

Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act during the COVID-19 Pandemic

Updated July 2, 2020

As public bodies across the State are taking action to curb the spread of COVID-19, this document is intended to serve as guidance from the Public Access Counselor (“PAC”) based on the current status of the law and, where applicable, the Governor’s Executive Orders issued as a result of the COVID-19 pandemic. As the situation is rapidly evolving, the PAC will update this guidance as necessary. If you have questions about the Open Meetings Act and/or the Freedom of Information Act, please contact the PAC at the following number: 1-877-299-3642 or by email at publicaccess@atg.state.il.us.

Gubernatorial Disaster Proclamations and Executive Orders

On March 9, 2020, pursuant to his authority under section 7 of the Illinois Emergency Management Agency Act (IEMA Act),¹ the Governor of Illinois “declared[d] all counties in the State of Illinois as a disaster area” in response to the outbreak of COVID-19.² The Governor then issued a series of executive orders for coping with the disaster. Because of the rapid spread of COVID-19, the Governor issued Executive Order No. 2020-10 (“Stay at Home Order”), which among other things, provides that, subject to certain limited exceptions, beginning on March 21, 2020, “all individuals currently living within the State of Illinois are required to stay at home or at their place of residence * * * ” and that [a]ll businesses and operations in the State, except Essential Businesses and Operations, *** are required to cease all activities within the State[.]”³ The Executive Order excepts from these prohibitions “Essential Governmental Functions,” a term which is defined to include: “all services provided by the State or any municipal, township, county, subdivision, or agency of governmental and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public[.]”⁴ The Order further provides that “[e]ach government body shall determine its Essential Governmental functions and identify employees and/or contractors necessary to the performance of those functions” and that “[n]othing in [the Order] shall prohibit any individual from performing or accessing Essential Governmental Functions.”⁵ (Emphasis Added). On April 1, 2020, the Governor issued a second Disaster Proclamation⁶ and extended the applicability of several executive orders through April 30, 2020, including the Stay at Home Order.⁷

¹20 ILCS 3305/7 (West 2018).

²Gubernatorial Disaster Proclamation, issued March 9, 2020, at 2.

³Executive Order No. 2020-10, §1(2), issued March 20, 2020.

⁴Executive Order No. 2020-10, §1(10), issued March 20, 2020.

⁵Executive Order No. 2020-10, §1(10), issued March 20, 2020.

⁶Gubernatorial Disaster Proclamation, issued April 1, 2020.

⁷Executive Order No. 2020-18, Part 1, issued April 1, 2020.

The Open Meetings Act

Of the many ways governments are responding to the COVID-19 pandemic, public bodies are addressing the important responsibility to limit circumstances that might allow for the spread of the COVID-19 virus while fulfilling their obligation to comply with the transparency and openness requirements of the Open Meetings Act (“OMA”).⁸

Executive Order No. 2020-07, issued March 16, 2020,⁹ and extended on April 1, 2020, by Executive Order No. 2020-18, suspends the OMA provisions relating to in-person attendance by members of a public body. Specifically, the Governor’s Order: (1) suspends the requirement in Section 2.01¹⁰ that “members of a public body must be physically present;” and (2) suspends the limitations in Section 7 on when remote participation is allowed.¹¹ Executive Order 2020-33, issued April 20, 2020, extended the applicable OMA provisions until May 29, 2020, and Executive Order 2020-39, issued May 29, 2020, extended the relevant provisions “through June 27, 2020 or until corresponding legislation (SB 2135) is enacted and takes effect, whichever comes first.”

On May 23, 2020, the legislature passed Senate Bill 2135, which includes **amendments to the Open Meetings Act**. The Governor signed the bill on June 12, 2020, which became Public Act 101-0640. The amendments to the OMA became effective on June 12, 2020, and accordingly, supersede Executive Order 2020-39. The text of Public Act 101-0640 is available [here](#). The following is a brief summary of the provisions of Public Act 101-0640 that relate to OMA.

Requirement for Physical Presence of a Quorum for Members of a Public Body

The OMA generally requires that in order for public body members to attend a meeting by a means other than a physical presence: (1) a quorum of members of the public body must be physically present at the meeting location; and (2) the public body must have adopted rules governing remote attendance.¹² However, the new law, Public Act 101-0640, allows a public body to hold “an open or closed meeting by audio or video conference without the physical presence of a quorum of the members” during a public health disaster as long as several enumerated conditions are met.¹³

Existence of a Disaster

The new remote meeting provisions of the OMA are only applicable when “the Governor or the Director of the Illinois Department of Public Health has issued a disaster declaration related to

⁸5 ILCS 120/1 *et seq.* (West 2018).

