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April 30, 2020

Washington Open Public Meetings Act, Public Records Act Requirements Temporarily Waived and Suspended in Response to COVID-19

Note: On May 12, 2020, Governor Jay Inslee issued Proclamation 20-28.3, amending and extending the OPMA and PRA proclamations through May 31, 2020.

Washington public meeting and public records laws contemplate that members of the public can be physically present at the meeting location or the agency office. During this time of social distancing, however, those requirements have been temporarily waived and suspended through Proclamation [20-28](#), which was extended by proclamations 20-28.1, [28.2](#) and 28.3, issued by Governor Jay Inslee, as further clarified by guidance published by the Washington attorney general's office (AGO). The proclamations and guidance address how local governments should conduct public meetings during the COVID-19 outbreak while remaining compliant with the Open Public Meetings Act (OPMA), chapter 42.30 RCW, and the Public Records Act (PRA), chapter 42.56 RCW.

The proclamations temporarily prohibit in-person public attendance at public meetings subject to the OPMA and require all remote meetings to provide for attendance electronically. Regarding the PRA, the proclamations waive certain in-person inspection and copying requirements, as well as agency response times. The proclamations are in effect until at least May 31, 2020. This update summarizes the proclamations and AGO guidance about (1) what actions can be taken in remote meetings and (2) which elements of the public records law are waived at this time.

Only Remote Meetings and Actions on Matters That Are "Necessary and Routine" or Are Necessary to Respond to COVID-19 Are Allowed Under the OPMA

Under the proclamations, public agencies may take "action" only on matters that are either "necessary and routine" or necessary to respond to the COVID-19 outbreak and current health emergency. Importantly, the OPMA defines "action" broadly to include receipt of public testimony, deliberations, discussions, consideration, reviews, and evaluations, in addition to taking final action on a matter (i.e., voting). RCW 42.30.020(3).

To qualify as "necessary and routine," a matter needs to be both necessary **and** routine in order to be taken up at a public meeting. When determining whether a matter is necessary, the AGO recommends that agency staff and members ask the following questions:

- Is there a requirement that the matter be considered at this time, and cannot wait? The requirement could come from a statute, a rule, a court order or court decision, a contract, a legal obligation, legal advice, or other authority.
- Is there a legal or financial consequence for not taking action?
- Is there some other reason the matter is essential to the agency to keep key agency operations or services intact at this time, and therefore cannot wait? (A non-exhaustive list of examples of those necessary meeting items might include actions affecting timely payment of payroll, vendor payments, addressing IT system failures, renewing contracts that might expire, providing essential public services to protect the health and welfare of constituents, and others.)

Keeping a record of the findings behind any determination that an action is necessary and routine is recommended. The findings could be contained in meeting materials, a staff report, the authorizing document (e.g., resolution), or a contemporaneous memorandum or email to the file.

The AGO also recommends allowing staff reports to be distributed electronically for review, rather than presented during a public meeting. The OPMA allows members of a governing body to passively receive documents, provided a quorum does not collectively take "action," such as exchanging emails to discuss the staff reports. *See, Equitable Shipyards, Inc. v. State of Wash.*, 93 Wn.2d 465 (1980).

Routine matters are performed as part of regular procedure and depend upon an agency's ordinary operations. According to the AGO, routine matters are the kind of activities that are consistently undertaken at public meetings pursuant to procedures or policies that existed prior to the COVID-19 outbreak. For example, approving consent agenda items may be routine, but not a discussion regarding the pros and cons of a potential new policy, unrelated to COVID-19, that would take effect the following year.

A matter that is not necessary and routine may still be acted upon at a public meeting if it is necessary to respond to COVID-19. "Necessary" is given its ordinary meaning, including whether it is something that is required or essential to the agency. The AGO provides the following analysis on whether a matter is necessary to respond to COVID-19:

Therefore, some nonexclusive questions we suggest that an agency may want to ask itself are inquiries such as: Given our agency and our agency's authority, and the facts before us, is the action "necessary" (required, needed, essential) to "respond to" the event? What is it we will need to do, at our particular agency, to respond to the emergency? For example, what is "necessary" for one agency (a school district or a public health district) and may require its governing body to meet on a particular matter may not be "necessary" for a different agency (a drainage district).

