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Restrictions on Open Government and Public Information During COVID-19

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The COVID-19 pandemic has left government agencies scrambling to modify ordinary procedures aimed at ensuring the transparency of government in light of federal, state and local mandates to limit face-to-face contact. Almost without exception, these "temporary" measures have had the effect of reducing, or at least making more difficult, public access to government information. All states have public information and open meetings law, and throughout the pandemic, most, including Texas, have temporarily altered those laws in response to COVID-19. Each state's open government laws are different, and so the temporary changes to those laws varies, but the changes that were seen in Texas, discussed below, illustrate the kinds of emergency measures that have been implemented across the country.

In addition, as the pandemic has progressed, the public has become more interested in obtaining information from governmental bodies about COVID-19 itself, in an effort to better understand and protect against the virus. There has been a corresponding rise in litigation related to the public's access to COVID-19 data, which likely will continue after the pandemic subsides.

Virtual Meetings and Teleconferences under the Texas Open Meetings Act

On March 13, 2020, Texas Governor Greg Abbott declared a state of disaster for all counties in Texas due to COVID-19. This declaration was renewed each month and most recently on July 10, 2020. As in other states, a disaster declaration allows the Governor to suspend any state statute that prescribes procedures for conducting state business that would "in any way prevent, hinder or delay necessary action in coping with a disaster."

The Texas Open Meetings Act ("Open Meetings Act") requires most meetings of governmental bodies to be open to the public and be preceded by public notice of the time, place and subject matter of the meeting. Meetings by videoconference are allowed, but for most governmental bodies a quorum must be physically present at one location, the notice must specify that location as the "place" of the meeting, and the videoconference must be both visible and audible at that location. On March 16, 2020, responding to a request from the Office of the Attorney General ("OAG"), Governor Abbott temporarily suspended:

- statutes requiring a quorum or presiding officer to be physically present at the specified location of the meeting (provided that a quorum must still participate);
- statutes that require physical posting of a meeting notice (provided that the online notice must include a toll-free dial-in number or free videoconference link along with an electronic copy of any agenda packet);
- statutes that require that the telephonic or videoconference meeting be audible to members of the public who are physically present at the specified location of the meeting (provided that the dial-in-number or video-conference link must allow for two-way communication, and, that the meeting must be recorded and made public); and

- statutes that may be interpreted to require face-to-face interaction between members of the public and public officials (provided that governmental bodies must provide alternative ways of communicating with public officials).

Thus, during the period this suspension, a meeting of a Texas governmental body may be truly remote with no two members of the governing body in the same location, and with no member of the "audience" in the same location.

In theory, the Governor's declaration provided the public the same rights to access meetings of governmental bodies as before COVID-19, only that the access may be remote. However, it is not clear that all governmental bodies affected by the Open Meetings Act have the technical capabilities to comply with Governor Abbott's order. Further, under this suspension, "attending" a meeting of a governmental body requires access to at least an internet or telephone connection, since there is no longer a requirement for a fixed "meeting location" at which audio and video are provided, and that is something that may still present a barrier to attendance for interested citizens. And finally, as is well known to the many Americans who have attended Zoom meetings recently, a certain level of interaction and understanding is lost when meetings shift from in-person to remote means. While it may not be possible to quantify that difference, that could ultimately prove to be the most significant aspect of these changes.

And yet, while there are drawbacks to remote meetings, as the pandemic wore on, some governmental bodies found themselves criticized for *not* meeting remotely, as citizens who wish to speak at such meetings must themselves appear in person, potentially risking exposure to the virus. As with so many other questions raised by the pandemic, there are trade-offs at work regardless of how the governmental body chooses to meet, and often without an easy answer.

Catastrophe-Suspensions of Deadlines under the Texas Public Information Act

The Texas Public Information Act ("TPIA") requires that a governmental body produce requested public information "promptly," which is defined as "as soon as possible under the circumstances, that is within a reasonable time, without delay." If an agency cannot produce public information within ten "business days" after the request, the TPIA requires it "to certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication."

In 2019, the Texas Legislature amended the TPIA to allow a governmental body to suspend the statute's requirements when it is impacted by a "catastrophe," defined as "a condition or occurrence that interferes with the ability of the governmental body to comply" with the TPIA, including an epidemic. The suspension may last for an initial period of up to seven consecutive days and may be extended once for up to another seven consecutive days. A request for public information received during a catastrophe-suspension period is considered to have been received on the first "business day" after the suspension period ends, and deadlines associated with all requests received before a catastrophe-suspension period are tolled until the first business day after the suspension period.

It is noteworthy that the maximum length of a "catastrophe suspension" is 14 days, which generally is sufficient for the types of catastrophes one normally sees, such as a hurricane, tornado or fire. But the COVID-19 catastrophe has obviously exceeded 14 days, and it is unclear whether additional restrictions on activity will be necessary in the future.

