

March 26, 2020



**UPDATED OPEN PUBLIC MEETINGS ACT GENERAL GUIDANCE
FROM THE OFFICE OF THE ATTORNEY GENERAL
REGARDING THE CORONAVIRUS DISEASE (COVID-19) EVENT**

Some state and local agencies may be considering their options for how to conduct public meetings under the state's Open Public Meetings Act (OPMA) at [RCW 42.30](#), during the outbreak of coronavirus disease 2019 (COVID-19) in Washington State. See also [Governor's Proclamation 20-05](#) declaring a state of emergency in all counties and directing state resources to affected political subdivisions. More proclamations are on the Governor's Office website [here](#).

On March 6, 2020, the Office of the Attorney General provided some general guidance on how to conduct meetings during this event, under RCW 42.30.210. There have been developments since then. On March 24, 2020, the Governor issued [Proclamation 20-28 \(Open Public Meetings Act and Public Records Act\)](#) to, among other things, temporarily prohibit in-person public attendance at meetings subject to the OPMA. **This proclamation is in effect from March 24, 2020 through midnight April 23, 2020, unless extended beyond that date.** Therefore, the March 6, 2020 guidance is hereby updated for the period of time the proclamation is in effect. This guidance document revises some parts of some responses to the questions in the March 6 guidance for the period of time the proclamation is in effect and provides some non-exclusive suggestions and considerations for agencies.

This document is not legal advice or a legal opinion. An agency should consult with its assigned legal counsel if it has questions or needs legal advice or a legal opinion. State agencies should consult with their assigned Assistant Attorney General. This updated guidance document for agencies and their attorneys addresses only the OPMA, and as of the events on the date above. Other laws may apply to some meetings of some agencies. In addition, depending upon the agency and its governing statutes, or agency resources, other options might be available at a particular agency. This guidance provides information about the OPMA as of the date above. Later-enacted statutes, case law, or other legal developments may affect the analysis.

For more information about COVID-19, see this webpage of the Washington State Department of Health: <https://www.doh.wa.gov/Emergencies/Coronavirus>. Information about strategies to mitigate exposure is also available from many federal and local agencies.

The March 6, 2020 guidance included several questions. Here is updated guidance relevant to parts of responses to Questions ## 1, 2, 3, 4 & 7.

1. In light of this COVID-19 event, what questions should an agency be asking itself if it has concerns about virus transmissions and a public meeting and before it proceeds with holding a current meeting or schedules a future meeting, when the meeting is required to be open to the public under the OPMA?

In response to this question, the March 6 guidance described a series of questions we suggested that agencies should be considering. Those included questions such as whether they need to meet or meet on all matters or whether they can cancel or reschedule a meeting. We suggested agencies ask themselves if they could reduce agenda items to only those most urgent, time-sensitive or essential. We suggested agencies consider if they could distribute some information in writing to governing body members (such a staff briefing memo or an updated calendar of events), rather than convening a meeting to discuss those briefings. Put another way, in this unusual and urgent time when members of the public may not be attending agency meetings as they normally would, we asked, could agencies “hold” on some matters until life returns to more normal.

Revision. However, since March 6, state and local agencies have placed more restrictions on the public’s movements and activities as a means to help stem the spread of the virus. Consistent with the *general* approach in the March 6 guidance --- asking agencies to focus where possible on holding meetings only on those matters that must be considered --- under the proclamation agencies must now *specifically* ask two questions on those matters where they want to take “action”¹. They are, is the matter (1) **“necessary and routine,”** or (2) **“necessary to respond to the COVID-19 outbreak and current public health emergency”**? If the matter does not meet those criteria in (1) or (2) for the temporary time the proclamation is in effect, then the matter must wait.

- **(1) “Necessary and Routine”**

With respect to the first part of these criteria, the matter must both be “necessary” and “routine.”

Necessary. We suggest “necessary” has its ordinary meaning. For example, one dictionary defines “necessary” as “required to be done, achieved, or present; needed; essential.” **What is “necessary” will be depend upon the agency.** Some nonexclusive

¹ The OPMA defines “action” as “the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). “Final action” means “a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.” *Id.*

questions to help an agency decide whether a matter is “necessary” are inquiries to itself such as: 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 nonexhaustive 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.)