Under these guidelines, for example, it may be necessary for a school district to respond to the COVID-19 outbreak by having its board convene a public meeting for the purpose of approving contracts with or payment to vendors providing remote learning systems.

Even if a matter satisfies one of these two tests, it may only be taken up at a meeting that complies with the new requirements for public meetings. The governor's proclamations temporarily suspended all in-person public meetings at physical locations, meaning that agencies must convene remotely in ways that still allow for public observation and, at least potentially, comment. According to the AGO:

Those remote options are at minimum, telephone access, but may also include electronic, internet or other means of remote access. Those methods must provide the ability for all persons to hear each other at the same time. This means, for example, an agency cannot record the audio of a meeting and post that audio later on its website as a method for the public to "attend." Instead, the public must be permitted to attend the meeting remotely while the meeting is underway and to hear the persons who are speaking. While the OPMA does not require public comment ... if the agency permits oral public comment at a meeting for other reasons, its remote participation arrangement will also need to have a means for each member of the public who is speaking to hear each other, not just to hear the members of the governing body who are speaking.

It is not a violation of the OPMA for an agency to impose conditions on attendance, such as requiring members of the public to use a conference call-in or remote access login number or to comply with other similar conditions of remote attendance, during the time the proclamations are in effect. The proclamations require that, at a minimum, agencies provide telephonic access to public meetings. If agencies choose to also provide visual access, steps should be taken to enable those calling in to follow along and fully participate. Taking comments

and questions through a website portal that is not accessible to telephonic-only attendees is not recommended unless those comments or questions are also read into the record for all to hear.

It is important to note that the OPMA addresses requirements for public meetings, not public hearings. Under the OPMA, public meetings occur whenever a quorum of the governing body convenes to take action on agency matters, which OPMA generally says must be done in public. Public hearings, by contrast, generally involve public testimony or comment given as evidence for or against a proposed agency action. At this point, there has been no guidance issued by either the governor or the AGO on standards for remote public hearings.

A final procedural issue for agencies to consider is how to provide public notice, which typically includes posting hard copies of the agenda at the location where the meeting takes place. Now, the AGO recommends providing notice online, including by uploading the agenda and information on how members of the public can attend and participate. Other more active ways to provide electronic notice include emailing stakeholders, posting on social media, and issuing news releases.

The OPMA is intended to facilitate easy public observation of all government decision making. *Cathcart v. Andersen*, 85 Wn.2d 102 (1975). Therefore, when drafting and implementing remote public meeting policies during the COVID-19 pandemic, it is important for agencies to consider whether they are providing proper notice and ensuring access to remote public meetings for all interested members of the public. Given the ability to hold remote public meetings telephonically, it is particularly important for agencies to provide for the participation of differently abled residents, such as the hearing impaired. As a practical matter, if an agency has the capacity to convene a remote hearing using audio and visual platforms, such as Zoom or WebEx, it should take advantage of this ability to enable participants to more fully observe the proceedings. Many of these platforms provide closed-captioning options, which allow hearing-impaired participants to observe the meeting.

Certain Inspection and Copying and Agency Response Requirements Are Temporarily Suspended and Waived Under the PRA

The governor's proclamations also suspend and waive certain requirements of the PRA that involve interpersonal contact and operations within an agency's physical office, as well as agency response times:

- Agency facilities need not be made available to members of the public for inspecting and copying public records under RCW 42.56.080(2).
- Public records need not be available for inspection and copying during customary office hours for a minimum of 30 hours per week under RCW 42.56.090.
- During this period, agency staff are required to respond to electronically-received public records requests within five business days, as is the standard rule. This response time requirement has been waived, however, for requests received via hard copy, although the requirement to reasonably respond to the requestors in one of the ways enumerated in RCW 42.56.520 has not been waived. If possible, providing a five-day response regardless of the format of the request is advisable. If that timing cannot be met for hard copy requests, we recommend documenting the timing constraints causing delay.
- The requirement for agencies to provide electronic records in response to requests has not been waived. Therefore, operations must continue to the extent agency staff is able to review electronic databases and email digital copies of responsive records to requestors.

The proclamations affect how local governments will interact with the public and take action on a wide variety of everyday matters during the COVID-19 outbreak, including approving development permits, authorizing real estate transactions, and taking public testimony. Please contact Perkins Coie for guidance on how to comply with or navigate these new remote procedures.

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