

# Legislative Analysis



## FREEDOM OF INFORMATION ACT DUTIES DURING STATE OF DISASTER OR STATE OF EMERGENCY

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### House Bill 4448 (H-1) as enrolled and vetoed

Sponsor: Rep. Steven Johnson

House Committee: Oversight

Senate Committee: Oversight

Complete to 9-28-21

Analysis available at  
<http://www.legislature.mi.gov>

**BRIEF SUMMARY:** House Bill 4448 would amend the Emergency Management Act to prohibit an executive order or directive from limiting the scope of a public body's duties under the Freedom of Information Act (FOIA) during a declared state of disaster or emergency unless the public body establishes a physical inability to meet those duties as a direct result of the disaster or emergency.

**FISCAL IMPACT:** The bill would have an indeterminate, but likely negligible, fiscal impact on state and local government. However, the scope and magnitude of a fiscal impact for a specific instance would depend on the nature of the state of disaster and the actions required to comply with a FOIA request if the state of disaster had a direct impact on the government's ability to respond to a request as required under FOIA.

### **THE APPARENT PROBLEM:**

When a state of emergency was declared in early 2020 in response to the COVID-19 pandemic, a related executive order (EO 2020-38) was issued that suspended the statutory response times for public bodies to respond to citizen requests for public documents accessible under FOIA. Although the executive order expired during the summer of 2020, it is reported that some governmental entities, in particular some local governments, still have not fulfilled FOIA requests.

Although a state of emergency, depending on the nature of the emergency or disaster, can disrupt the typical flow of any business or governmental entity, some say that it is during such times that timely access to certain public information becomes even more important. Legislation has been offered to prohibit issuance of an executive order by the governor during a declared emergency or disaster that would extend the statutorily required response times under FOIA or limit a public entity's statutory duties related to fulfilling requests for public documents by the public.

### **THE CONTENT OF THE BILL:**

House Bill 4448 would amend the Emergency Management Act to prohibit, during a declared state of disaster or emergency, an executive order, proclamation, or directive issued under the act from extending a response time or otherwise limiting the scope of duties of a public body under FOIA. This prohibition would not apply if the public body establishes, by clear and convincing evidence, a physical inability to comply with those duties as a direct result of the declared state of disaster or emergency.

MCL 30.403

## ***BACKGROUND INFORMATION:***

**FOIA** generally establishes procedures and requirements for the disclosure of public records by certain public bodies in the state. Public records are writings prepared, owned, used, possessed, or retained by a public body in the performance of an official function. There are two classes of public records: those subject to disclosure and those exempt from disclosure. Generally, all records are subject to disclosure unless specifically exempted.

FOIA applies to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government (but not the executive office of governor or lieutenant governor); an agency, board, commission, or council in the legislative branch of the state government (but not the legislature itself); a county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or their boards, departments, commissions, councils, and agencies; and any other body created by state or local authority or primarily funded by or through state or local authority. It does not apply to the judicial branch, including the office of the county clerk when acting in the capacity of clerk to the circuit court.

In addition to laying out which public bodies are subject to the act and which public records are subject to disclosure or exempt from it, FOIA prescribes procedures for those requesting public records and procedures and time frames that a public body must follow in responding to those requests.

**The Emergency Management Act**, which House Bill 4448 would amend, authorizes the governor to proclaim a state of emergency or state of disaster. After making such a declaration, the governor can take certain actions in response to the emergency or disaster, except for suspending criminal process and procedures or taking lawfully possessed firearms, ammunition, or other weapons.

**Executive Order 2020-38** was issued by the governor on April 5, 2020, during states of emergency and disaster declared under the Emergency Management Act and 1945 PA 302. The order temporarily suspended strict compliance with required response periods and in-person efforts for public record requests under FOIA. Many state and local employees were working remotely due to the response to the COVID-19 pandemic.

Specifically, the order required a public body to respond in writing to a FOIA request or appeal received at its physical office (by mail, hand delivery, or fax) within 10 business days after an employee actually physically received it, but did not require an employee to report to the office to open mail and check for requests if the employee did not otherwise have to do so. The order allowed a public body to extend response time, up to the end of the declared emergency, if a timely response could not be made because of the COVID-19 pandemic, and allowed a public body to defer, until the end of the declared emergency, a public records request requiring an in-person effort. The public body had to inform the requestor of such a deferment, and the requestor could amend the request to exclude the deferred component.

The order stated: “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.”

Executive Order 2020-38 was extended through June 10, 2020, by Executive Order 2020-112 and was rescinded at 12:01 a.m. on June 11.

House Bill 4448 would prohibit suspensions or modifications of FOIA requirements similar to those made by Executive Order 2020-38.

### ***ARGUMENTS:***

#### ***For:***

If anything, the ongoing COVID-19 pandemic has shown the ability to continue many governmental functions even during a prolonged emergency or disaster, and even when those functions are sometimes conducted remotely from kitchens and home offices. Therefore, some do not see the need for an executive order to exclude public entities automatically, rather than on a case-by-case basis, from their statutory obligations to respond to requests for public documents. Some would say that the ability to access such public information might be all the more important during such times. For instance, some feel that the timely access to public information could reduce the proliferation of conspiracy theories by continuing the ability of the free press, watchdog groups, and citizens to provide oversight and monitor how a state or local governmental entity conducts itself during an emergency. Moreover, depending on the nature of the emergency or disaster, life does go on and people do need access to certain publicly held information to conduct their own affairs, such as accessing court documents or police reports. The bill would have ensured that, just because something out of the ordinary was occurring, the public's right to public documents would not be infringed upon without good cause. The bill would have provided an exception to the prohibition if an incident or event that generated a declared state of emergency or disaster made it impossible, or nearly so, for government employees to comply with the statutory response times—for example, a tornado that takes out a government building in which the requested documents are stored, a flood that makes passage to an office to retrieve and copy paper documents dangerous, or a prolonged power outage in which digital documents cannot be accessed.

#### ***Against:***

The required response time under FOIA is roughly a week, with a two-week extension allowed. This may not be sufficient depending on the nature of a request and the reason an emergency or disaster has been declared. Although an exception was provided in the bill, it could have resulted in an increased cost to taxpayers if public entities needed to seek additional judicial reviews to show that they could meet the required burden of proof. As to public entities that were still slow in responding to FOIA requests after an executive order or declared emergency or disaster had expired, FOIA already provides judicial review and civil penalties for a public entity that capriciously and arbitrarily refuses or delays responding to requests, including punitive damages that must be paid to the individual requesting the information.

#### ***Against:***

The novel coronavirus SARS-CoV-2 presented many unknowns, and it took scientists and medical experts time to begin to identify transmission pathways, populations at highest risk for serious illness or death, and effective ways for individuals to minimize risk of becoming infected. In her veto message, Governor Whitmer noted that Executive Order 2020-38, to which HB 4448 appeared to be a response, “was designed to protect the lives of public officials tasked with responding to FOIA requests during the first surge—an exceptionally frightening and uncertain moment in Michigan’s history,” and that the limited scope of the executive order

“did not change FOIA’s core requirement that public bodies respond to FOIA requests in a timely manner.” Some agree that the bill would have removed a governor’s ability to protect public servants from potential physical harm in the face of a future event presenting known or never-before-seen impacts to health and safety.

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