For example, depending upon the facts at a particular agency, it may be “necessary” for boards that approve payroll or vendor payments as part of a meeting to continue to so in order for agency staff and vendors to be timely paid during the time the proclamation is in effect. However, it may not be “necessary” for a board to decide, during the time the proclamation is in effect, whether it will hold its annual retreat next December. It may not be “necessary” for a board to hear regular oral reports or presentations from its committees or staff at a meeting during the time the proclamation is in effect, and instead, it can defer such presentations until a future meeting or have the reports submitted in writing to the governing body. Under the OPMA, individual members of a governing body can passively receive and individually review documents, so long as a majority (quorum) does not collectively intend to meet to take “action.” *See Equitable Shipyards, Inc. v. State of Wash.*, 93 Wn.2d 465, 611 P.2d 396 (1980).

Routine. With respect to what is “routine,” again, we suggest the word has its ordinary meaning. For example, one dictionary definition describes that it means, “performed as part of a regular procedure rather than for a special reason.” What is “routine” for an agency will depend upon the agency. Some nonexclusive questions an agency can ask itself to determine what is “routine” for it are, for example: Is this the kind of activity that we routinely undertake at a public meeting pursuant to our regular procedures or policies adopted by the governing body and that existed prior to the COVID-19 event? Do we have examples of where we have routinely considered such a matter under our current practices? In contrast, the agency might also ask itself: Is the reason for meeting on the matter unusual, special, and/or expected to be controversial and for which there will be a high public interest? Is this an exceptional or unique new project we want to launch? Is this an “out of the ordinary” matter?

Using the same illustrative example above, it may be “routine” for a particular governing body to approve payroll or vendor payments at its meetings. However, in contrast, perhaps only a “special reason” might prompt a governing body to discuss a potential new policy it might want to adopt later next year.

These factors, questions and examples are nonexclusive and are suggestions only, and do not bind any agency. There may be other considerations for a particular governing body. As noted, the facts at a particular agency will be pertinent to any such decisions.

The bottom line on criteria (1) (“necessary and routine”) is that, temporarily, agencies will need to defer “action” on matters that do not meet both these terms. We suggest the agency make a reasonable judgment that focuses on what is “necessary and routine” for it based on its role, its relevant authorities, and the facts; and, wait to meet on other matters until the public has its normal methods to attend.

- **(2) “Necessary to Respond to the COVID-19 Outbreak and Current Public Health Emergency”**

Even if the “necessary and routine” criteria of (1) is not met, an agency can still take “action” during the time the proclamation is in effect under (2) if the action is “necessary to respond to the COVID-19 outbreak and current public health emergency.” This analysis under (2) will again depend upon the agency.

As noted, we suggest the term “necessary” should be given its ordinary meaning and can be defined as “required to be done, achieved, or present; needed; essential.” What facts are present showing an action is “necessary” for an agency to “respond to” this event may vary from agency to agency.

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).

These factors, examples and questions are nonexclusive and are suggestions only, and do not bind any agency. There may be other considerations for a particular governing body. As noted, the facts at a particular agency will be pertinent to any such decisions.

We suggest the agency make a reasonable judgment that focuses on what is “necessary to respond to the COVID-19 outbreak and current public health emergency” for that agency based on its role, its relevant authorities, and the facts; and, wait to meet on other matters until the public has its normal methods to attend.

- **Reminder on Both (1) and (2): OPMA Cornerstones**

Finally, it is useful to recognize that at this time public attendance at OPMA meetings is more restricted than normal as a consequence of the outbreak (see also revised answer to Question # 4 with respect to remote attendance only.) These COVID-19 response matters are outside the public’s control and may affect their otherwise robust ability to access and provide oversight of their government.

