



ALABAMA LEAGUE OF MUNICIPALITIES

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MAYOR RONNIE MARKS, ATHENS
President

TO: Mayors, Councilmembers, City Clerks
FROM: Alabama League of Municipalities
DATE: April 3, 2020 (update to March 19, 2020 Memo)
RE: Updated Guidance on Open Meetings Act

On April 2, 2020, the Governor issued a Fifth Supplemental Proclamation, which revisited the Open Meetings Act. In her previous Governor's March 18, 2020 Proclamation, the Governor provided the option for governmental bodies where members of a governmental body could attend a meeting by telephone or video conference, be counted for a quorum, and vote on matters coming before the body, so long as the deliberations conducted or actions taken during the meeting are limited to either:

- (a) matters that are necessary to respond to COVID-19; or
- (b) matters that are "necessary to perform essential minimum functions of the governmental body".

The Governor's April 2, 2020 Proclamation expands the telephone or video conference meeting option to quasi-governmental entities created pursuant to state statutes or municipal ordinance. As a result, municipal boards now have the option to meet by telephone or video conference to address matters necessary to respond to COVID-19 or matters necessary to perform essential minimum functions of the board as long the boards follow the procedure provided in the Governor's March 18, 2020 Proclamation.

In addition, the Governor's April 2, 2020 Proclamation authorizes the chair of the governmental or quasi-governmental entities to postpone and reschedule public meetings and public hearings as long as the chair provides public notice. As a result, for council meetings, the presiding officer no longer needs to use process in Section 11-43-50, Code of Alabama 1975 to postpone meetings.

IMPORTANT CONSIDERATIONS:

If the matters to be addressed at the meeting include any deliberations or votes on other matters, then arguably the Governor's exception cannot be used, and the regular Open Meetings Law applies. Keep in mind, however, that it's important for governmental bodies proceeding under the Governor's proclamation or the regular Open Meetings Law to adhere to any applicable public health orders that are in effect. Right now, for example, Jefferson County and contiguous counties are under public health orders that restrict gatherings of 25 or more persons or gatherings of any size that cannot maintain a consistent 6-foot distance between attendees. See <http://alabamapublichealth.gov/legal/orders.html>. It is likely these orders will continue locally or even statewide in the days ahead. It is also important to keep these in mind when addressing issues regarding public hearings mandated by law. It may be necessary to postpone public hearings and re-advertise at a later date after the expiration of the state of emergency.

If the Governor's exception can be used, then (a) the communications equipment must allow meeting participants to hear one another at the same time, and (b) no less than 12 hours after the meeting, the governing

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body must post a summary of the meeting on its website or in another prominent location. That summary must “recount the deliberations conducted and the actions taken with reasonable specificity to allow the public to understand what happened,” something that may be more than what some bodies typically record in their minutes. The governmental body is encouraged, but not required, to use communications equipment that allows the public to listen to, observe, or participate in the meeting. Other provisions of the Open Meeting Law that are not inconsistent with this exception will still apply, meaning, for example, that governing bodies must still provide notice to the public of all meetings.

The relief provided by the Governor with respect to meetings of governmental bodies is limited to certain specific provisions of the Open Meetings Act. So, please be mindful that other provisions of law, such as meeting notice requirements, are not affected by the Proclamation.

This is an important action by the Governor under her emergency powers, and it will help - in certain situations - many local governments adhere to the CDC guidance about gatherings while continuing to do business.

Here is an important “take-away” from the Governor’s exception: this exception does not apply to all deliberations and actions of a governmental body. If a governmental body wants to use this exception, it must first ask these two questions for each item on the agenda or reasonably expected to be discussed at the meeting: (a) does it relate to the COVID-19 response?; and (b) does it involve something that is “necessary to perform essential minimum functions of the governmental body”? If the answer to either item is “yes” for each and every item, then the governmental body can use this exception for its upcoming meeting. But if the answer to either question is “no”, then the governmental body cannot use this exception, and it should refer to the earlier guidance provided by the League concerning the Open Meetings Law via memo to officials dated March 15 available on the League’s website.

The big question here, of course, will be trying to determine whether a business item is “necessary to perform essential minimum functions of the governmental body.” This will have to be decided by governmental officials on a case-by-case basis depending on the nature of the governing body and the business item. Governmental bodies should consult with their attorneys in making these decisions.

If the Governor’s exception is not used, then a governmental body has three choices: (1) not discuss or take action on items not satisfying either of the Governor’s two tests, (2) to proceed under the Open Meetings Law, as best one can, without the use of the Governor’s exception or (3) postpone the meeting.