



## Temporary Extensions to FOIA Deadlines per Executive Order 2020-38

(expires June 10, 2020)

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Below is a summary provided by MTA Legal Counsel on the FOIA provisions revised by Executive Order No. 2020-38. The Order provides:

1. If a public body receives a FOIA request by **mail, fax or hand delivery (not email)**, the public body has 10 business days (*Monday through Friday that is not a holiday*) to respond in writing after actual receipt of the request. This also applies to appeals of FOIA decisions.<sup>1</sup>
2. Actual receipt is when an employee physically opens the envelope or takes the fax off the fax machine.
3. This Order does not require the public body to have someone physically report to the office to check the mail or fax if this would not otherwise be performed.
4. If COVID-19 or any response efforts, including compliance with an emergency order or mitigation recommendations related to COVID-19, interfere with timely grant or denial of a request or appeal, then the public body may respond by extending the period as long as deemed necessary but not beyond June 4, 2020, or by an extension order of the governor. This provision allows an extension to make a decision on the request beyond the normal 10 business day extension under FOIA. **Written notice must be given of the extension. (See highlighted information below)**
5. If a public records request requires in-person efforts, such as in-person search, inspection, examination, preparation or production of public records, by the requestor or public body, a public body may defer in writing that portion of the request until the expiration of the Order or any order that follows from it.
6. If the public body defers the in-person search, then in the public body's written response, it must explain this action, its reasons, and the ability of the requestor to amend the request to exclude the deferred portion of the request. The requestor may then inform the public body that it is amending its request in this way.
7. **During the COVID-19 state of emergency, public bodies must still respond to FOIA requests as expeditiously as possible and by electronic means to the extent practicable.**

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<sup>1</sup> It should be noted that Executive Order No. 2020-38 does not alter the FOIA statute with regard to the time for responding to email requests and the determinations of when an email request is actually received. However, bullet points 4-7 **DO** also apply to email requests.

[Executive Order No. 2020-38](#) [Excerpt]

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

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. **["Section 2(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 requestor 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 requestor under section 5(2) or 10(2) of the FOIA, MCL 15.235(2) and 15.240(2), as applicable.**
  - c. **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.

4. The provisions of this order apply notwithstanding any contrary policy adopted by a public body.
5. 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](#).
6. This order is effective immediately and continues through **June 10, 2020 (as extended by EO 2020-1120)**

## Sections of the FOIA subject to temporary suspension in EO 2020-38

### FREEDOM OF INFORMATION ACT (EXCERPT) Act 442 of 1976

[15.235 Request to inspect or receive copy of public record; response to request; failure to respond; damages; contents of notice denying request; signing notice of denial; notice extending period of response; action by requesting person; law enforcement records management system; alternate responses.v](#)

#### Sec. 5.

(1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body. A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until 1 business day after the electronic transmission is made. However, if a written request is sent by electronic mail and delivered to the public body's spam or junk-mail folder, the request is not received until 1 day after the public body first becomes aware of the written request. The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

(2) Unless otherwise agreed to in writing by the person making the request, a public body shall, subject to subsection (10), respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

- (a) Granting the request.
- (b) Issuing a written notice to the requesting person denying the request.
- (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
- (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

(3) Failure to respond to a request under subsection (2) constitutes a public body's final determination to deny the request if either of the following applies:

- (a) The failure was willful and intentional.

(b) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "information", "FOIA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to this act, on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page.

(4) In a civil action to compel a public body's disclosure of a public record under section 10, the court shall assess damages against the public body under section 10(7) if the court has done both of the following:

(a) Determined that the public body has not complied with subsection (2).

(b) Ordered the public body to disclose or provide copies of all or a portion of the public record.

(5) A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice must contain:

(a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.

(c) A description of a public record or information on a public record that is separated or deleted under section 14, if a separation or deletion is made.

(d) A full explanation of the requesting person's right to do either of the following:

(i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.

(ii) Seek judicial review of the denial under section 10.

(e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

(6) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

(7) If a public body issues a notice extending the period for a response to the request, the notice must specify the reasons for the extension and the date by which the public body will do 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(8) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:

(a) Appeal the denial to the head of the public body under section 10.

(b) Commence a civil action, under section 10.

(9) Notwithstanding any other provision of this act to the contrary, a public body that maintains a law enforcement records management system and stores public records for another public body that subscribes to the law enforcement records management system is not in possession of, retaining, or the custodian of, a public record stored on behalf of the subscribing public body. If the public body that maintains a law enforcement records management system receives a written request for a public record that is stored on behalf of a subscribing public body, the public body that maintains the law enforcement records management system shall, within 10 business days after receipt of the request, give written notice to the requesting person identifying the subscribing public body and stating that the requesting person shall submit the request to the subscribing public body. As used in this subsection, "law enforcement records management system" means a data storage system that may be used voluntarily by subscribers, including any subscribing public bodies, to share information and facilitate intergovernmental collaboration in the provision of law enforcement services.

(10) A person making a request under subsection (1) may stipulate that the public body's response under subsection (2) be electronically mailed, delivered by facsimile, or delivered by first-class mail. This subsection does not apply if the public body lacks the technological capability to provide an electronically mailed response.

**History:** 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. [1996, Act 553](#), Eff. Mar. 31, 1997 ;-- Am. [2014, Act 563](#), Eff. July 1, 2015 ;-- Am. 2018, Act 105, Imd. Eff. Apr. 5, 2018 ;-- Am. [2020, Act 36](#), Imd. Eff. Mar. 3, 2020

**FREEDOM OF INFORMATION ACT (EXCERPT)**  
**Act 442 of 1976**

[15.240 Options by requesting person; appeal; actions by public body; receipt of written appeal; judicial review; civil action; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.](#)

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

**History:** 1976, Act 442, Eff. Apr. 13, 1977 ;-- Am. 1978, Act 329, Imd. Eff. July 11, 1978 ;-- Am. [1996, Act 553](#), Eff. Mar. 31, 1997 ;-- Am. [2014, Act 563](#), Eff. July 1, 2015

**FREEDOM OF INFORMATION ACT (EXCERPT)**  
**Act 442 of 1976**

**15.240a Fee in excess of amount permitted under procedures and guidelines or MCL 15.234.**

Sec. 10a.

(1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the requesting person may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, in the court of claims, for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. If a civil action is commenced against the public body under this subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action shall not be filed under this subdivision unless 1 of the following applies:

- (i) The public body does not provide for appeals under subdivision (a).
- (ii) The head of the public body failed to respond to a written appeal as required under subsection (2).
- (iii) The head of the public body issued a determination to a written appeal as required under subsection (2).

(2) Within 10 business days after receiving a written appeal under subsection (1)(a), the head of a public body shall do 1 of the following:

- (a) Waive the fee.
- (b) Reduce the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the remaining fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.
- (c) Uphold the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the required fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.
- (d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).

(4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 shall reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located. The court shall determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If the requesting person prevails in an action commenced under this section by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

(8) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

**History:** Add. [2014, Act 563](#), Eff. July 1, 2015