⁹Executive Order No. 2020-07, §6, issued March 16, 2020.

¹⁰5 ILCS 120/2.01 (West 2018).

¹¹Executive Order No. 2020-18, Part 1, issued April 1, 2020.

¹²*See* 5 ILCS 120/2.01 (West 2018), as amended by Public Act 101-640, effective June 12, 2020; *see* 5 ILCS 120/7 (West 2018), as amended by Public Act 101-640, effective June 12, 2020.

¹³5 ILCS 120/7(e) (West 2018), as amended by Public Act 101-0640, effective June 12, 2020.

public health concerns because of a disaster as defined in Section 4 of the Illinois Emergency Management Agency Act, and all or part of the jurisdiction of the public body is covered by the disaster area.”¹⁴ In addition, the head of the public body (as defined in Section 2(e) of the Freedom of Information Act), must determine that “an in-person meeting or a meeting conducted under [the OMA] is not practical or prudent because of a disaster.”¹⁵ According to the Freedom of Information Act, the “head of the public body” is “the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person’s duly authorized designee.”¹⁶

Convenient and Open Meetings

OMA requires public meetings to be “convenient and open” for members of the public.¹⁷ To that end, OMA sets forth several transparency requirements that may pose challenges for holding public meetings during this public health emergency. Public gatherings, and especially public gatherings of more than ten people, can hasten the spread of COVID-19 throughout communities. In addition, members of a public body and their staffs may become exposed to or infected with COVID-19, which could require quarantine or isolation. With these public health concerns in mind, public bodies are encouraged to cancel any public meetings that are not deemed essential at this time.

Public Act 101-0640 addresses some of the challenges posed while setting forth certain requirements to maintain transparency of public business. Pursuant to Public Act 101-0640, once the required conditions exist to hold a remote meeting during a disaster, the public body must adhere to further requirements for conducting the meeting. These additional conditions are set out in the new Sections 7(e)(3) through 7(e)(10) of OMA (5 ILCS 120/7(e)(3) – 7(e)(10) (West 2018), as amended by Public Act 101-0640, effective June 12, 2020).

Member Participation

All members of the public body who are participating in the meeting, regardless of their physical location shall be:

- Verified, able to hear one another, and able to hear discussion and testimony (7(e)(3));
- All votes shall be conducted by a roll call and each member’s vote on each issue shall be identified and recorded (7(e)(6));
- At least one member of the public body or the chief legal counsel or chief administrative officer must be physically present at the regular meeting location, unless physical presence is “unfeasible due to the disaster” (7(e)(5));

¹⁴5 ILCS 120/7(e)(1) (West 2018), as amended by Public Act 101-0640, effective June 12, 2020.

¹⁵5 ILCS 120/7(e)(2) (West 2018), as amended by Public Act 101-0640, effective June 12, 2020.

¹⁶5 ILCS 140/2(e) (West 2018).

¹⁷See 5 ILCS 120/2.01 (West 2018), as amended by Public Act 101-640, effective June 12, 2020.

- Each member of the public body who participates in a remote meeting held in accordance with these disaster requirements “is considered present at the meeting for purposes of determining a quorum and participating in all proceedings (7(e)(8)).

Public Participation

When the meeting is in open session, Section 7(e)(4) of OMA requires the meeting to be conducted in a manner that allows members of the public present at the regular meeting location of the body to hear all discussion, testimony, and votes. If attendance at the regular meeting location is not feasible because of the disaster, Section 7(e)(4) further provides that the public body must make alternative arrangements, with the proper notice, which “allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes[.]” Alternative arrangements include offering a telephone number or web-based link.

Notice provisions

Unless there is a bona fide emergency, in order to hold a remote meeting, public bodies must provide 48 hours’ notice in accordance with Section 2.02 of the OMA,¹⁸ which also requires public bodies to post the notice of the meeting and the agenda at the principal office of the body holding the meeting and the building in which the meeting is to be held. In addition to the existing notice requirements under Section 2.02(a) and 2.02(b), the new law requires notice for remote meetings to be: provided to all members of the public body, posted on the public body’s website,¹⁹ and provided to any news media who has requested notice of meetings. However, if the public body declares a bona fide emergency, notice shall be given pursuant to the existing requirements in Section 2.02(a) of the OMA, which state, “notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any new medium which has filed an annual request for notice.”²⁰ In the event of a bona fide emergency meeting, the presiding officer is required to state the nature of the emergency at the beginning of the meeting.

