

ATTORNEY GENERAL GUIDANCE ON EXECUTIVE ORDER NO. 20-36 CORONAVIRUS — PUBLIC MEETINGS REQUIREMENT LIMITED WAIVER

Posted:

Monday, November 30, 2020

On November 25, 2020, Governor Ricketts issued Executive Order No. 20-36, “Corona Virus — Public Meetings Requirement Limited Waiver” (“Order”). This Order is essentially identical to Executive Order No. 20-03, issued at the onset of the pandemic on March 17, 2020. Like the previous executive order, this Order provides a limited waiver of certain requirements of the Nebraska Open Meetings Act (“Act”), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2018, Supp. 2019). The Order permits public bodies in the state to meet by videoconferencing, telephone conference call, or other electronic means so long as members of the public and the media are provided access to the meetings. The Order requires that any public body that elects to meet by electronic means (1) provide reasonable advance publicized notice of its meeting and (2) prepare an agenda of items to be discussed at the meeting. See Neb. Rev. Stat § 84-1411(1) (Supp. 2019). Public bodies must meet all other requirements of the Act. The Order applies to all public meetings beginning December 1 through January 31, 2021.

All guidance previously issued by the Attorney General pertaining to Executive Order No. 20-03 is applicable to the new Order. Our previous guidance is set out below.

Posted: Tuesday, March 17, 2020

Nebraskans are facing unprecedented challenges to conduct open, public meetings in the face of the Coronavirus pandemic. Recommendations to limit social gatherings to fight the spread of the virus have generated several questions and concerns about the ability of public bodies to meet electronically. In response, earlier today Governor Ricketts issued Executive Order No. 20—03 (“Order”), which provides a limited waiver of certain requirements of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014, Cum. Supp. 2018, Supp. 2019). The Order permits all public bodies in the state to meet by videoconferencing, telephone conference call, and other telecommunications applications, so long as members of the public and the media are provided access to the meetings in some manner. The Order requires that any public body that elects to meet by these means (1) provide reasonable advance publicized notice of its meeting and (2) prepare an agenda of items to be discussed at the meeting. See Neb. Rev. Stat § 84-1411(1) (Supp. 2019). Provisions in Neb. Rev. Stat. § 84-1411(2) and (3) requiring public access to videoconference sites and telephone conference sites are waived by the Order. All other requirements of the Act relating to closed sessions, voting, minutes, etc., must be met. The Order applies to all public meetings beginning today through May 31, 2020.

Posted: Thursday, March 19, 2020

Since the issuance of the Order, our office has received numerous calls about its meaning and application. Some callers have interpreted the Order to mean that they can continue to have regular “in-person” meetings, but exclude the public from such meetings. Some have indicated that they plan to close the meeting and post a sign on the door giving the public a call-in number to the meeting being conducted.

Please keep in mind that the Order is a *limited* waiver of some of the provisions of the Open Meetings Act, specifically relating to videoconference and telephone conference meetings. The Order permits all public bodies in the state to meet by videoconferencing, telephone conference call, and other telecommunications applications, so long as access to the meeting is provided to members of the public and the media. All other provisions of the Open Meetings Act have not been waived. If a public body elects to have an in-person meeting, there is no legal basis in the Open Meetings Act or the Order to close the meeting to the members of the public and press who wish to attend.

Our conclusion above is also applicable to instances where there is a “mixed meeting”—i.e., a portion of the public body meets in person and a portion participates electronically. This office has indicated on multiple occasions that a “meeting” subject to the Open Meetings Act occurs when there is a quorum present and the members of the quorum are engaged in any of the activities included in the definition of “meeting” set out in Neb. Rev. Stat. § 84-1409(2) (2014). If a quorum of the public body elects to physically meet to discuss public business, even though other members may be participating electronically, then members of the public and media should be allowed physical access to the meeting.