In March 2020, the OAG, having received dozens of inquiries about the TPIA's catastrophe-suspension procedure related to COVID-19, issued guidance stating that a catastrophe suspension is appropriate only when the governmental body is open for business but determines that a catastrophe has interfered with its ability to comply with TPIA, and is not necessary at all if the governmental body is not open for business. The guidance also noted that a "business day" for purposes of calculating TPIA deadlines does *not* include:

- skeleton crew days;
- a day on which a governmental body's administrative offices are closed;
- a day on which the governmental body closes its physical offices because of a public health response, or, is unable to access its records on a calendar day, even if the staff is working remotely or the staff is onsite but involved directly in the public health response.

This interpretation of the term "business days," which is not defined in the TPIA, is consistent with the OAG's long standing practice. Normally, however, the effect on a TPIA deadline is minimal and limited to days that are not legal holidays but on which governmental offices customarily close (for example, the Friday after Thanksgiving), or days on which unforeseen circumstances, such as weather, require an office to close for a short period.

With some governmental bodies "closing" indefinitely (albeit working remotely) the beginning of a TPIA response period may effectively extend indefinitely. Then, upon "re-opening," a governmental body could invoke the catastrophe declaration and potentially extend the response period for an additional 14 days, a far cry from the "prompt" production of public information the TPIA mandates.

Look for bills to be filed in the 2021 session of the Legislature addressing this issue, possibly by defining "business day" more precisely or by expressly providing that if a governmental body is available for business by remote means, that "remote" day is not to be excluded from the calculation of TPIA deadlines.

Access to COVID-19 Data under Public Information Laws

As the pandemic wears on, a significant government transparency issue has arisen over access under public records laws to COVID-19 related data, usually involving information about positive cases. For example, in May, Raleigh's The News & Observer, along with other media organizations, sued North Carolina Governor Roy Cooper and other state officials under North Carolina's public records law regarding 26 outstanding records requests, including requests for the state's data base on COVID-19 cases and copies of prison inspection reports. In June, The Bay Area News Group sued the Alameda County health department for data about COVID-19 cases and deaths at nursing homes and other long-term care facilities. In April, the Freedom of Information Foundation of Texas and others challenged an assertion from the Texas Health and Human Services Commission and local government officials that identifying which nursing homes have been impacted by the virus violated the TPIA or the federal Health Insurance Portability and Accountability Act ("HIPAA").

Each state's public information law is different, but, generally, those seeking the names and locations of certain facilities where there have been COVID-19 cases argue that the names and locations of those facilities is not protected health information ("PHI"). Requestors generally recognize that the *identity* of a person diagnosed with COVID-19 is typically PHI, but because nursing homes, prisons and similar facilities house dozens to hundreds of people, releasing this name and address of the facility would not normally reveal which residents actually have the virus.

In Texas, the Texas Health and Human Services Commission ("Commission") denied reporters' requests for the names of nursing homes and assisted-living facilities in Texas that had confirmed COVID-19 cases or deaths, citing PHI concerns. The Commission later requested an opinion from the OAG on the issue.[1] In early July, the Attorney General issued its opinion concluding that the requested information did not consist of either PHI (which is defined under the TPIA in accordance with HIPAA) or a series of confidential documents about these facilities that are kept by the state (e.g., a statement of violations prepared after an inspection of a nursing home or a report of abuse or neglect). Thus, the requested information was subject to disclosure. *See* Tex. Att'y Gen. OR2020-16956 (July 6, 2020). In late July, the Commission started posting to its website COVID-19 case counts and deaths by facility for state supported living centers, state hospitals, and state-licensed nursing and assisted living facilities.

Those requesting this type of data have also disagreed over government's timeline for responding. In *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, the United States District Court for the District of Columbia granted a preliminary injunction to American Immigration Council ("AIC"), an organization seeking COVID-19 data about the U.S. Immigration and Customs Enforcement's ("ICE") response to the pandemic over the timing issue. *See* No. CV 20-1196 (TFH), 2020 WL 3639733, at *1 (D.D.C. July 6, 2020). AIC requested records in March under FOIA related to ICE's protocols regarding medical screening, sanitization of facilities, and the number of detained individuals who have tested positive for the virus. The Department of Homeland Security ("DHS"), the federal agency over ICE, replied that it had identified 800 pages of potentially responsive documents, but was "unable to estimate" when it would be able to complete this review or production due to strained personnel and the impact of the pandemic. The court rejected DHS's assertion, finding that producing these documents presented only a "minimal burden." The court considered the importance of the data in helping AIC fulfill its mission of protecting the legal rights of noncitizens, as well as the time-sensitive nature of the issue, as justifying requiring DHS to produce these documents over the following two months.

One example of how COVID-data obtained through FOIA requests can be used to benefit the public comes from The New York Times' suit against the Centers for Disease Control ("CDC"), filed after the CDC failed to respond to the Times's request for demographic data on all positive COVID cases reported to the agency. The Times asserted that the data was necessary to understand the disproportional effects that the pandemic has had on low-income and minority communities, without which these communities have not been able to address potential risks and inequities in healthcare. After the Times sued, the CDC turned over data on 1.45 million COVID cases, allowing the Times to publish a comprehensive analysis of racial disparities in virus contraction.

[1] The Commission submitted a representative sample of the specific information that was requested for the Attorney General's review, presumably similar to the information requested by reporters and others during the pandemic.