



New FOIA Executive Order/Flexibility During COVID-19

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New FOIA Flexibility During COVID-19

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OVERVIEW

- Freedom of Information Act (FOIA)
- COVID-19
- Executive Order 2020-38
- Suggestions



PUBLIC POLICY OF FOIA

“It is the public policy of this state that all persons, except those persons incarcerated . . . , 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.”



MANDATORY DISCLOSURE UNDER FOIA

- FOIA provides that all public records are subject to disclosure unless specifically exempted by the Act.
 - Exempt Records: FOIA Coordinator must prepare a written response indicating the request is denied and specific basis for the denial, e.g. specific exemptions in MCLA 15.243, attorney-client privilege, or any other statutory exemptions.



RESPONSE TIME UNDER FOIA

- FOIA provides specific time periods by which a public body must respond to a request for public records.
 - A public body must respond to a request for public records within 5 business days after receipt of the request.
 - Upon written notice, a public body may be entitled to an extension for not more than 10 business days.



RESPONSE TIME UNDER FOIA

- The time periods by which a public body must respond to a FOIA request begins on the date the request was received for requests made by first-class mail and hand delivery.
- FOIA requests made by email, website submission, and facsimile is not considered received until one business day after the transmission was made.



RESPONDING TO REQUESTS UNDER FOIA

Four options to respond to a request under FOIA (all responses must be in writing):

1. Grant the request.
2. Deny the request.
3. Grant the request in part and deny the request in part.
4. Extend the time to respond for not more than 10 business days.



APPEALS UNDER FOIA

- If a FOIA request is denied in full or in part, notice must be sent to the requester explaining the reason for the denial and the requester's appeal rights, including their right to attorney fees and damages if successful in a civil action.



APPEALS UNDER FOIA

- FOIA provides specific time periods by which a public body must respond to an appeal.
 - The head of a public body must respond to an appeal within 10 business days after receipt of the request.
 - Upon written notice, a public body may be entitled to an extension for not more than 10 business days.



APPEALS UNDER FOIA

- If the “head of the public body” is a board or commission, FOIA dictates an appeal is not “received” until the first regularly scheduled meeting of the board or commission following submission of the appeal.



RESPONDING TO APPEALS UNDER FOIA

Four options to respond to an appeal under FOIA
(all responses must be in writing):

1. Reverse the denial.
2. Uphold the denial.
3. Reverse the denial in part and uphold the denial in part.
4. Under unusual circumstances, extend the time to respond for not more than 10 business days.



COVID-19 EMERGENCY

“During a time of crisis, it’s crucial that Michiganders have access to the information they need to stay safe. My administration is committed to ensuring that while also protecting public health and encouraging social distancing... This Executive Order encourages public bodies to respond to Freedom of Information Act requests in a timely manner and in the safest way possible.”

- Governor Gretchen Whitmer



COVID-19 EMERGENCY

- March 23, 2020 Governor Whitmer signed the “Stay Home, Stay Safe” Executive Order (EO 2020-21).
 - This Order prohibited all Michigan businesses and operations to temporarily suspend in-person operations that are not necessary to sustain or protect life.



COVID-19 EMERGENCY

Stay Home, Stay Safe Executive Order

-VS-

Freedom of Information Act (FOIA)



EXECUTIVE ORDER NO. 2020-38



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

EXECUTIVE ORDER

No. 2020-38

Temporary extensions of certain FOIA deadlines to facilitate COVID-19 emergency response efforts

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-33.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. In response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-38 on April 1, 2020. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to "protect[] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(3). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

