

March 6, 2020



**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.

The current COVID-19 event may impact many state and local agencies, including governing bodies subject to the OPMA. This document provides general information about the OPMA from the Office of the Attorney General under RCW 42.30.210. 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 document suggests general guidance, options and resources for agencies that are concerned about virus transmission and are seeking to reduce opportunities for such transmissions at public meetings governed by the OPMA. This 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 on the laws 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.

1. In light of this COVID-19 event, what questions should the agency be asking itself if it has concerns about virus transmission at 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?

We suggest that the agency should be considering at least the following:

- Does the governing body really need to hold the meeting at this time or are there matters that can wait or be set over to a future meeting?
- If so, can the meeting be cancelled or rescheduled? If an agency needs to cancel a regular meeting, it can wait until the next or a future regular meeting to conduct business (RCW 42.30.070, RCW 42.30.077), or it can schedule the items on the agenda of a future special meeting (RCW 42.30.080). (More details below.)
- If the governing body does need to meet, does it need to meet on all the agenda items? Could the number of agenda items be reduced so the governing body can make decisions only on the most urgent or time-sensitive or essential items, thus decreasing the time needed for the public meeting?
- If the governing body does need to meet to decide some matters, can it set up a conference call or other remote participation options for the members? (More details below.)
- If the governing body does need to meet to decide some matters, can it set up options (in addition to a meeting room location) where the public could choose to listen to the discussion such as via conference call or other remote alternatives, rather than attending a meeting in person? (More details below.)
- If there is information that could be distributed or made available in writing to the governing body and the public by agency staff and which does not need governing body action, can the staff provide that information without a discussion at a governing body's meeting? An example might be a staff briefing memo or an updated agency calendar of events.
- If the governing body accepts public comments at a meeting, can it strongly encourage written comments instead? (More details below.)

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

The OPMA does not use the word “cancel.” Some OPMA procedures appear to apply or may apply to rescheduled meetings. The OPMA does not provide specific direction on how to cancel or reschedule a meeting due to a situation such as the COVID-19 event. However, there are times at which an agency governing body must cancel or reschedule a meeting. Here is some suggested guidance.

Rescheduling (“Adjourning”) a Meeting. The OPMA uses the word “adjourn” in RCW 42.30.090, which, as this Municipal Research and Services Center article describes, “can be really understood as rescheduling a meeting.” Robert Sepler, “Windstorms, Blizzards and More: What Can Be Done When Weather-Related Issues Cancel a Public Meeting,”

Dec. 5, 2016, available at <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/December-2016/When-Weather-Cancels-a-Public-Meeting.aspx>.

RCW 42.30.090 provides,

The governing body of a public agency may adjourn any regular, adjourned regular, special, or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting the clerk or secretary of the governing body may declare the meeting adjourned to a stated time and place. He or she shall cause a written notice of the adjournment to be given in the same manner as provided in RCW 42.30.080 for special meetings, unless such notice is waived as provided for special meetings. Whenever any meeting is adjourned a copy of the order or notice of adjournment shall be conspicuously posted immediately after the time of the adjournment on or near the door of the place where the regular, adjourned regular, special, or adjourned special meeting was held. When a regular or adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by ordinance, resolution, bylaw, or other rule.

The MRSC article provides other suggestions on how to adjourn a meeting.

In addition, for state agencies that have filed a regular meeting schedule in the *Washington State Register* with the Code Reviser under RCW 42.30.075, that statute also provides, “Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date.” See also [WAC 1-21-076](#).

Cancelling a Meeting. The MRSC article also describes that while the OPMA does not require any specific procedure for canceling an upcoming meeting, the author recommends “providing notice of the cancellation to the public in the same manner that notice is given for a special meeting under RCW 42.30.080.” It may be easier for an agency to simply cancel (rather than “adjourn” or reschedule) a meeting, and hold it later as a special meeting if the next appropriate date/time is not a regular meeting date/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?**

Yes. All governing members can participate by phone. While not required by the OPMA, it may be a good idea to note on the agenda that the members are participating by phone.

