



STATE OF INDIANA

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FAQs regarding COVID-19 and Indiana's public access laws

Updated 3/23/2020

This guidance is intended for state and local public agencies, agency governing bodies, the public-at-large, and the media. As this situation evolves, we will update this guidance with any relevant information.

UPDATE (3/23/20): Governor Holcomb today issued Executive Order 20-09, which relates to the continuity of government operations. The governor, in part, declared that strict compliance with various deadlines found in regulatory statutes are preventing, hindering, and delaying necessary action in coping with COVID-19 emergency.

Executive Order 20-09, among other things, further modifies and suspends certain provisions of the state's public access laws as follows:

1. Open Door Law: The governor's order suspends the requirement of governing bodies of public agencies to explicitly adopt a policy for electronic participation prior to holding a meeting electronically.

- Suspends the requirement to have any members physically present for a public meeting for the duration of the COVID-19 emergency;
- Authorizes all governing bodies to hold a public meeting by videoconference or by telephone conference if: (1) a quorum of members participate; and (2) any meeting is made available to members of the public and media;

2. Access to Public Records Act: For a period of two weeks, beginning at 5:00 p.m. on March 23, 2020, and continuing until 8:00 a.m. on April 7, 2020, the governor's order has the following effects:

- Suspends the public's ability to request a public record in person or by telephone;
 - Requires a requester submit requests for records remotely through U.S. mail, email, or fax;
- Suspends the provision in APRA that deems a request denied if the agency does not respond (i.e., acknowledge) to the request within 7 days;
 - Requires public agencies to acknowledge receipt of a request received during the two week period set forth above within a reasonable time after the two week period ends;

3. Public Access Counselor: Suspends any mandatory deadline or requirement found in Indiana Code Section 5-14-5-8, -9, and -10 regarding formal complaints for alleged public access violations for the duration of the public health emergency;

- Requires the public access counselor carry out those provisions within a reasonable time;

Notably, Executive Order 20-09 is a supplement to, and deemed to be part of, Executive Orders 20-02 and 20-04.

Updated FAQs and additional guidance

1. How does Governor Holcomb's Executive Order 20-09 affect a governing body's responsibilities under the Open Door Law during the COVID-19 emergency?

Executive Order No. 20-09, in part, further modifies and suspends certain provisions of the Open Door Law for the duration of the COVID-19 emergency.

Specifically, the governor's orders:

1. Directs state and local agencies to limit public meetings to only essential matters critical to the operations of the governmental agency or entity for the duration of the public health emergency;
2. Suspends the provision of the ODL that requires a governing body to adopt a policy governing electronic participation in meetings;
3. Suspends the provision requiring the physical presence of a minimum number of members at the meeting location;
 - All members of the governing body may meet virtually by videoconference or phone conference;
4. Authorizes all public agencies to post public notice and meeting agendas solely by electronic means;
5. Suspends section 3.5 of the ODL; authorizing any political subdivision or entity to comply with section 3.6 as modified;
6. Suspends all specific statutory deadlines requiring a governing body to meet during the public health emergency so long as the cancellations do not disrupt essential government decisions or services or when meetings are required by federal law;
 - **Example:** Some governing bodies are required by statute to meet in certain intervals (e.g., monthly; quarterly). The governor's order suspends those requirements so long as the cancellations do not disrupt essential government decisions or services or a meeting is required by federal law.

2. How does a governing body make a meeting available to public and media as required by Governor Holcomb's Executive Order 20-09?

The governor's order modifies the manner of a convening public meetings by authorizing governing bodies to meet virtually or remotely if a quorum is present and it is made available to the public and media for real-time observation.

3. Do the other provisions of the ODL still apply during the COVID-19 emergency?

Yes. The provisions of the ODL that are not addressed by Governor Holcomb's Executive Order operate as usual.

4. How should governing bodies handle public meetings during the COVID-19 emergency?

- **Postpone or cancel.** Postpone or cancel public meetings scheduled during the emergency declaration if the meeting does not concern essential matters critical to government operations;
 - The ODL does not require a governing body to provide advance public notice to cancel or postpone a public meeting or executive session;
 - We advise agencies to notify the news media of any cancellation and provide notice on the agency’s website and social media as far in advance as practicable;
- **Delegate authority.** Governing bodies should delegate authority to the presiding officer—if feasible and permitted by law—to act on administrative or ministerial matters and ratify those actions at the governing body’s next public meeting;
- **Essential meetings.** If a governing body decides that a public meeting is necessary to take action on essential matters critical to the operations of the government during the COVID-19 emergency, the agency must comply with the Open Door Law, as modified by the governor’s order.

5. How does an agency comply with the ODL if a meeting is necessary during the COVID-19 emergency?

The governor’s order modifies the ODL to make section 3.6, which governs electronic participation in meetings by members of the governing bodies of state agencies, applicable to the governing bodies of all public agencies.