GARLIN GILCHRIST
GOVERNOR

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. At the same time, and as memorialized by Michigan's Freedom of Information Act ("FOIA"), 1976 PA 442, as amended, MCL 15.231 et seq., it remains the public policy of this state—and a priority of my administration—that Michiganders have access 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," so that they "may fully participate in the democratic process." MCL 15.231(2). To balance this core priority with the steep and urgent demands posed by the COVID-19 pandemic, it is reasonable and necessary to provide limited and temporary extensions of certain FOIA deadlines, so that Michiganders may remain informed and involved in their government during this unprecedented crisis without unduly compromising the health and safety of this state and its residents.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Strict compliance with the required response periods set forth under sections 5(2), 10(2), and 10a(2) of the Freedom of Information Act ("FOIA"), 1976 PA 442, as amended, MCL 15.235(2), 15.240(2), and 15.240a(2), is temporarily suspended, as follows:
 - a. A public body must respond in writing to a request or an appeal received at its physical office via mail, hand delivery, or facsimile within 10 business days after actual receipt of the request or appeal. For purposes of this order, actual receipt of a request or appeal occurs when an employee of the public body physically opens the envelope containing the request or physically takes the faxed request from the fax machine. Nothing in this order requires an employee to report to the office to open mail or check the fax machine if the employee would not otherwise be permitted to report to the office in person and required to perform those tasks.
 - b. If COVID-19 or any accompanying response efforts, including but not limited to compliance with any emergency order or mitigation recommendations related to COVID-19, interferes with the timely grant or denial of a request or the timely reversal or upholding of a denial on appeal, a public body may issue a notice under section 5(2)(d), 10(2)(d), or 10a(2)(d) of the FOIA, MCL 15.235(2)(d), 15.240(2)(d), or 15.240a(2)(d), as applicable, extending the period of time in which to respond for as long as the public body deems necessary but no longer than until the expiration of this order or any order that follows from it.
2. Strict compliance with the requirements relating to in-person efforts in connection with a public records request set forth under sections 3 and 4 of the FOIA, MCL 15.233 and 15.234, is temporarily suspended, as follows:

(a) If a public records request requires in-person efforts, such as an in-person search, inspection, examination, preparation, or production of public records, by

the requester or the public body, a public body may defer that portion of the request until the expiration of this order or any order that follows from it.

- b. If a public body defers a portion of a public records request pursuant to section 2(a) of this order, it must explain this deferral and its reason in the public body's response to the requester under section 5(2) or 10(2) of the FOIA, MCL 15.235(2) and 15.240(2), as applicable.
 - a. If a public body defers a portion of a public records request pursuant to section 2(a) of this order, the requestor may inform the public body in writing that the requestor is amending its request to exclude the deferred portion of the request so that the public body may more promptly process the request. The public body must notify the requestor of its ability to amend its request in the response required under section 2(b) of this order.
3. It is the public policy of this state that, during the COVID-19 states of emergency and disaster, public bodies continue to respond to requests for public records as expeditiously as possible and, to the extent practicable, by using electronic means.

1. The provisions of this order apply notwithstanding any contrary policy adopted by a public body.
2. For purposes of this order, the terms "public body" and "public record" mean those terms as defined under section 2 of the FOIA, MCL 15.232.
3. This order is effective immediately and continues through June 4, 2020 at 11:59 pm.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 5, 2020

Time: 8:47 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

EXECUTIVE ORDER NO. 2020-38

- https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524359--,00.html



SUMMARY OF EO 2020-38

Relaxation from FOIA in the following ways:

- Responses
- Extensions
- Deferrals



RESPONSE TIME UNDER EO. 2020-38

- The Order changes the initial response time for requests or appeals **Received** by first-class mail, hand delivery and facsimile from 5 business days to 10 business days.
 - Note: The Order does not change response time for email or website submissions, so FOIA guidelines still apply to requests received by email or website submission.
 - Note: The Order's initial response time "extension" does not actually extend appeal response times. FOIA dictates that a public body must respond to a request for an appeal within 10 business days, which is what the Order provides.



RESPONSE TIME UNDER EO. 2020-38

- The Order clarifies that the term “received,” for purposes of the Order is defined as: “when an employee of the public body physically opens the envelope containing the request or physically takes the faxed request from the fax machine.”
 - Note: The Order does not change receipt time for email or website submissions. FOIA dictates that requests made by email, website submission, and facsimile is not considered received until one business day after the transmission was made.



EXTENSIONS UNDER EO. 2020-38

- If Covid-19 or any response efforts, including any order or mitigation recommendation related to Covid-19 interferes with a public body's ability to timely respond to a request or appeal, the Order grants the public body the ability to elect an extension to respond to a FOIA request or appeal from the 10 business days permitted under FOIA to "as long as the public body deems necessary but no longer than until the expiration of this order or any other that follows from it."