As a result, we suggest that an agency will want to keep in mind the OPMA’s open government cornerstones. These cornerstones would support reasons to temporarily limit a governing body’s usual business during this outbreak and for it to focus instead on only those matters necessary and routine, or those needed to deal with the outbreak, until the public can again fully attend all OPMA meetings, including in person if they choose. These cornerstones include the OPMA itself, which provides at RCW 42.30.010:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

More OPMA cornerstones are grounded in its other provisions and in case law. The OPMA is to be “liberally construed” to effect its purpose. RCW 42.30.910. The State Supreme Court held that the purpose of the OPMA is to permit the public to “observe all steps” in the making of governmental decisions by a public agency board. *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975). The OPMA “employs some of the strongest language used in any legislation.” *Id.*

Finally, the proclamation also finds that “transparency in state government and all of its political subdivisions is an important state policy.”

2. How does an agency reschedule or cancel a meeting under the OPMA?

In response to this question, the March 6 guidance described procedures for rescheduling or canceling a meeting.

Revision. The reference to the requirement that state agencies submit changes to their regular meeting schedules to the Code Reviser (for publication in the *Washington State Register*) is not applicable during the time the proclamation is in effect. State agencies can change regular meeting locations to remote meetings only, without submitting a new notice to the Code Reviser, during this time.

3. Many governing bodies typically hold in-person meetings with most or all governing body members in physical (in-person) attendance at the agency designated meeting office or other meeting room. On occasion, some members participate by conference call. Can all governing body members participate by conference call?

In response to this question, the March 6 guidance described that all governing body members can attend by phone.

Revision. The proclamation language stating that meetings are “not conducted in-person” applies to the governing body members as well. Remember, the purpose of the temporary proclamation is to enhance social distancing and reduce person-to-person opportunities for virus transmission. This means board members will not want to place themselves or their agency staff in a position that potentially puts them in physical contact with each other in preparation for or during OPMA meetings. Such contacts could occur, for example, when staff are setting up a meeting room where some board members or the clerk would attend in person, or when board members attend in person even if the public does not. It is possible many governing bodies, even prior to the proclamation, had already arranged for all governing body members to attend remotely during the outbreak in order to implement social distancing.

4. If some or all of the governing body members are participating remotely by phone, how does the public attend the meeting to observe?

In response to this question, the March 6 guidance described that the OPMA permits members of the public to attend governing body meetings. RCW 42.30.030. Under normal circumstances, an agency cannot place conditions on attendance. RCW 42.30.040. Under normal circumstances, when one or more governing body members participate remotely by phone, the agency needs to have a speakerphone available at an agency meeting location (agency office or other designated physical location) where the public can attend to listen to the discussion. [AGO 2017 No. 4](#). The March 6 guidance described that under normal circumstances, while a speakerphone and a meeting physical location are needed, the agency can look at options for additional means for the public to attend to observe, such as through phone call-in numbers the public can use, or real time streaming of the meeting online, or remote means for the public to listen to the discussion.

Revision. However, under the proclamation and for the period covered by the proclamation, in order to reduce opportunities for virus transmissions, agencies cannot

conduct meetings where the public can attend in person. Statutes requiring agencies to have a physical location where the public can attend in person are temporarily suspended.

Instead, temporarily, agency meetings are “not conducted in-person” and must provide options for the public to attend remotely only. 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 (see Question # 5), 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.

During the time the proclamation is effect, agencies are not required to post paper agendas or paper meeting notices at the physical locations where the meetings were to be held, describing that the meeting is now remote only. We suggest that the agency should provide public notice on its online agenda of how the public may remotely attend a meeting, listing the details such as a call-in phone number and access code, or login instructions. We suggest that the agency should also provide public notice of those remote participation means in other ways, particularly if this is a new remote meeting process at the agency. Those public notices could be made, for example, on the agency’s website, agency online meeting calendars, via email to stakeholders, social media postings, news releases, or other relevant or available means, depending upon the agency.

Under the proclamation, it will not be a violation of the OPMA for an agency to require 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 proclamation is in effect.

7. Doesn’t the OPMA have other meeting procedures when there is an emergency that, in effect, suspend some of these requirements?

In response to this question, the March 6 guidance reviewed OPMA emergency meeting requirements.

Revision. The references to remote meetings as a “supplemental” alternative and the need for a speakerphone at a physical location do not apply while the proclamation is in effect.