In other words, the members of local governing bodies (e.g., counties; cities; towns; schools) may participate in meetings electronically under section 3.6 like their counterparts at state agencies, charter schools, airport authorities, and departments of aviation for the duration of the COVID-19 emergency in accordance with Governor Holcomb’s Executive Order.

Here is an ODL compliance checklist:

- ✓ **Public notice of the date, time, and place posted 48 hours before the meeting;**
 - The governor’s order authorizes agencies to provide public notice solely through electronic means;
 - **Example:** Posting public notice on the agency’s website or social media;
 - Electronic notice is available only for meetings convened under the ODL;
 - It does not apply to a hearing that requires notice by publication in accordance with Indiana Code section 5-3-1;
- ✓ **The meeting agenda, if the governing body uses one, is posted before the meeting;**
 - An agency may post agenda solely through electronic means;
- ✓ **All votes of the governing body during an electronic meeting must be taken by roll call vote;**
 - The clerk or secretary of the governing body calls each member’s name and the member casts aloud his or her vote;

- ✓ **The meeting is open to the public;**
 - Use technology to facilitate the public’s right to observe and record the proceeding remotely and limit in-person contact;
 - Live stream or broadcast meetings online in real time and encourage the public—especially high-risk populations—to observe remotely;
- ✓ **The clerk or secretary of the governing body creates the meeting memoranda;**

6. May a governing body vote on public business by email during the emergency?

No. The ODL expressly requires a governing body take final action (i.e., voting on public business) at a meeting open to the public;

7. Can we call an emergency meeting for any subject matter?

The ODL suspends the 48 hour notice requirement for a meeting called to deal with an actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event. *See* question 8.

- Regardless, it must be a meeting to deal with an actual or threatened injury to a person, property, or disruption of government activity to qualify as an emergency meeting that does not require 48 hour notice.
- Emergency executive sessions should be used sparingly, if at all, as the executive session authorizations are not immediate in nature.

8. Does the ODL’s 48 hour public notice requirement still apply?

Yes. Generally the ODL requires an agency to provide public notice of the date, time, and place of any meeting, executive sessions, or of any rescheduled or reconvened meeting at least 48 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. The ODL requires agencies to post a copy of the notice at the agency’s principal office (e.g., city hall) or if there is no such office at the location of the meeting.

- **Electronic notice authorized.** Governor Holcomb’s orders authorize all state and local governing bodies to provide public notice of meetings solely by electronic means for the duration of the public health emergency. In effect, this suspends the requirement that a governing body must post a copy of the notice at its office or the meeting location.
 - **Example:** An agency may post public notice for an upcoming meeting on the agency’s website 48 hours before the meeting;

Exception to 48 hour notice requirement: The only exception to the ODL’s 48 hour notice requirement is when a governing body calls a meeting to deal with an actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event.

- **Example:** A governing body calls a meeting to deal with threatened disruption of governmental activity under the jurisdiction of the agency caused by COVID-19;
 - The council is still required to post public notice of the meeting, but it does not need to be 48 hours before the meeting;

- The council must also give the news media that requested notice of meetings the same notice as is given to members of the governing body and post the public notice electronically;
- The other provisions of the Open Door Law still apply;

9. Do governing bodies still have to keep minutes or memoranda?

Yes. If a governing body convenes a public meeting or an executive session during the COVID-19 emergency, it must keep the meeting minutes or memoranda in accordance with the Open Door Law.

10. Can governing bodies suspend public comment?

The ODL does not require public comment.

11. If a public hearing is required on an issue, is the governing body required to receive public comment?

A public hearing is distinguishable from a public meeting for purposes of the ODL. Generally, a public hearing is when the public has a right to be heard. Governing bodies may have a remote submission plan for comments.

12. What impact does the governor's order have on the formal complaint I filed with the Public Access Counselor alleging a violation by a public agency?

Governor Holcomb's order suspends the mandatory deadlines and requirements concerning the formal complaint procedure administered by this office for the duration of the public health emergency. The order requires this office to carry out those provisions within a reasonable time.

- **Example:** For the duration of the COVID-19 emergency, the Public Access Counselor may issue an advisory opinion to a formal complaint within a reasonable time rather than the usual statutory deadline of 30 days under Indiana Code section 5-14-5-9.

13. Can a person still request public records from an agency during the COVID-19 emergency?

Yes. The governor's order suspends the public's ability to request public records in person or by phone until 8:00 a.m. on April 7, 2020.

- **Submit requests remotely.** The governor's order also requires a requester to submit requests remotely via email, U.S. mail, or fax.

14. I submitted a request for records to an agency after 5:00 p.m. on March 23, 2020, and I have not received a response from the agency. Is my request denied?

No. The governor's order suspends until April 7, 2020, the provision of APRA that deems a request for records denied if the agency fails to respond within 7 days of receiving the request. An agency is required to acknowledge receipt of a request within a reasonable time following this two week period.