Recordings

In addition to the requirement in Section 2.06(a)²¹ to keep verbatim recordings of closed meetings, Section 7(e)(9) requires public bodies holding open meetings under the new Public Act to keep a verbatim record of all their meetings, including the open sessions, in the form of an audio or video recording. These verbatim records shall be made available to the public under, and are otherwise subject to, the provisions of Section 2.06, including maintaining the records for at least 18 months after the meeting was held.²²

¹⁸5 ILCS 120/2.02 (West 2018).

¹⁹Section 2.02(a) and 2.02(b) only require public bodies to provide advance notice on their websites if the websites are maintained by full-time staff.

²⁰5 ILCS 120/2.02(a) (West 2018).

²¹5 ILCS 120/2.06(a) (West 2018).

²²5 ILCS 120/2.06(c) (West 2018).

Postponing or Cancellation of Public Meetings

Public bodies may choose to postpone or cancel public meetings. Where a public body does not have critical issues that must be addressed because time is of the essence, cancelling or postponing public meetings may be prudent during the COVID-19 outbreak, rather than holding meetings that could pose a risk of danger to the public. If a public body chooses to cancel a meeting after it has already posted the notice and agenda in accordance with the OMA's 48-hours' notice requirement, the public body should place the cancellation notice on its website, at the principal office of the public body, and at the meeting location.

PAC is often asked whether cancelling a meeting or changing a meeting date requires 10 days' notice of the change by publication in a newspaper. The answer is no; this requirement applies only to a change in the **schedule of regular meetings**,²³ for example, changing the regular meeting dates from Mondays to Thursdays. This specific notice and publication requirement does not apply to cancelling a single meeting.

Meetings Held In-Person

Public bodies determining whether to hold meetings at this time should exercise good judgment and discretion and utilize the availability of remote participation to help curb the spread of COVID-19. Public bodies should continue to be aware of appropriate public health considerations if the circumstances do not exist to hold a remote meeting, the public body decides to hold an in-person meeting, or members of the public are present at the normal location to observe a remote meeting. If a public body determines it is necessary to hold a public meeting, consider the following actions to recognize and address the serious public health issues involved with COVID-19:

- Hold your public meeting in a larger room than normal. For example, instead of a conference room, hold a meeting in an auditorium, a gymnasium, or other large space in order to facilitate social distancing.
- You may consider having a separate room for the public that is video or audio linked to the room where the public body is meeting. This arrangement can promote social distancing by utilizing large spaces while still allowing for open meetings.
- You may consider recording the entire meeting,²⁴ open portions as well as any closed sessions, for persons who are unable to attend or access open meetings during this public health crisis. Post the open session recording on your public body's website as soon after the meeting as is practical.
- Be sure to clearly designate the location of a meeting in the notice and posting required under OMA, as well as instructions for accessing the meeting remotely. Public bodies

²³See 5 ILCS 120/2.03 (West 2018).

²⁴Remember, for meetings held under the new remote meetings provisions, the entire meeting **must** be recorded. See 5 ILCS 120/7(e)(9) (West 2018), as amended by Public Act 101-0640, effective June 12, 2020.

are encouraged to place additional signage in the facility hosting a public meeting so the public is aware of the specific room or space location where a meeting is being held, especially if meetings are being held in places where staffing is minimal and there may be limited personnel to assist the public in locating a public meeting.

If public bodies are convening via electronic means, such as by conference call or by web-assisted meetings, the public body should ensure that the public has a means to both observe and comment during these meetings. This can be achieved by sharing conference call or other log-in information in the notice of the public meeting. To help ensure all meetings are “convenient and open” to the public to the greatest extent possible, public bodies should offer multiple ways for the public to access a public meeting, such as offering both a telephone number and a weblink, so that individuals who do not have internet services have an option to access the meeting.

Public bodies may consider using third party resources that provide conference call-in lines or other virtual meeting programs to host their meetings during the COVID-19 pandemic. Public bodies should be aware, however, that there have been recent instances of outside parties “hijacking” video conferences by inserting inappropriate and offensive language or graphic images onto the screen that all participants can see. If using a web-based conference call or video-conferencing service, public bodies should exercise caution and thoroughly review all terms and conditions of use, including any provisions related to security, data collection, and users’ privacy.

