



**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



TO: AGENCY FOIA OFFICERS

**FROM: NIQUELLE M. ALLEN, ESQ.
DIRECTOR OF OPEN GOVERNMENT**

DATE: OCTOBER 14, 2021

**RE: GUIDANCE FOR D.C. FOIA COMPLIANCE: TRANSITION OUT OF
TEMPORARY AND EMERGENCY COVID-19 AMENDMENTS**

This memorandum provides guidance on processing District of Columbia’s Freedom of Information Act (“D.C. FOIA”)¹ requests during the coronavirus pandemic (or “COVID-19 pandemic”). This guidance is necessary because the Council of the District of Columbia (“D.C. Council”) amended D.C. FOIA several times during the coronavirus pandemic and altered agencies’ obligations to process the requests it receives under D.C. FOIA.

The memorandum first provides an overview of the changes to D.C. FOIA as a result of the COVID-19 pandemic. Next, it details the current state of D.C. FOIA and obligations of FOIA Officers. Last, it provides advice and “best practices” for responding to requesters.

I. SUMMARY OF CHANGES TO D.C. FOIA

Since the beginning of the COVID-19 pandemic, the D.C. Council enacted seven amendments to D.C. FOIA; the first, an emergency law, became effective on March 17, 2020. As of September 22, 2021, the amendments include the following:

- Section 2 of the FOIA Tolling Temporary Amendment Act of 2020, March 16, 2021 (D.C. Law 23-267 (D.C. Act 23-595); 68 DCR 001190) (permits an extension, by written notice to requester, of up to 45 business days, in the event of a “need to conduct an on-site review of records that could present a significant risk to health or safety,” during (1) Mayor-declared public health emergency or (2) closure “by the personnel authority of the public body”) (expires 10/27/2021).
- Section 2 of the FOIA Tolling Emergency Amendment Act of 2020, December 22, 2020 (D.C. Act 23-555; 68 DCR 000136) (suspended time limits through January 15, 2021; and thereafter permitted an extension, by written notice to requester, of up to 45 business days,

¹ District of Columbia Freedom of Information Act of 1976, effective March 25, 1977 (D.C. Law 1-96, D.C. Official Code § 2-531 *et seq.*).

in the event of a “need to conduct an on-site review of records that could present a significant risk to health or safety,” during (1) Mayor-declared public health emergency or (2) closure “by the personnel authority of the public body”) (expired 3/22/2021).

- Section 808 of the Coronavirus Support Temporary Amendment Act of 2020, October 9, 2020 (D.C. Law 23–130 (D.C. Act 23–334); 67 DCR 008622) (suspended time limits during “days of a COVID-19 closure”) (repealed 12/22/2020).
- Section 808 of the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020, August 19, 2020 (D.C. Act 23–405; 67 DCR 010235) (suspended time limits during “days of a COVID-19 closure”) (expired 11/16/2020).
- Section 808 of the Coronavirus Support Congressional Review Emergency Amendment Act of 2020, June 8, 2020 (D.C. Act 23–328; 67 DCR 007598) (suspended time limits during “days of a COVID-19 closure”) (expired 9/6/2020).
- Section 808 of the Coronavirus Support Emergency Amendment Act of 2020, May 27, 2020 (D.C. Act 23–326; 67 DCR 007045) (suspended time limits during “days of a COVID-19 closure”) (expired 8/25/2020).
- Section 503 of the COVID–19 Response Emergency Amendment Act of 2020, March 17, 2020 (D.C. Act 23–247; 67 DCR 003093) (suspended time limits during “days of a COVID-19 closure”) (repealed 5/27/2020).

These amendments shared identical or similar text. They functioned as an unbroken period of leniency for public bodies to process D.C. FOIA requests, extended to parallel each extension of the public health emergency by the Mayor.² Thus, the declaration of a public health emergency by the Mayor significantly impacted the effect of these laws and subsequent amendments. Those Mayor’s Orders are discussed below.

The Mayor first declared a public health emergency on March 11, 2020, by issuing Mayor’s Order 2020–046.³ The public health emergency lasted for fifteen days pursuant to this Order. The Mayor subsequently issued ten Orders extending the public health emergency. Those Mayor’s Orders are as follows:

- Mayor’s Order 2020–050,⁴ effective March 20, 2020, extended the public health emergency through April 24, 2020 (also continued emergency measures and requirements);

² See generally, D.C. Official Code § 7–2304.01(a) (section 5a(a) of the District of Columbia Public Emergency Act of 1980 (D.C. Law 3–149)).

