October 21, 2013

Mr. Paul Joseph Harcz

1365 E. Mt Morris Rd.

Mt. Morris, MI 48458

Email: joeharcz@comcast.com

Dear Mr. Harcz:

This notice is in response to your October 16, 2013 email to Mr. Michael Zimmer, Chief Deputy Director, Michigan Department of Licensing and Regulatory Affairs (LARA) regarding your assertions that LARA is not complying with the federal American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 regarding your requests for existing, nonexempt public records. You assert that because your September 27, 2013 request for records from LARA’s Bureau of Services to Blind Persons (BSBP) was made under the ADA and/or the Rehab Act, you cannot be charged the estimated costs ($200.22) to process the request under the state’s Freedom of Information Act (FOIA, MCL 15.231 et seq.). The BSBP response of October 15, 2013 indicated that your request was being processed under the state’s FOIA which complies with the ADA and Rehab Act regarding charges related to persons with disabilities.

As you have been informed many times, whether LARA records are requested under the state’s FOIA, or otherwise, the estimated fee charges for searching for records and examining records to separate nonexempt information are consistent with the fees charge practices of federal agencies, e.g. the U.S. Departments of Labor and Justice. The following excerpts from federal resources clearly illustrate that LARA is in compliance with the ADA and Rehab Act regarding fee charges to process requests for public records:

**Rehabilitation Act of 1973, Section 504** (Wikipedia)

The **U.S. Rehabilitation Act of 1973** prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act. Section 504 of the Rehabilitation Act created and extended civil rights to people with disabilities.

**ADA Title II: State and Local Government Activities** (Guide to Disability Rights Law, U.S. Department of Justice, 2005)

Title II covers all activities of State and local governments regardless of the government entity size or receipt of Federal funding. Title II requires that state and local governments give people with disabilities an equal opportunity to benefit from all their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings.) Public entities are not required to take actions that would result in undue financial and administrative burdens.

**Fees and Fee Waivers** (U.S. Department of Justice Guide to Freedom of Information Act)

“Types of Fees”: The FOIA provides for three types of fees that may be assessed in response to FOIA requests: search, review, and duplication. The fees that may be charged to a particular requester are dependent upon the requester’s fee category.

The first requester category, commercial use requesters, are assessed all three types of fees. The second requester category, those determined to be educational or noncommercial scientific institutions, or representatives of news media, are assessed only duplication fees. Requesters in the third category, those who do not fall within either the first or second requester category, are assessed both search fees and duplication fees. OMB recognized that costs would necessarily vary from vary from agency to agency and directed that each agency promulgate regulations specifying the specific charges for search, review, and duplication fees.

“Search” fees include all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents. Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request, or even if the records located are subsequently determined to be exempt from disclosure. The OMB Guidelines direct that searches for responsive records should be done in the most efficient and least expensive manner. The term “search” means locating records or information either “manually or by automated means” and requires agencies to expend “reasonable efforts” in electronic searches, if requested to do so by the requesters willing to pay for that search activity.

The “review” costs which may be charged to commercial-use requesters consist of the “direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]. Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release, but it does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that already are applied. The OMB Fee Guidelines provide that records that have been withheld in full under a particular exemption that is later determined during administrative proceedings not to apply may be “reviewed again to determine the application of other exemptions not previously considered and review fees assessed accordingly.”

OMB Fee Guideline, 52 Fed. Reg. at 10.018 (“agencies should charge at the salary rate(s) [i.e. basic pay plus 16 percent] making the search” or, “where a homogeneous class of personnel is used exclusively…agencies may establish an average rate for the range of grades typically involved”).

**ADA Title III Technical Assistance Manual** (Excerpts)

**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.”

**Reasonable Modifications** “III-4.2100 General. A public accommodation must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public accommodation can demonstrate, however, that a modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations it provides, it is not required to make the modification.”

**Auxiliary Aids** “III-4.3100 General. A public accommodation is required to provide auxiliary aids and services that are necessary to ensure equal access to goods and services, facilities, privileges, or accommodations that it offers, unless an undue burden or a fundamental alteration would result. Who is entitled to auxiliary aids? This obligation extends only to individuals with disabilities who have physical or mental impairments, such as vision, hearing, or speech impairments that substantially limit the ability to communicate…”

**LARA Records Search and Review Fee Charges**

In accordance with MCL 15.234, Section 4(3) of the state’s FOIA and the above mentioned federal guidelines, LARA generally charges **all** requesters a fee to process requests for records that exceed its established threshold cost of $25.00. As you have been informed, LARA does not charge a fee to convert requested records into accessible formats for persons with disabilities. However, LARA, under the state’s FOIA and federal guidelines, is allowed to charge for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information. Neither the federal ADA nor the Rehabilitation Act prohibit the charging of fees to search for and review/examine requested records. This is illustrated by the attached chart comparing the allowable FOIA fee charging policies of the U. S. DOL, U.S. DOJ, and LARA.

To summarize LARA’s position regarding your assertions:

* LARA does not use the state’s FOIA as a mechanism to circumvent federal statutes and/or regulations regarding an individual’s right to access existing, nonexempt public records/information within LARA. LARA processes all written requests for records/information in accordance with applicable state and/or federal statutes/regulations.
* LARA’s fee charges regarding the search for and review of written requests for public records/information is in accordance with federal regulations/guidelines that allow public bodies to charge fees to process requests for records/information that would result “in a fundamental alteration of in the service, program, or activity or in undue financial and administrative burdens.” A request that requires an extensive search for records/information, electronic or otherwise, draws staff away from their respective duties and assignments. Thusly, in particular instances, failure to charge for searching for and reviewing requested records would result in an undue financial and administrative burden to LARA.
* Neither state nor federal FOIA regulations/guidelines require a public body to make a compilation, summary, report, or create a new record/report not already in existence to comply with a request for records/information.

* As previously informed, you can access the LARA FOIA FY’14 Processing Cost Guidelines at: <http://www.michigan.gov/lara> (click on Agencies, Bureaus, and Commissions and then Freedom of Information Act).

Thusly, based on the above, I certify that to the best of my knowledge, information, and belief, LARA is in compliance with state and federal (ADA and the Rehab Act) statutes, regulations and policies regarding its fees for searching for and reviewing/examining of existing, nonexempt public records requested by persons with disabilities.

Sincerely,

/S/Melvin Farmer, Jr.

LARA Central FOIA Coordinator

cc: Michael Zimmer

Edward Rodgers

Carol Haynes