Public Comment

OMA requires public bodies to allow for public comment.²⁵ Members of the public may be prevented from attending public meetings because of compliance with quarantine or isolation orders or following the general instruction to remain at home during the pandemic. Public bodies are urged to provide remote access to members of the public and to update their websites and social media with the goal of openness and transparency during this time. Further, public bodies should consider taking public comment by email or written submission and reading those public comments into the record of the public meeting. If members of the public attend meetings in-person, social distancing is essential as outlined above. In addition, during public comment periods, have commenters approach a microphone one at a time instead of gathering in close proximity. If the public body convenes via electronic means, it should provide multiple alternative means for the public to comment, such as, telephone or video-conference capabilities, in addition to the submission of emailed or written comments noted above.

²⁵See 5 ILCS 120/2.06(g) (West 2018).

The Freedom of Information Act

While public bodies across the State are taking steps to protect their employees and the public by reducing staff and partially or fully closing public offices, they are also attempting to comply with the requirements of the Freedom of Information Act (“FOIA”). None of the Governor’s executive orders issued to date, the Attorney General Act,²⁶ nor FOIA²⁷ provides the Office of the Illinois Attorney General or the Public Access Counselor with the authority to suspend FOIA’s statutory deadlines. Only an executive order issued pursuant to section 7 of the IEMA Act can suspend the statutory deadlines or an act of the General Assembly can alter such deadlines. Public bodies, therefore, should continue to comply with FOIA and respond to each request promptly, to the extent they are able to, given the limitation on staff and resources during the COVID-19 pandemic.

Public bodies’ responses to the COVID-19 pandemic may limit public bodies, to varying degrees, from fully functioning and transacting business. At the same time, all public bodies must be aware that the General Assembly has already determined that “[i]t is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA][.]”²⁸ To date, none of the COVID-related Executive Orders authorize public bodies to disregard FOIA or to issue blanket denials of all FOIA requests where the General Assembly has already determined that it is the public policy of this State to provide “full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees[.]”²⁹ In addition, the legislature has not amended FOIA to change or extend any deadline requirements during the COVID-19 pandemic or other public health emergency. Therefore, in the FOIA context, the determination of how to provide this specific essential governmental function must necessarily include a review of the staff and resources required to respond to FOIA requests within the statutory deadlines.

FOIA Response Time Requirements

FOIA requires each public body to promptly respond to a request for public records, either by complying with or denying the request, within 5 business days after the public body has received the request.³⁰ The public body may extend the time to respond for an additional 5 business days from the original due date, if: (1) the requested records are stored in a different location; (2) the request requires the collection of a substantial number of specified records; (3) the request requires an extensive search; (4) additional efforts must be made to locate the records; (5) the records require analysis by specific personnel to determine if any exception to the disclosure

²⁶See 15 ILCS 205/0.01 *et seq.* (West 2018).

²⁷See 5 ILCS 140/1 *et seq.* (West 2018).

²⁸5 ILCS 140/1 (West 2018).

²⁹5 ILCS 140/1 (West 2018).

³⁰5 ILCS 140/3(d) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

applies; (6) the response cannot be compiled within the requisite time limits without unduly burdening the public body's operations; and (7) the public body needs to consult with another public body that has a substantial interest in the request.³¹

Due to the COVID-19 pandemic and preventative measures taken in attempt to control the spread of the virus, various public bodies are operating with limited staff and resources. Many public bodies have chosen to allow their employees to work remotely, while other public bodies have partially or completely closed their offices. In addition, as more and more individuals become ill or come into contact with someone infected with COVID-19 and are isolated or quarantined, public employees may be unable to report to work. In such circumstances, public bodies may assert an exception listed above, particularly if responding to the request is unduly burdensome in the circumstances, requires review by an unavailable staff member, or requires resources to obtain records located off-site. If a public body seeks to utilize an extension, it must notify the requester of the reasons for the delay and the date on which the public body will respond to the request.

Given that the length of the pandemic remains unknown, it may be difficult to respond to the request even with an extension. Both requesters and public bodies should keep in mind that FOIA allows the public body and the requester to come to a mutually agreeable response period to comply with a FOIA request.³² Members of the public and media are asked to keep these considerations in mind and are strongly encouraged to work with public bodies to agree on reasonable and appropriate response times in light of the public health concerns that we all face.

³¹5 ILCS 140/3(e) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

³²5 ILCS 140/3(e) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.