³ <https://tinyurl.com/tf6bjutu>

⁴ <https://tinyurl.com/2zns3s5w>

- Mayor’s Order 2020–053,⁵ effective March 24, 2020, superseded Mayor’s Order 2020-50 and the date of the public health emergency declaration concluded on April 24, 2020 pursuant to this Order (also closed non-essential businesses with the closure effective on March 25, 2020 at 10:00 pm);
- Mayor’s Order 2020–063,⁶ effective April 17, 2020, extended the public health emergency through May 15, 2020 (also contained Orders concerning particular measures for group institutions such as jails and residential/care facilities; amendments concerning mask requirements, medical marijuana registration cards);
- Mayor’s Order 2020–066,⁷ effective May 16, 2020, extended the public health emergency through June 8, 2020 (also contained Orders concerning mask requirements, and preparations for reopening);
- Mayor’s Order 2020–067,⁸ effective May 29, 2020, extended the public health emergency “for the duration authorized by the Council . . . , to July 24, 2020” (also concerned details of “Phase One”⁹ reopening);
- Mayor’s Order 2020–079,¹⁰ effective July 22, 2020 in relevant part, extended the public health emergency through October 9, 2020 (also concerned delegations of authority to take agency-specific measures such as reassignment of personnel and promulgating rules);
- Mayor’s Order 2020–103,¹¹ effective October 7, 2020, extended the public health emergency through December 31, 2020 (also concerned additional and modified measures for “Phase Two”¹² reopening);

⁵ <https://tinyurl.com/46fnykmf>

⁶ <https://tinyurl.com/d6njt5hc>

⁷ <https://tinyurl.com/33sebjdy>

⁸ <https://tinyurl.com/sznkadf7>

⁹ “4. On April 23, 2020, [the Mayor] constituted the ReOpen DC Advisory Group and charged it with making recommendations for . . . a sustainable reopening of the District . . . anchored in . . . health, opportunity, prosperity, and equity. . . . 5. The ReOpen DC Advisory Group recommended a four[-]phase approach to reopening businesses, government operations, services, and activities in the District, with each phase reducing restrictions and moving toward Phase Four, when District restrictions based in protecting public health would lift. These are recommendations without the force of guidance, order, or law. The Administration will operationalize those recommendations that it accepts per phase by Mayor’s Order. . . . 7. In Phase One, certain activities – where the risk of transmission has been determined to be low and when strong safeguards are in place – are being allowed to restart.” Mayor’s Order 2020–067, § I.

¹⁰ <https://tinyurl.com/3847jybm>

¹¹ <https://tinyurl.com/3vzu6ety>

¹² “Phase Two” reopening, see discussion of four-phase approach, *supra* n.9, “beg[a]n on Monday, June 22, 2020, allowing certain businesses to reopen and activities to resume under specified conditions outlined at

- Mayor’s Order 2020–127,¹³ effective December 18, 2020, extended the public health emergency through March 31, 2021 (also included further provisions such as barring indoor dining in restaurants, closing museums, suspending indoor service at libraries, limiting Department of Parks and Recreation services to individual reservations, requiring non-essential employees to telework, suspending the DC Circulator National Mall route, and repealing occupancy limit for retail food sellers but requiring social distancing);
- Mayor’s Order 2021–004, effective January 11, 2021, modified Mayor’s Order 2020–127 “to correspond with the duration of” D.C. Act 23–524 “such that the . . . public health emergency . . . [is] extended through March 17, 2021” (also extended the “[h]oliday [p]ause” on “Phase Two”¹² activities, implemented by Mayor’s Order 2020–127, until 5:00 a.m. on January 22, 2021);
- Mayor’s Order 2021–038,¹⁴ effective Mar. 17, 2021 in relevant part, extended the public health emergency through May 20, 2021 (also updated and modified the Mayor’s “Phase Two” reopening measures first introduced in Mayor’s Order 2020-103 and established requirements for quarantine, testing, and travel); and
- Mayor’s Order 2021–069,¹⁵ effective May 21, 2021 in relevant part, extended the public health emergency “for so long as District of Columbia law extends the emergency” (also concerned “Modified Measures for Spring/Summer 2021”);
- Mayor’s Order 2021–096, effective “Sunday, July 25, 2021, at 12:01 a.m., unless otherwise noted [t]herein,” terminated the public health emergency.

