

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

Updated April 09, 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](mailto: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),<sup>1</sup> 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.<sup>2</sup> 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[.]”<sup>3</sup> 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[.]”<sup>4</sup> 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.”<sup>5</sup> (Emphasis Added). On April 1, 2020, the Governor issued a second Disaster Proclamation<sup>6</sup> and

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<sup>1</sup>20 ILCS 3305/7 (West 2018).

<sup>2</sup>Gubernatorial Disaster Proclamation, issued March 9, 2020, at 2.

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

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

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

<sup>6</sup>Gubernatorial Disaster Proclamation, issued April 1, 2020.

extended the applicability of several executive orders through April 30, 2020, including the Stay at Home Order.<sup>7</sup>

### **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”).<sup>8</sup>

Executive Order No. 2020-07, issued March 16, 2020,<sup>9</sup> and extended on April 1, 2020, by Executive Order No. 2020-18, 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<sup>10</sup> that “members of a public body must be physically present;” and (2) suspends the limitations in Section 7 on when remote participation is allowed.<sup>11</sup> The Executive Order is effective the duration of the Second Gubernatorial Disaster proclamation,<sup>12</sup> which ends on April 30, 2020.<sup>13</sup>

### **Postponing or Cancellation of Public Meetings**

Public bodies may choose to postpone or cancel public meetings. Executive Order Nos. 2020-07 and 2020-18 encourage public bodies to postpone public business when possible.<sup>14</sup> **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.<sup>15</sup>

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<sup>7</sup>Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>8</sup>5 ILCS 120/1 *et seq.* (West 2018).

<sup>9</sup>Executive Order No. 2020-07, §6, issued March 16, 2020.

<sup>10</sup>5 ILCS 120/2.01 (West 2018).

<sup>11</sup>Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>12</sup>Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>13</sup>Gubernatorial Disaster Proclamation, issued April 1, 2020.

<sup>14</sup>Executive Order No. 2020-07, §6, issued March 16, 2020; Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>15</sup>See 5 ILCS 120/2.02(a) (West 2018).

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**,<sup>16</sup> 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.<sup>17</sup> Executive Order Nos. 2020-07 and 2020-18 suspend the in-person presence requirements and eliminate the limitation on remote access.<sup>18</sup> If a meeting is necessary, public bodies are encouraged to utilize remote access as allowed by the Executive Order.

### **Convenient and Open Meetings**

OMA requires public meetings to be “convenient and open” for members of the public.<sup>19</sup> 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.

Executive Order Nos. 2020-07 and 2020-18 suspend the in-person attendance requirement for members of the public body and allow for remote participation.<sup>20</sup> 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. Even if the public body decides to hold a meeting where the members of the public body are not physically present, the public body is still required to post notice and an agenda at the location of the public body's principal office, the location of the meeting, and on its website, if maintained by a full time staff member, at least 48 hours in advance of holding the meeting.<sup>21</sup> Meeting notices should include instructions for the public on how to access the meeting remotely.

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<sup>16</sup>See 5 ILCS 120/2.03 (West 2018).

<sup>17</sup>See 5 ILCS 120/2.01 (West 2018); see 5 ILCS 120/7 (West 2018).

<sup>18</sup>Executive Order No. 2020-07, §6, issued March 16, 2020; Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>19</sup>See 5 ILCS 120/2.01 (West 2018).

<sup>20</sup>Executive Order No. 2020-07, §6, issued March 16, 2020; Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>21</sup>See 5 ILCS 120/2.02(a) (West 2018).

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. Remember, nothing in the Governor's executive orders prohibits individuals from accessing essential governmental functions. 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, 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 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.<sup>22</sup> 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.

## **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,<sup>23</sup> nor FOIA<sup>24</sup> 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.

## **Impact on FOIA of the Gubernatorial Disaster Proclamations and Executive Orders**

As explained above, the Governor’s Stay at Home Order does not prohibit activities deemed “Essential Governmental Functions.” Further, the Stay at Home Order makes it clear that it does not prohibit any individual from “accessing” Essential Governmental Functions. Rather, it is an

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<sup>22</sup>See 5 ILCS 120/2.06(g) (West 2018).

<sup>23</sup>See 15 ILCS 205/0.01 *et seq.* (West 2018).

<sup>24</sup>See 5 ILCS 140/1 *et seq.* (West 2018).

exercise of a public body's discretion to determine how it will provide "its Essential Governmental Functions" in accordance with Executive Order Nos. 2020-10 and 2020-18.<sup>25</sup>

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][.]"<sup>26</sup> Therefore, while Executive Order No. 2020-10 allows a public body to determine "its Essential Governmental Functions[.]" the Order does not 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[.]"<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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

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<sup>25</sup>Executive Order No. 2020-10, §1(10), issued March 20, 2020; Executive Order No. 2020-18, Part 1, issued April 1, 2020.

<sup>26</sup>5 ILCS 140/1 (West 2018).

<sup>27</sup>5 ILCS 140/1 (West 2018).

<sup>28</sup>5 ILCS 140/3(d) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

<sup>29</sup>5 ILCS 140/3(e) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

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.<sup>30</sup> 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.

Public bodies that are unable to meet statutory deadlines due to the circumstances surrounding COVID-19 may determine it is appropriate to set reasonable time periods beyond the statutory deadlines within which to respond to FOIA requests during this time of crisis. Determinations about reasonable extensions should take into consideration the extent to which public bodies have staff members with the necessary expertise and resources available to respond to FOIA requests given the exigent circumstances.

Please note that when the restrictions of the statewide disaster proclamations are lifted, public bodies will be required, once again, to comply with all applicable time periods and deadlines set out in FOIA.

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<sup>30</sup>5 ILCS 140/3(e) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.