If a governing body has a policy about when it will permit telephone participation by its members, it may need to review that policy.

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

The OPMA permits members of the public to attend governing body meetings. RCW 42.30.030. An agency cannot place conditions on attendance. RCW 42.30.040. 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](#).

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 GoToMeeting, or similar remote means for the public to listen to the discussion.

If an agency has these additional means for the public to observe remotely (via phone, online, or otherwise), we suggest the agency provide public notice of that on the agenda, listing the details. It should also provide public notice of those options through other means, particularly if this is a new meeting process at the agency. Those public notices could be made, for example, on the agency's website, via email to stakeholders, social media postings, news releases, or other relevant or available means.

On those notices, the agency can also strongly encourage members of the public to use those alternate means of attending the meeting, rather than attending in person, given the current situation. The agency can also post that information (about how to attend remotely) at the physical location of the meeting where the speakerphone is set up.

However, under the OPMA, an agency cannot prohibit a member of the public from attending in person at the agency location where the speakerphone is set up, even if all governing body members are participating remotely.

5. What about public comment? How does an agency accomplish that remotely?

The OPMA does not require public comment. If an agency typically permits or wishes to permit public comment, it could consider accepting only written comments for the time being. An agency should consult with its assigned attorney if it is required through other laws outside the OPMA to accept public comment, and to determine if written comments are sufficient.

If an agency does wish to solicit and accept written comments from the public, it should also provide information on how to do that in its public meeting notices.

6. Could the governing body remotely “meet” via an exchange of texts or emails, and then later make those records available to the public?

No. While those records would be public records, when a quorum collectively meets to conduct official agency business (“action”) it must do so in a public meeting where the public can attend, not by email or text. *See* RCW 42.30.010; RCW 42.30.030; *Wood v. Battle Ground School District*, 107 Wn. App. 550, 27 P.3d 1208 (2001); *see also* RCW 42.30.060(2) (no secret ballots).

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

Yes, but those procedures are limited and they do not apply to all emergencies and may not apply to all governing bodies. What may be an emergency for one governing body that needs take expedited action in its jurisdiction (for example, perhaps a particular a health board) may not qualify as an emergency for a different governing body that is not required to take expedited action to meet or deal with the emergency (for example, perhaps a particular planning commission). The analysis will depend upon the law, the facts, and the authority of the particular governing body.

Regular Meetings. Specifically, the OPMA regular meeting statute at RCW 42.30.070 allows for an emergency meeting as follows:

- If, by reason of fire, flood, earthquake, or other emergency,
- there is a *need*
- *for expedited action*
- *by a governing body*
- *to meet the emergency,*
- the presiding officer of the governing body may provide for a meeting *site* other than the regular meeting site
- and the *notice* requirements of this chapter shall be suspended during such emergency.

(Emphasis added).

The fact that there is an emergency in the city or state (including one that has been declared by another agency), and which may impact the governing body in some way, may or may not mean there is a “need” for “expedited action” by that governing body itself to “meet the emergency.” As noted, the analysis would depend upon the facts and the authority of the governing body. Recall that an agency often has other choices, such as cancelling or rescheduling a meeting, or providing remote participation supplemental alternatives, if it determines that it wants to reduce opportunities for virus transmission at public meetings. Note that while the “meeting site” of a regular meeting may be changed, the same

procedures apply for having a speakerphone available if some governing body members are attending remotely. Currently, that speakerphone arrangement should not be an issue as many if not most agency staff and officials have cell phones and most cell phones have a speaker capability.

Special Meetings. Somewhat similarly, the special meeting statute at 42.30.080 provides that:

- The *notices* provided in this section may be dispensed with
- in the event a special meeting is called
- *to deal with*
- *an emergency* involving injury or damage to persons or property or the likelihood of such injury or damage,
- *when* time requirements of such *notice*
- would make notice impractical *and*
- increase the likelihood of such injury or damage.

