

GUIDANCE ON PUBLIC MEETINGS DURING COVID-19 OUTBREAK

March 20, 2020

Safety Concerns and Social Distancing

Due to the outbreak of COVID-19 across the nation and the state of Arkansas, we have received many questions regarding cities conducting public meetings during this time. We understand city business must continue, which include council meetings, board meetings and commission meetings. With no clear knowledge of when this outbreak will cease and due to the concern for the health and safety of our citizens, we have come up with a few recommendations for public meetings.

First, we recommend you look out for the health and safety of your citizens and public officials by considering the postponement of all public meetings until threat levels have been reduced. Of course, we realize that there is no end in sight to this pandemic. And, if your city or town needs to have a public meeting, we recommend having only a limited agenda that includes only the items that need immediate consideration.

As for citizen participation at the meeting, it must be noted that the FOIA laws are still in place and have not been relaxed during this pandemic. Thus, if you must have a meeting, the public must be allowed to participate (*see below for 'virtual' meetings*). When holding such a meeting, we would advise providing notice to citizens that the health and safety of your community, and especially those most at risk in your community, is of primary importance. With that notice provided, we encourage cities to explore ways to allow for public participation while also minimizing the health risks during this pandemic. For instance, a city could limit seating during public meetings to ensure social distancing as suggested by the CDC. Or, if your city does not already post its meetings online, a city may consider having the council meeting streamed on Facebook Live so that the city can encourage citizens to keep up with their city government while in the safety of their own residence.

“Virtual” Attendance by Council Members

Many municipalities have asked: *can council members attend meetings, and vote, virtually? In other words, can council members participate in the meeting by phone or some other electronic means?*

The Arkansas Attorney General has indicated the most likely answer is ‘yes.’ However, ‘virtual’ participation must ensure the public’s ability to participate in the meeting is maintained. While the law is not crystal clear, we look to guidance from the Attorney General, who cites to a well-respected book on the FOIA.

According to the Attorney General, for ‘virtual’ participation by councilmembers to not violate the FOIA, “there must also be some means of safeguarding the public's right to hear or monitor the telephone conversation or the electronic discussion, e.g., by use of speaker phones or by logging on to the computer network. *See generally J. Watkins, The Arkansas Freedom of Information Act*, p. 281 (3rd ed. 1998).” *Ark. Op. Att’y Gen. No. 2000-096* (Mar. 20, 2000); *see also Ark. Op. Att’y Gen. No. 2008-055* (May 7, 2008). In other words, if there is nothing in place to ensure the public can hear the ‘virtual’ councilmember and nothing to ensure the ‘virtual’ council member can hear the public, the meeting will likely violate the FOIA.

“Virtual” Attendance by Members of the Public

A related question is: Can a city council meeting be conducted with the public participating ‘virtually’? Or, in other words, can a council meeting be conducted with the public participating by telephone, video or Facebook Live?

The answer to this question is also not crystal clear; however, we believe the same logic from the AG opinion mentioned above applies to this question, as well. So, while the answer is likely ‘yes,’ public participation must still be maintained.

Professors Watkins and Peltz, in their most recent version of their FOIA book, state that it is permissible to hold a meeting in which “members of the public can ‘attend’ by participating in the video conference or logging on to the network and monitoring the electronic discussion.” J. Watkins and R. Peltz, *The Arkansas Freedom of Information Act*, p. 306 (Fifth Edition 2009). The Arkansas Supreme Court in *Rehab Hospital Services Corporation v. Delta Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985) has approved the use of a telephone meeting with “telephones available to the public and press...” With that said, neither the FOIA book nor the Arkansas Supreme Court have addressed whether public participation via telephone, or other virtual means, would apply to a city council meeting.

However, considering these difficult times, we believe that as long as the proper safeguards were in place to ensure all members of the public could hear the council and that the council could hear the public, the meeting would not violate the FOIA. Please note, it is likely not enough to merely make the meeting available on the internet for the public to watch. There could be a location open to the public to listen to the council and a system allowing the public to speak to the council. This, or any number of other solutions ensuring public participation, would help ensure the meeting would not violate the FOIA. Of course, we understand technical capabilities are limited for many cities and towns.

If you need assistance in developing ways to ensure public participation at your next public meeting, please contact the Legal Department at 501-978-6136 with any questions you may have.