The changes to D.C. FOIA that the D.C. Council implemented were touted as necessary during the COVID-19 pandemic to preserve resources and ensure the continuity of government operations. The tolling of D.C. FOIA processing was dependent upon the existence of a public health emergency. However, as you know, the blanket District-wide tolling of FOIA deadlines due to the COVID–19 pandemic has lapsed, and the public health emergency ended at 12:01 a.m. on July 25, 2021. As a result, in most instances, the pre-pandemic D.C. FOIA laws apply to your processing of D.C. FOIA requests.

coronavirus.dc.gov/phasetwo.” Mayor’s press release of June 19, 2020 (hyperlink omitted). The “specific conditions” for Phase Two are described in the guidance sheets available at coronavirus.dc.gov/phasetwo, but the conditions vary widely among different industries and circumstances, *e.g.*: handlers of service and therapy animals, individuals with chronic health conditions, and summer camps.

¹³ <https://tinyurl.com/dxprzxx8>

¹⁴ <https://tinyurl.com/ym3wxz8y>

¹⁵ <https://tinyurl.com/9822znh8>

Next, information on the impact of the D.C. FOIA amendments and the current status of D.C. FOIA is discussed.

II. IMPACT OF THE D.C. FOIA AMENDMENTS AND CURRENT STATUS

For identification purposes, this memorandum describes the progression of changes in D.C. FOIA since the start of the public health emergency in three distinct stages:

(1) *Phase I COVID-19 closure* period: March 11, 2020 through January 15, 2021, during which D.C. FOIA was fully tolled.¹⁶

(2) *Phase II COVID-19 closure* period: January 16, 2021 through the last day of the public health emergency, July 24, 2021, during which D.C. FOIA-response parameters returned to their pre-pandemic state, except, where request processing required on-site reviews “that could present a significant risk to health or safety,” the response was tolled while the facility remains closed and the possibility of “significant risk to health or safety” endures; once the facility opens or the risk mitigates, the request must be processed within 45 business days.¹⁷

(3) *Phase III COVID-19 Closure Period*: A post-July 24, 2021 period of closure due to COVID-19, which is the same as Phase II, but only applies to independent agencies with government facilities that are closed *and* only until October 27, 2021 (unless that provision is carried forward by another later enactment).¹⁸

A. Processing FOIA Requests Received During *Phase I COVID-19 Closure Period*.

These D.C. FOIA requests should be completed as of the date of this memorandum. If an outstanding request was received by your agency during this time period, and your agency has not responded, the request may be deemed a constructive denial and the FOIA requester may have a

¹⁶ Section 2 of the FOIA Tolling Emergency Amendment Act of 2020, December 22, 2020 (D.C. Act 23-555; 68 DCR 000136); section 808 of the Coronavirus Support Temporary Amendment Act of 2020, October 9, 2020 (D.C. Law 23-130; 67 DCR 008622); section 808 of the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020, August 19, 2020 (D.C. Act 23-405; 67 DCR 010235); section 808 of the Coronavirus Support Congressional Review Emergency Amendment Act of 2020, June 8, 2020 (D.C. Act 23-328; 67 DCR 007598); section 808 of the Coronavirus Support Emergency Amendment Act of 2020, May 27, 2020 (D.C. Act 23-326; 67 DCR 007045); section 503 of the COVID-19 Response Emergency Amendment Act of 2020, March 17, 2020 (D.C. Act 23-247; 67 DCR 003093); Mayor’s Orders 2020-046, 2020-053, 2020-063, 2020-066, 2020-067, 2020-079, 2020-103, 2020-127).

¹⁷ Section 2 of the FOIA Tolling Temporary Amendment Act of 2020, March 16, 2021 (D.C. Law 23-267; 68 DCR 001190); section 2 of the FOIA Tolling Emergency Amendment Act of 2020, December 22, 2020 (D.C. Act 23-555; 68 DCR 000136); Mayor’s Orders 2020-127, 2021-038, 2021-069.

