

COVID-19 Emergency Response: Open Meeting Law and Public Records Law Implications March 21, 2020

While responding to pressing municipal business during the COVID-19 virus outbreak, many questions have arisen concerning compliance with the Open Meeting Law and Public Records Law. The below guidance can assist communities in navigating Open Meeting Law and Public Records Law requirements during such a state of emergency. As conditions are evolving daily, we will keep you updated with any further developments or changes.

OPEN MEETING LAW

As you know, on March 12, 2020, Governor Baker issued an “Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §20” (“Emergency Order”). The Emergency Order, which is in effect until the end of the State of Emergency, authorizes public bodies to conduct meetings and hearings required by state or local law or regulation “virtually,” so long as the public body provides “adequate alternative means of public access” to the meetings through video and audio streaming services. The Emergency Order and detailed explanations and analyses are available on our website at www.k-plaw.com.

In summary, the Emergency Order permits:

- Meetings of public bodies to be held in locations other than public places.
- All members of the public body, and those scheduled to appear before the public body, to participate **remotely** (regardless of any previous decision by the municipality’s chief executive officer to authorize remote participation).
- The public body to post to the municipal website a full and complete transcript, recording, or other comprehensive record of the proceedings as soon as possible, if economic hardship and technical hurdles prevent the public body from providing adequate means of “real time” virtual public access to the meeting.

Compliance with the Open Meeting Law under the Emergency Order requires:

- “**Adequate alternative means of public access,**” meaning telephone, internet, or satellite enabled audio or video conferencing, or any other technology that permits the public to follow the meeting in real time.
- For **public hearings**, any applicants and members of the public that wish to participate **must** be provided the opportunity to do so remotely (though it may be preferable for public hearings to be continued, to the

extent possible, and statutory or regulatory deadlines be extended, in writing; this may also be the subject of future legislative action).

- Notice of the meeting or hearing 48 hours in advance, excluding Saturdays, Sundays, and legal holidays, if an emergency does not exist warranting the waiver of such posting requirements. We recommend the notice include a statement that the meeting will be conducted virtually, and an explanation of how the meetings will be conducted and how the public can access and participate in the meeting. **For additional guidance and sample language for virtual meeting notices, click [here](#).** Also, please note that even for an emergency meeting, the Open Meeting Law should be complied with the extent possible; non-emergency matters should not be discussed at an emergency meeting.
- Meeting minutes prepared, approved, and published in accordance with the Open Meeting Law.

Of note, the Emergency Order does not apply to Town Meetings. For information on continuing Town Meetings in light of such public health emergency, click [here](#).

PUBLIC RECORDS LAW IMPLICATIONS

In light of the current COVID-19 public health emergency, most public buildings and offices are closing or limiting public access and municipal staffing at this time. This reduced access and/or closure, the related limitations on staffing, as well as the re-direction of municipal staff and resources to respond to the public health crisis, have greatly burdened many municipalities' ability to respond completely to pending or future public records requests. See G.L. c.66, §10.

As of this writing, there has been no action at the state level to modify the application of the existing Public Records Law or its implementing regulations. Thus, to the extent that the municipal Records Access Officer receives a public records request, has access to the requested records and the tools to respond timely, strict compliance should continue to be the goal, with an initial response provided within 10 business days. Based upon the plain reading of the law, and our experience with the state Public Records Division, one can anticipate that failure to respond to the requester within the initial 10 days with a fee estimate (at a minimum) will prohibit the municipality from assessing a fee in connection with the work required to respond.

We are aware that many Records Access Officers have very limited access to municipal buildings, computer systems and records at this time. In these circumstances, what are the deadlines for responding to the requester? Does it matter if the request is sent to someone other than the Records Access Officer? Does it matter if the Records Access Officer can only respond to requests for a couple of hours a week? Unfortunately, these questions are unsettled and there simply are no completely "right" answers at this time.

As such, we have posed a few possibilities for your consideration.

- (1) Make sure the Records Access Officer has adopted public records access policies that mandate submission of any public records request to the Records Access Officer; that way, if requests are sent to other departments, officials, etc., the municipality can appropriately indicate that the records request was not received for the purposes of the law;

- (2) Consider creating a separate email address for all public records requests. Having such an address can facilitate the ability of several individuals to access records requests and provide timely initial responses. Your public records access policies should be amended to clearly reflect that all public records requests should be directed to the designated email address.
- (3) Upon receipt of a public records request, seek confirmation of an extension in writing, explaining the reason why compliance will be difficult at this time.

The Records Access Officer must keep a detailed log of all requests to facilitate a prompt response once municipal operations resume on a more regular schedule.

If you receive a public records request during the current State of Emergency, and are unable to respond timely, or fully, due to administrative or logistical issues created by the emergency, we still recommend that a response be sent. You may consider including in the response a statement as to why the municipality's specific emergency response to COVID-19 has impeded or limited the ability to respond fully to the request. Such language may take a form similar to the following, modified appropriately for the circumstances:

The [Town/City] of _____ is currently unable to process your public records request due to the local [if applicable], state and federally declared state of emergency relative to the novel coronavirus (COVID-19). In addition, at this time, the Town/City Hall is closed because of COVID-19 and there is limited municipal staffing, and, accordingly, the Records Access Officer [has not received this request, and this e-mail is to notify you of the same] *OR* [will not be able to access responsive records required to respond to your request].

As a result, and despite its best efforts, the [Town/City] is not now able to respond to your public records request [timely] *AND/OR* [fully]. The [Town/City] will log this request and, as promptly as possible following resumption of more normalized operations, respond in accordance with the Public Records Law. Please understand that where public buildings are closed and staff is limited, resources must be devoted to those matters directly related to the public health and safety; as soon as we are able, we will notify you that we are working on your request.

Please acknowledge receipt of this email at your earliest convenience and confirm that such additional time is permissible by responding to this email at the following address: _____.

Thank you for your cooperation at during this difficult time.

Perhaps most important, remember that this is a fluid situation and advice may change depending on circumstances.

Please feel free to contact your KP Law attorney with any questions, and/or e-mail us at coronavirusinfo@kplaw.com. We will be in touch with you as soon as possible.

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