; left Walton as the Council Representative and agreed via phone call; called to fill the last seat, Mr. Barnes.

e. I was impressed by Chris Webb on the Planning Commission. I called and talked to him and he agreed to consider a council seat.

[REDACTED]