

# Transparency vs. Safety: Restrictions to Open Government During COVID-19

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**PRACTICES** Media Entertainment and Sports, Anti-SLAPP and First Amendment Rights, Media and Entertainment Litigation

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Every part of life has been affected by the COVID-19 pandemic, and access to open government is no exception. The rise of COVID-19 has seen 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 the effect of reducing, or at least making more difficult, public access to government information. For the time being, that may be a necessary price for society to pay to contain the pandemic; it will remain to be seen whether any of these new restrictions survive the current emergency.

All states have public information and open meetings law. According to a USA Today Network survey, as of early April 2020, at least 35 states, including Texas, have temporarily altered their public information and/or open meetings laws in response to COVID-19. Each state’s open government laws are different, and so the temporary changes to those laws vary, but the changes that have been seen so far in Texas illustrate the kinds of emergency measures that have been implemented across the country.

## *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 governmental body invoking this procedure must post notice of the suspension in the same manner it posts notices of public meetings under the Texas Open Meetings Act and must also provide notice to the Office of the Attorney General (“OAG”). 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. In March 2020, the Attorney General received 80 catastrophe notices from governmental bodies around the state who were unable to comply with the TPIA’s requirements due to the coronavirus. To put that into perspective, the OAG had previously only received two catastrophe notices since the TPIA was amended to allow for such suspensions.

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 already exceeded 14 days, and the current limitations on activity will be in place at least until April 30, 2020, and perhaps longer.

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 which 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.

Now, however, 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.

### *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. 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 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 allow for two-way communication, and, that the meeting 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 provide alternative ways of communicating with public officials).

Thus, during this period of 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 provides the public the same rights to access meetings of governmental bodies as before COVID-19, it is just that the access must for the time being be remote. Indeed, the Governor’s press release announcing the move carried the headline “ensures continued government operation while preserving transparency.” 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, “attending” a meeting of a governmental body now 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 business meetings by Zoom 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.

These temporary changes to Texas’ open government laws, and the similar modifications made in other states, are understandable in light of the current public health crisis, but it will be important to ensure that once the COVID-19 situation improves, these “temporary” measures do not become permanent.