DEFERRALS UNDER EO. 2020-38

- Under the Order, a deferral is permitted if the FOIA request requires “in-person efforts” in order to respond, e.g. search, inspection, examination, preparation or production of public records, *by the requestor or the public body*, then the public body may defer preparing that portion of the request until the expiration of the Order or any extension of it.
- Note: deferrals under the Order apply to requests received by any means, including email and website submissions.



DEFERRALS UNDER EO. 2020-38

- The Order requires the public body to explain in its notice to the requester the reason for its election to defer, and provide notice to the requestor that the requestor may chose to amend its request to exclude those deferred portions and receive a more timely response to their request.



RESPONDING TO REQUESTS UNDER EO. 2020-38

Six options to respond to a request under the Executive Order (all responses must be in writing):

1. Grant the request.
2. Deny the request.
3. Grant the request in part and deny the request in part.
4. Extend the time to respond for not more than 10 business days.
5. If the orders, recommendations, or other response efforts surrounding Covid-19 interferes with a timely response, extend the time to respond for as long as necessary, but no later than June 4 (or a later date if the Order is extended).
6. Defer the time to respond until the expiration of the Order (June 4), or an extension of the Order.



RESPONDING TO APPEALS UNDER EO. 2020-38

Five options to respond to an appeal under the Executive Order (all responses must be in writing):

1. Reverse the denial.
2. Uphold the denial.
3. Reverse the denial in part and uphold the denial in part.
4. Extend the time to respond for not more than 10 business days.
5. If the orders, recommendations, or other response efforts surrounding Covid-19 interferes with a timely response, extend the time to respond for as long as necessary, but no later than June 4 (or a later date if the Order is extended).



DECISION TREE UNDER EO. 2020-38

Decision Tree to Assist Public Bodies in Responding to FOIA Requests During the Covid-19 Pandemic

Prepared by: Clyde Robinson, City Attorney for the City of Kalamazoo

Question 1: How was the request received by the public body (City)?

- A. By email or through the City's website FOIA page? Go to Question 2A.
- B. Regular mail, hand delivery, or facsimile? Go to Question 2B.

Question 2: When is the FOIA request deemed "received"?

- A. The next business day for the City per FOIA Section 5(1). Go to Question 3.
- B. Per E.O. 2020-38, when a City employee physically opens the envelope containing the request or removes it from the fax machine or takes physical delivery. However, the E.O. does not require City to have an employee open mail or check a fax machine if the employee is not otherwise required to report to work. Go to Question 3.

Question 3: What is the time frame to respond to a request once it is received?

- A. 5 business days, which may be extended for an additional 10 business days per FOIA Section 5. Go to Question

Question 4: Does the request seek an in-person inspection of a public record?

- A. Yes. Go to Question 5.
- B. No. Go to Question 6.

Question 5: What are the obligations of a public body (City) to respond to a request for in-person inspection of a public record?

- A. While City offices are closed to the public, and until June 4, 2020, the City may defer acting on the request.
- B. If the City defers the request for an in-person inspection of records, it must explain the deferral and its reason for doing so in the timely response (See Question 3) to the requestor.
- C. City response must advise requestor that they may amend the request to exclude the deferred portion of the request in order to permit the City to more promptly process the remainder of the request. Go to Question 6.

Question 6: Does the response to the request require "in-person efforts" by public body (City) staff to locate, examine, delete exempt information, copying, or mailing?

- A. Yes. The response may be deferred to June 4, 2020 and the City must provide the requestor the notices set forth at Question 5.
- B. No. If the work required by "in-person efforts" can be done remotely by electronic means, the E.O. requires a timely response under FOIA Section 5 and delivery of non-exempt portions of the requested public records by electronic means as required by FOIA Section 4(1)(c).



Suggestions – Response Letter

COVID-19 FOIA RESPONSE OPTIONS UNDER 4/5/2020 GOVERNOR EXECUTIVE ORDER 2020-38

Date

Addressee

Address

Address

Re: Response to Request Received _____ (attached)

Dear _____:

As the FOIA Coordinator, I am responding to your attached request in the manner authorized by Governor Whitmer’s April 5, 2020, Executive Order No. 2020-38, titled, “Temporary extensions of certain FOIA deadlines to facilitate COVID-19 emergency response efforts”. Under that Order, responses to requests received via first-class mail, hand-delivery and facsimile are due within 10 business days of when your request is considered as received, which is when the envelope containing it was opened or it was removed from the fax machine. Requests received by email or website submission that can be responded to without in-person efforts will be handled in accordance with the time periods outlined in the FOIA.

