

FOIA—Governor Temporarily Suspends Certain Deadlines

Introduction

Since the state of emergency was declared, many public bodies have been grappling with how to fulfill Freedom of Information Act (FOIA) requests while still honoring the stay-at-home order. Employees of public bodies who have been working remotely often do not have access to the public records. Yet, people are still filing FOIA requests. On Sunday, April 5, 2020, Governor Whitmer issued Executive Order 2020-38 (EO-38) to provide temporary extensions of certain deadlines under the FOIA during the COVID-19 crisis.

What Deadlines Are Temporarily Suspended?

Prior to EO-38, no executive orders directly addressed FOIA requests. Now, EO-38 provides “limited and temporary extensions” of certain FOIA deadlines to balance the purpose of FOIA, allowing citizens to be involved in their government, and the health and safety of government employees and citizens.

Under EO-38, strict compliance with the required response periods set forth under the following FOIA sections are temporarily suspended:

1. **Section 5(2):** Section 5(2) requires the public body to respond within 5 business days, and includes subsection (d), which allows the public body to issue a 10-business day extension.
2. **Section 10(2):** Section 10(2) requires the public body to respond within 10 business days to an appeal involving a denial or denial in part of a FOIA request.
3. **Section 10a(2):** Section 10a(2) requires the public body to respond within 10 business days to a fee appeal.

The suspensions of the above provisions are limited to the reasons set forth in EO-38 and described more fully below.

What If I Am Not in the Office to Receive A FOIA Request That Is Mailed, Hand Delivered, Or Sent By Fax?

EO-38 requires that a public body respond to a request or appeal received “at its physical office via mail, hand delivery, or facsimile” within 10 business days after actual receipt. So, the initial deadline for mailed, faxed, or hand-delivered request is extended from 5 business days to 10 business days after actual receipt. Appeal and fee appeal deadlines have not changed and remain at 10 business days.

The “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. EO-38 uses the term “employee” and not FOIA Coordinator. This means that any employee who opens the envelope or takes the fax triggers the deadline. With that said, EO-38 specifically states that nothing 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.

EO-38 did not address FOIA requests received by email or text. So, if the request is received by email or text, the current statutory provisions involving receipt of FOIA requests still apply and are unchanged by EO-38.

What If the “Stay at Home” or Other Emergency Order Prevents the Public Body From Timely Responding?

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 granting or denial of a request or the timely reversal or upholding of a denial on appeal, a public body may issue an extension notice under Section 5(2)(d), 10(2)(d) and 10a(2)(d). These are the notices for extensions for the initial response or a response to an appeal of a denial or a fee appeal. While the current statutory extension is limited to 10 business days, EO-38 allows the public body to extend the response time “as the public body deems necessary but no longer than until the expiration of this order or any order that follows from it.” EO-38 expires on June 4, 2020 at 11:59 p.m.

EO-38 does not specifically address what information must be included in the extension notice. However, by referencing the statutory provisions regarding the notice of extension, conservatively the public body should still comply with the content of the notice requirements that is currently in the statute by providing a reason for the extension of the initial deadline and the date by which the public body will grant the request, deny the request or grant in part and deny in part.

What if the Request Requires the Public Body to Search Records In-Person at the Office?

EO-38 relaxes the strict compliance with requirements involving “in-person efforts” in responding to a FOIA request as follows:

- *In Person Efforts:* If the FOIA request requires the requestor or the public body to search, inspect, examine, prepare, or produce public records in person, the public body may defer that portion of the request until the expiration of EO-38 or any order that follows from it. Put another way, no search, review, examination or inspection has to occur until after June 4, 2020. EO-38 does not provide any additional standards or reasons that the public body must have in order to defer other than if “in-person” efforts are required.
- *Notice of Deferral:* If deferred, the public body must explain this deferral and its reason in the public body’s initial response required by 5(2) of the FOIA or the public body’s response to the appeal under 10(2) of the FOIA. The response must also notify the requestor of the ability to amend the request as set forth more fully below
- *Amendment of Deferred Portion:* If deferred, the requestor may inform the public body in writing that he or she is amending the FOIA request to exclude the deferred portion.

What if the Request Involves Electronic Records the Public Body Can Access Remotely?

EO-38 reminds public bodies to continue to respond to requests for public records as expeditiously as possible and, to the extent practicable, by using electronic means. If the public body receives an email request and can access and send the documents electronically from the employee’s remote location, EO-38 appears to keep all the current statutory requirements in place.

What If the Public Body Received a FOIA Request Prior to April 5 But Has Not Finally Processed or Responded to It?

EO-38 took immediate effect. However, the public body’s response to FOIA requests filed before the effective date of EO-38 may depend upon the timing and the nature of the request. We recommend that the public body seek legal counsel for any outstanding FOIA requests.

The laws surrounding COVID-19 and the interpretations of Executive Orders are constantly evolving. We will strive to keep you updated of any further changes involving the FOIA.

This publication was provided by the law firm of Foster, Swift, Collins & Smith P.C.