FOIA Guidance Amid Covid-19 and EO 2020-21

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Introduction:

The public health emergency caused by the Covid-19 virus and the resulting Executive Orders issued by Governor Whitmer have presented municipalities with unique and unprecedented challenges as they attempt to provide essential government services with limited staff and contact with the public.

Section 6 of the Governor’s Executive Order 2020-21 attempts to provide direction and guidance in this area by directing that “[a]ll in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.” However, this order concerns only “in-person” governmental activities. So what can be done with mailed, emailed, or faxed FOIA requests for copies of public records?

FOIA and the Importance of Public Involvement

It is tempting to deem FOIA requests as unimportant in light of the current crisis, where limited resources are being directed to multiple pressing situations. However, the Freedom of Information Act and the Open Meetings Act were enacted to ensure governmental transparency and openness, which is particularly important in times of national crisis and the enactment of unusual government orders.

The Governor’s Executive Order 2020-15, dealing with the Open Meetings Act, confirms the importance of continuing public business and the importance for the general public to “be able to continue to participate in government decision-making without unduly compromising public health, safety, and welfare.” Understanding governmental actions and processes is heightened, not alleviated, by the current circumstances.

Timelines in Light of Covid-19

The biggest issue for municipalities in responding to FOIA requests during the Covid-19 outbreak is complying with the statutory timeframe mandates. To date, no executive orders have suspended the statutory requirement that a municipality respond within five business days (or seek an extension of no more than 10 business days). The term “business days” is not defined in the Act. The Court of Appeals recognized this issue in the case of Key v. Township of Paw Paw, 254 Mich. App. 508 (2002), which concerned a dispute over the extension period. The plaintiff argued that the term included Saturdays, because many businesses were open on Saturdays, while the township argued that the term meant only the days that the township was actually open for business. The Court found it was not necessary to resolve the question in that case, concluding:
While many businesses are in fact open on Saturdays (and even Sundays for that matter), the Legislature consistently defines “business day” as Monday through Friday, excluding legal holidays. While we might include Saturday as a business day under the FOIA if the public body were open for business on Saturdays, that is not the case here and, therefore, we need not resolve that question. Furthermore, we need not determine if days (Monday through Friday) on which the office is closed should be excluded because defendant’s response in the case at bar is timely even if we count the Tuesdays and Thursdays on which it is closed. *Id.* at 515-516.

Thus, the Court left the decision for “another day.” That day just may have arrived.

**Recommended Practices:**

Until there is a definitive suspension of FOIA deadlines, municipalities should continue responding to FOIA requests to the fullest extent possible. Extensions should be requested if needed in light of limited staffing, detailing the reason for the extension and the expected response date (limited to 10 business days).

Each municipality should consult with its counsel regarding its interpretation of the term “business day” in issuing responses, with the further understanding that there is an additional open question whether a municipality is considered open for business when it continues operations but is closed to the public.

Municipalities should also keep in mind that although the FOIA specifies a short time window for responding to the request, it does not require the requested records to be provided at that time. There is support in the law for distinguishing between responding to a FOIA request and fulfilling it. So long as the municipality provides a response within the time required and then provides the requested public records within a reasonable time in light of the facts and circumstances, the municipality is compliant, even though the records were not provided within the timeframes outlined in the FOIA.