(Emphasis added).

As with the regular meeting analysis, the fact that there is an emergency including one declared by some other agency may or may not mean the governing body has to “deal with” an emergency that involves injury or damage to persons or property or the likelihood of that, and that the usual notice procedures impede its ability to do that. Again, an agency may have options such as rescheduling or canceling a meeting, or providing remote supplemental participation alternatives. Moreover, again, any conclusions would be dependent upon the law, the facts and the authority of the governing body. Note that this statute concerns only the notices, and not a change in locations.

Court Decisions. While there is little case law on emergency meetings, the appellate courts have on two occasions looked at whether a situation is an emergency for a particular governing body.

In *Mead Sch. Dist. No. 354 v. Mead Educ. Ass’n*, 85 Wn.2d. 140, 530 P.2d 302 (1975), for example, the court held that the type of emergency contemplated by RCW 42.30.070 and RCW 42.30.080 to justify a meeting of a particular governing body without having to comply with the OPMA is a “severe one” that “involves or threatens physical damage” and requires urgent or immediate action by the governing body. In that case, a teachers’ strike did not justify an “emergency” meeting by the school board, under RCW 42.30.080. The court described:

The context and history of RCW 42.30.080 indicate that the “emergency” it contemplates is a severe one. The term is used in the parallel provision of RCW 42.30.070, which permits notice of scheduled meetings to be dispensed with in case of “fire, flood, earthquake, or other emergency . . .” The reference in RCW 42.30.080 is similar. Its emergency exception was

not included in the original version of the Open Public Meetings Act of 1971 submitted in the Senate. S. Jour. 704 (1971). It was added in response to the concern of several legislators that the notice requirement would be unworkable and unjustified in unusual circumstances. This difficulty was first expressed in debate on the Senate floor by Senator Scott, who noted that the restriction of business to matters mentioned in prior notices might hamstring agencies in their ability to respond expeditiously to unexpected developments:

If you have an emergent situation, and *I use the instance of a public utility district operation where you had a flash flood*, you would not be able to bring that up . (Italics ours.) S. Jour. 705 (1971).

...

In order to dispense with the notice required by RCW 42.30.080, therefore, an emergency must exist which involves or threatens physical damage. The circumstances must be unexpected and must call so urgently for action that even the 1-day delay the notice entails would substantially increase a likelihood of such injuries. The situation facing the Mead School District Board when it was called to meet on April 29, 1974 [to approve a lawsuit to stop the strike], was not this kind of emergency.

This constricted reading of the exception to the notice requirement of RCW 42.30.080 is justified, we believe, in light of the remedial purpose of the Open Public Meetings Act of 1971. RCW 42.30.910. The legislative command that the coverage of the act's provisions be "liberally construed" implies a concomitant intent that its exceptions be narrowly confined. The act is intended to guarantee public access to and participation in the activities of their representative agencies. RCW 42.30.010. The decisions of governmental bodies are usually important and the circumstances in which they are made are often pressing. Were we to allow them to escape public scrutiny by the simple expedient of declaring the situations they face emergent, we would subject the act's requirements to the whim of the public officials whose activities it is designed to regulate.

The *Mead* decision was discussed in the more recent unpublished Court of Appeals decision of *Hilliard v. Lewis County Water & Sewer District # 5*, 2019 WL 279846 (July 2, 2019). The court rejected the argument that the sewer and water board must formally "declare" an emergency. However, the court remanded the case to determine the facts concerning whether there was an actual emergency that permitted an emergency special meeting of that board under RCW 42.30.080. While this *Hilliard* decision is unpublished and cannot be cited as binding precedent, it does reflect that a court will look at whether the urgent matter qualifies as an emergency for a particular governing body.