¹⁸ Section 2 of the FOIA Tolling Temporary Amendment Act of 2020, March 16, 2021 (D.C. Law 23-267; 68 DCR 001190); Mayor’s Order 2021-096.

right to appeal. However, if the FOIA request required your FOIA Officer or agency employee to enter a D.C. government facility prior to July 12, 2021, which is the date most Executive Branch agencies reopened, the FOIA request may have been tolled.

B. Processing FOIA Requests Received During *Phase II COVID-19 Closure Period.*

In most instances, these D.C. FOIA requests should be processed under the normal rules and processing times. So, most requests received during this period should have been processed on or before August 2, 2021 (or August 16, 2021, if you invoked a ten-day extension). If an outstanding request was received by your agency during this time period, and your agency has not responded, the request may be deemed a denial and the FOIA requester may have a right to appeal. However, if FOIA request required your FOIA Officer or agency employee to enter a D.C. government facility prior to July 12, 2021, which is the date most Executive Branch agencies reopened, the FOIA request may have been tolled.

If you receive a D.C. FOIA request that requires a staff person or FOIA Officer to enter your agency's facilities and those facilities did not follow the Mayor's July 12, 2021 reopening, the request may be tolled. D.C. FOIA requests received by your agency are not due until 45 business days after your agency reopens or the possibility of "significant risk to health or safety" ends or ended, whichever happens or happened first.

C. Processing FOIA Requests Received During *Phase III COVID-19 Closure Period.*

This phase is identical to Phase II above. However, the statutory authorization under D.C. FOIA, unless extended expires on October 27, 2021. That means you should be prepared to respond to all FOIA requests tolled due to closed facilities 45 business days after October 27, 2021, or on or before **January 4, 2022.**

III. BEST PRACTICE RECOMMENDATIONS

The following best practice recommendations are intended to assist you in performing your duties as FOIA Officers for your agency. Adoption of these recommendations in your processing of FOIA requests will ensure that you meet statutory deadlines and develop processes and procedures in your agency that will incorporate FOIA processing into your normal workflow as a part of your District government operations.

- Develop a template for language to send to requesters, explaining the altered time limits discussed in this memorandum. A template is provided as an attachment to this memorandum to assist with formulating an agency-specific template that the agency FOIA Officer will send out to FOIA requesters.
- Maintain communication with requesters throughout the pendency of the request, even where an ongoing closure enables a public body to delay its ultimate response and release

of records. Communication should occur promptly, as soon as the FOIA request is received and as often as is practicable to fulfil the request.

- Prioritize the digitization of analog records. FOIA Officers should stress the importance of this task to agency leadership and records officers. This has the dual benefit of easing the transmission of records to individual requesters, while also preparing the records for more efficient release to a wider audience.¹⁹
- Utilize FOIAXpress to process FOIA requests submitted through the District of Columbia Freedom of Information Act Public Access Portal (“FOIA Portal”) when the agency possesses a license to utilize the system. In most cases, FOIAXpress will automatically have the appropriate deadlines and time limits discussed in this memorandum included as a feature of the technology. This is a convenient method to ensure that FOIA Officers are able to track requests. However, we recommend that FOIA Officers contact FOIA requesters outside of FOIAXpress as well. We recommend sending the requester an acknowledgement letter or an e-mail with the FOIA Officer’s contact information, including your telephone number and e-mail address, so that the FOIA requester may reach you with questions or concerns. There are instances when the D.C. government e-mail filter may mark e-mails from the FOIA Portal as spam and you may not get them. So, providing the requester with your contact information will ensure that they are able to reach you in the event this happens or there are technical issues with the FOIA Portal.

IV. CONTACTS FOR FURTHER ASSISTANCE

The Office of Open Government’s (OOG) legal staff is available to assist you with responding to D.C. FOIA requests. OOG’s legal staff are its Chief Counsel, Johnnie Barton, and staff attorneys Sheree DeBerry, Zita Orji, and Nicholas Weil. Please contact OOG at (202) 481–3411 or open.govoffice@dc.gov anytime for further information, training, or other assistance.

¹⁹ Recall there is a requirement to publish completed FOIA requests to an online FOIA “reading room” or similar website, *see, e.g.*, D.C. Official Code § 2–536(a)(9) (section 206(a)(9) of D.C. FOIA) (requiring proactive publication of “all records . . . which have been released to any person under [D.C. FOIA] and which, because of the nature of their subject matter, the public body determines have become or are likely to become the subject of subsequent requests for substantially the same records”).