

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

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.

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”).

The Governor’s Executive Order 2020-07, issued on March 16, 2020, suspends the Open Meetings Act provisions relating to in-person attendance by members of a public body. Specifically, the Governor’s Order: (1) suspends the requirement in Section 2.01 that “members of a public body must be physically present;” and (2) suspends the limitations in Section 7 on when remote participation is allowed. This Executive Order is effective the duration of the Gubernatorial Disaster proclamation, which is 30 days from its issuance on March 9, 2020.

Postponing or Cancellation of Public Meetings

Public bodies may choose to postpone or cancel public meetings. The Executive Order 2020-07 encourages public bodies to postpone public business when possible. 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 shall 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**, 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.

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

OMA requires that a quorum of members of the public body be physically present at the meeting location and allows for limited circumstances in which remote access is acceptable. Executive Order 2020-07 suspends the in-person presence requirements and eliminates the limitation on remote access. If a meeting is necessary, public bodies are encouraged to utilize remote access as allowed by the Executive Order.

Open and Convenient Meetings

OMA requires public meetings to be “open and convenient” for members of the public. To that end, OMA sets forth several transparency requirements that may pose challenges for holding public meetings during this public health emergency. Public gatherings can hasten the spread of COVID-19 throughout communities. In addition, members of a public body and their staffs may become exposed or infected with COVID-19, which could require quarantine or isolation. To that end, Executive Order 2020-07 prohibits all public and private gatherings of 50 or more people beginning on March 18, 2020. With this directive, public bodies are encouraged to cancel any public meetings in which they expect more than 50 people to attend.

For a public body that determines it must hold a meeting during the COVID-19 pandemic, the Executive Order 2020-07 suspends the in-person attendance requirement for members of the public body and allows for remote participation. If a meeting is necessary, public bodies are encouraged to provide video, audio, and/or telephonic access to maintain openness and transparency to members of the public. 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. If a public body determines it must 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 rooms while still allowing for open meetings.

- You may consider recording the entire meeting, open portions as well as any closed sessions. Post the open session recording on your public body's website as soon after the meeting as is practical.
- Be sure to clearly mark a location of a meeting in the notice and posting required under OMA. It is encouraged to place additional signage in the area of a public meeting so the public is aware of 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.

Public Comment

OMA requires public bodies to allow for public comment. The public may not be able to attend an open meeting because of compliance with quarantine or isolation orders or general efforts 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 at 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 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.

Public bodies may consider using resources that provide free conference call-in lines or other virtual meeting programs to host their meetings during the COVID-19 pandemic. If using a web-based conference call service, public bodies should thoroughly review all terms and conditions of use, including any provisions related to data collection and users' privacy.

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”). Public bodies 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.

Response Time Requirements

FOIA requires each public body to promptly respond to a request for public records, either by complying or denying the request, within 5 business days after the public body has received the request. 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 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.

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 the 5-day 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 a 5-day 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. 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.