Extension

The COVID-19 outbreak and efforts to respond to it, including complying with emergency orders and mitigation recommendations by the State, County, and Federal governments, interferes with the [public body]’s ability to timely grant or deny your request. Therefore, the [public body] hereby extends the time for responding to your request to (1) June 4, 2020, (2) a later date you will be notified of if the Governor’s Order is extended, or (3) an earlier date if the [public body] determines this extension is no longer necessary. By the extended date, the [public body] will grant the request, issue a written notice denying the request or grant the request in part and issue a written notice denying the request in part.



Suggestions – Response Letter Cont'

Deferral

Because your request requires in-person efforts to search, inspect, examine, prepare, or produce public records, the [public body] hereby defers its response until June 5, 2020, when the Governor's Executive Order expires, or a later date you will be notified of if the Governor's Order is extended. Those in-person efforts include [insert reasons].

You may amend your request in writing to exclude public records that require in-person efforts for a response so that the [public body] may more promptly process, rather than defer its response to, your request. Upon receipt of an amended request that does not require in-person efforts, within the time allowed or extended under the FOIA or the Governor's Order, the [public body] will grant, issue a written notice denying, or grant in part and issue a written notice denying in part, the amended request.

Final Paragraph in All Approvals or Denials.

For the parts of your request that have been denied, or any aspects of this response you consider to be a denial, you have the right to submit a written appeal to the [public body]'s [Council or Board of Trustees] that specifically states the word "appeal" and identifies the reason or reasons for reversal of a denial. Appeals should be delivered to the [public body]'s Clerk's office, at [insert address]. In addition, you may also seek judicial review of a denial pursuant to MCL 15.240, and may have the right to receive attorneys' fees and damages as provided in MCL 15.240, if after judicial review, the circuit court determines that the [public body] has not complied with MCL 15.235 and orders disclosure of all or a portion of a public record.

[public body]'s FOIA procedures and guidelines are available free of charge from the Clerk's office during regular business hours at [insert address], or online at: [insert link].

Sincerely,

FOIA Coordinator



Suggestions – Website Notice

As a result of the Governor’s April 6, 2020 Executive Order (Order) No. 2020-38 [link], [public body] will continue to fulfill any Freedom of Information Act requests to the extent possible due to the circumstances arising out of the COVID-19 pandemic. However, pursuant to the Order, “strict compliance” with FOIA’s response requirement will be temporarily suspended. The [public body] now has ten (10) business days to respond to a FOIA request or appeal received via first-class mail, hand-delivery or fax. Furthermore, the calculation of the new time period begins when a [public body]’s employee physically opens, or removes from the fax machine, the correspondence containing the FOIA request or appeal, not when it is postmarked or dated. The [public body] will provide written notice to the requestor should compliance with any of the current COVID-19 emergency orders preclude the [public body] from providing a response within the new time period.

The [public body] will continue to respond to all FOIA requests or appeals received via email or website submission, within the FOIA’s current guidelines set forth in MCL 15.235.

However, if the FOIA request requires “in-person efforts” to prepare the response, e.g. search, examination and copying of documents, then the [public body] will inform the requestor of its election to defer preparing that portion of the request until the expiration of the Order, or any extension of the Order. A requestor may inform the [public body] in writing if they want to revise their FOIA request to exclude the portions that require “in-person efforts” and receive the records that would not require such preparation.



The [public body] will adhere to the Order through its effective date of **June 4, 2020** or any extension of the Order’s duration.

Thank you

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Upcoming Webinars



Register for the upcoming webinars here: <http://www.mml.org/coronavirus>

- Secure the Cities: Cybersecurity 101 for Michigan's Municipalities, Monday, April 13, 10 - 11 AM
- MML Monday Morning Live, Monday April 13, Noon – 1 PM
- COVID-19 Updates and Resources for Local Governments, April 20, 2 PM – 3PM



COVID-19 Resource Page for Local Governments



Go to this page to get the latest COVID-19 information for local governments and to submit your questions to the Governor's Office:

<http://www.mml.org/coronavirus>



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