

KTJKLEIN, THORPE & JENKINS, LTD.
Attorneys at Law

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LEGAL ALERT**Updated PAC OMA and FOIA Guidance**

As part of Illinois' continuing response to the COVID-19 crisis, the Public Access Counselor ("PAC") of the Illinois Attorney General has issued guidance on compliance with the Open Meetings Act and FOIA based on the Governor's Executive Orders and the current public health situation. The PAC most recently updated its guidance on April 9, 2020 ("Updated Guidance"), which can be found [here](#).

Executive Orders 2020-07, 2020-10, and 2020-20, first signed on March 16, 2020 and extended on March 20, 2020 and April 1, 2020, suspend two provisions of the Open Meetings Act: (1) the requirement in Section 2.01 that members of a public body be physically present, and (2) the limitations in Section 7 on remote participation. The Executive Orders are effective for the duration of the Gubernatorial Disaster proclamation, which currently expires on April 30, 2020. The PAC's guidance is summarized below.

Changes or Cancellations of Public Meetings

The COVID-19 outbreak may require a public body to postpone, cancel, or otherwise change the date of a meeting. If the meeting is cancelled after the agenda and notice have already been posted, the cancellation notice should be posted on the website, at the principal office of the public body, and at the meeting location. However, the change does not require 10 day notice of publication—the publication requirement applies only to a change in the regular schedule of meetings, and not to the cancellation, or rescheduling of individual meetings.

The Updated Guidance encourages public bodies to cancel or postpone meetings where possible.

Remote Participation by Members of the Public Body

If the public body proceeds with a meeting, it can do so with any or all of the members accessing and participating in the meeting by remote access—either by telephonic, audio, or audiovisual participation.

Convenient and Open Meetings

The Updated Guidance acknowledges that the transparency requirements of OMA pose challenges for holding public meetings

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Authored By:

Name: James V. Ferolo

Email: jvferolo@ktjlaw.com

Phone: 312-984-6433



Name: Mallory A. Milluzzi

Email: mamilluzzi@ktjlaw.com

Phone: 312-984-6458



Name: Anne M. Skrodzki

Email: amskrodzki@ktjlaw.com

Phone: 312-984-6413



during this public health emergency, but then emphasizes that public bodies need to take steps to maintain openness and transparency to members of the public. All agenda notice requirements must still be met, even if the entire meeting is remote, and that agenda notices should include instructions for the public on how to access the meeting remotely. The Updated Guidance additionally states that to help ensure all meetings are “convenient and open” to the public, public bodies should offer multiple ways for the public to access a public meeting, such as offering both a telephone number and a weblink.

Public Comment and Observation

Whether or not the public body chooses to convene by electronic means, the public body must still provide the opportunity for the public to both observe and comment at the meeting. The public body may consider taking public comment by email or written submission and reading those public comments at the public meeting. This policy was challenged in a Request for Review to the PAC (2020 PAC 62329) containing an allegation that the McHenry County Board of Health violated OMA at its March 23, 2020 meeting, because public comments were required to be submitted by e-mail two hours in advance of the virtually held meeting. The PAC determined that the Board did not unreasonably restrict public comment, and that public comment does not need to be in-person or interactive to meet the requirements of OMA in light of the current circumstances. The PAC dismissed the complaint without requiring the public body to respond to the allegation. For more information, see Klein, Thorpe and Jenkins, Ltd.’s full E-note on the PAC’s decision, published April 7, 2020, which can be found [here](#). The Updated Guidance however, provides conflicting direction as it emphasizes that a public body needs to provide the public the ability to observe and comment at the meeting. In fact, the Updated Guidance goes as far as to say that “If public bodies are convening via electronic means, such as by conference call or by webassisted meetings, the public body should ensure that the public has a means to both observe **and comment** during these meetings” and additionally states that “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.” **Public bodies should be aware of the PAC’s inconsistent guidance on this issue and talk to your attorney to best address public comments during any public meetings.**

The public body may also consider sharing conference call or log-in information in the notice of the meeting so that members of the public may make public comment via conference call. For those public bodies who do not televise or stream their meetings, the public body should also consider recording the meeting and placing any recording of open session on the website. If utilizing a web-based conference call service, particular attention should be paid to the provider’s data collection and privacy policies.

Physical Precautions

If a meeting must take place and it is less than 10 people, additional precautions may be taken. Public bodies are encouraged to hold meetings in a large space so that parties can keep distance between them; to have a separate room for the public which is video or audio linked to the meeting room in order to promote social distancing; or to have only one person at a time approach a microphone so that there are no lines. Public bodies can use enhanced signage to lessen the amount of interaction between the public and any staff members.

FOIA

The Freedom of Information Act is still in full force and effect, and public bodies should make attempts to comply. The Updated Guidance states the Attorney General’s position that he does not have the authority to suspend FOIA’s statutory deadlines and that only an executive order or an act of the General Assembly can alter such deadlines and therefore all public bodies should continue to comply with FOIA and follow all deadlines. The Updated Guidance also suggests that complying with FOIA requests is a fundamental or essential government function, even during the public health crisis

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Chicago Office

20 N. Wacker Drive, Ste. 1660
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

Orland Park Office

15010 S. Ravinia Ave., Ste. 10
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

Streator Office

7 Northpoint Drive
Streator, Illinois 61364

T: (815) 672.3116

F: (815) 672.0738

Lincolnshire Office

250 Parkway Drive, Ste. 330
Lincolnshire, Illinois 60069

T: (312) 984-6400

F: (312) 984-6444

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and states that FOIA requests cannot be ignored or per se denied because of the public health crisis.

If the request is unduly burdensome or requires a specific staff member who is unavailable due to quarantine or other restriction, the public body can utilize the provision for extension of time. Because even a 10-day window may be difficult to comply with; the Public Access Counselor notes that the requester and the public body can come to a mutually agreeable response period and encourages the parties to attempt to accommodate each other with reasonable and appropriate response time arrangements. However, in another contradictory statement, the Updated Guidance states that “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.” **However, as noted above, the statutory requirements of FOIA have not been waived and under FOIA, a public body cannot unilaterally extend the deadline to respond beyond ten (10) business days of receipt of the FOIA request.** As such, if there is a FOIA request that a public body cannot respond to within the statutory ten (10) business days, public bodies need to (1) notify the requestor that the request is unduly burdensome and articulate why by describing current staffing and the difficulties of responding to the specific request; and (2) provide the requestor with an option to narrow or, if applicable, suggest a reasonable deadline to comply with the request. In this scenario, if the requestor does not narrow or agree to the additional time the request will be technically be denied at unduly burdensome. However, the public body should still meet its proposed deadline and by doing this will moot most of the claims and financial risk associated with a potential FOIA lawsuit. If you have questions about specific FOIA requests or concerns during this time, please contact your KTJ attorney.