

## COVID-19 UPDATE

### Michigan's Governor Signs Executive Order Protecting Workers Handling FOIA Requests

On April 5, 2020, Governor Whitmer issued Executive Order (EO)-38, which addresses requests under Michigan's Freedom of Information Act (FOIA). The Governor reiterated the FOIA policy that public bodies continue to respond to requests for public records as expeditiously as possible and, to the extent practicable, through electronic means. FOIA is a mechanism by which the press, regulated parties, and others gain access to information about what the State government is doing.

Developers often conduct due diligence, in part, via FOIA. As the government is largely working remotely, it is more important than ever that information and communications by email and text be available to the public. Unfortunately, the State's FOIA process is not fully online, although more documents are available electronically than ever before. This Executive Order is effective through June 4<sup>th</sup>.

The Governor's Executive Order makes these important changes:

- The clock starts to run in determining when a government response is due based on when an employee of the public body physically: (a) opens an envelope containing the request; or (b) takes the request from a fax machine. Ominously, the order 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." That may effectively suspend FOIA requests entirely except for inquiries made electronically.
- If COVID-19 or any accompanying response efforts, including complying with any emergency order, interferes with the timely response to a FOIA response or appeal, a public body may issue a notice extending the period of time in which to respond for as long as the public body deems necessary but no longer than until the Executive Order expires.
- If a public records request requires in-person efforts, such as an in-person search, inspection, examination, preparation, or *production of public records* (searching, copying, or mailing), a public body may defer that portion of the request until the Executive Order expires. The public body must explain this deferral and its reason in the response to the requestor and the requestor may amend its request in writing to exclude the deferred portion of the request so that the public body may more promptly process the request.

This Executive Order is an effort to address something that our government has declared a key matter: the ability of citizens to timely know what their government is doing. Further, it highlights the fact that the State's FOIA system is antiquated and needs updating and that, even if updated, not every person can make an online request. Those who cannot make an electronic request may find their inquiry delayed for extended periods of time.

We hope you found this information helpful. Should you have any questions, please contact us.

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