The Attorney General highly recommends that public bodies that wish to conduct virtual meetings in accordance with the Order indicate this in the meeting notice. The notice should clearly state how the members of the public and media may access the meeting. The notice should also indicate that since the meeting will be held electronically, and no quorum of the public body will be physically present together, there will be no public in-person attendance.

The Attorney General urges members of public bodies in Nebraska to use their best judgment in deciding how to proceed in light of the Coronavirus pandemic and the Governor’s Order.

Posted: Thursday, April 2, 2020

The Attorney General is issuing this additional guidance in response to continuing inquiries from individuals and governmental entities across Nebraska with respect to Executive Order No. 20-03 (“Order”) and its impact on the Open Meetings Act. We are fully aware of the numerous difficulties facing public bodies in light of the current public health concerns brought on by the COVID-19 pandemic. We are also aware that public bodies must balance the need to remain operational while ensuring the safety of their members, the public and the media. However, notwithstanding these challenges, there is still a need to maintain governmental accountability and transparency.

The Nebraska Emergency Management Act provides that “[t]he Governor shall be responsible for meeting the dangers to the state and people presented by disasters, emergencies, and civil defense emergencies Neb. Rev. Stat. § 81-829.40(1) (2014). Consistent with this statutory responsibility to protect Nebraska and its citizens, Governor Ricketts issued the Order to allow

all governmental entities subject to the Open Meetings Act the ability to conduct public business by videoconference or telephone conference call, or any other electronic means, so long as members of the public and the media have access to the meeting. Current requirements in the Open Meetings Act relating to public access to videoconference or telephone conference sites have been waived to avoid face-to-face contact. Public bodies conducting meetings in accordance with the Order must still provide advance publicized notice and comply with the agenda requirements in Neb. Rev. Stat. § 84-1411(1) (Supp. 2019). All other provisions of the Open Meetings Act remain in full force and effect.

The Governor's Order is in no way unique. Other states, with laws similar to Nebraska's, have issued orders suspending provisions of their open meetings law to deal with the public health concerns of the pandemic. For example, in Texas, the governor approved a request by the attorney general to "relax . . . open-meeting requirements to allow for telephonic or videoconference meetings of governmental bodies, without the need for face-to-face contact during a pandemic." Texas Attorney General News Release (March 16, 2020), <https://www.texasattorneygeneral.gov/news/releases/governors-office-clears-path-governmental-bodies-meet-telephonically-or-videoconference-during>. The Governor of Louisiana has ordered that "[a]ll state agencies, boards and commissions, and local political subdivisions of the state shall provide for attendance at essential governmental meetings via teleconference or video conference and such attendance shall be allowed during the pendency of this emergency." Proclamation Number JBE 2020-30—Additional Measures for COVID-19 Public Health Emergency (March 16, 2020), <https://gov.louisiana.gov/assets/ExecutiveOrders/JBE-EO-30.pdf>. In Rhode Island, "[p]ublic bodies conducting meetings . . . are hereby relieved from the prohibitions regarding use of telephonic or electronic communication to conduct meetings . . . provided that the public body is meeting for an essential purpose and makes provisions to ensure public access to the meeting of the public body for members of the public through adequate, alternative means." Executive Order 20-05 (March 16, 2020), Third Supplemental Emergency Declaration – Public Meetings and Public Records Requests, <http://www.governor.ri.gov/documents/orders/Executive-Order-20-05.pdf>. On March 20, 2020, the Tennessee governor suspended certain provisions of the open meetings law "to allow a governing body . . . to meet and conduct its essential business by electronic means, rather than being required to gather a quorum of members physically present at the same location, if the governing body determines that meeting electronically is necessary to protect the health, safety and welfare of Tennesseans in light of the COVID-19 outbreak" State of Tennessee, Executive Order by the Governor, No. 16 (March 20, 2020), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee16.pdf>.

Nebraskans are currently functioning under states of emergency at the state and federal levels. Public health officials are urging people to avoid social gatherings and practice social distancing. Officials are also advising older persons and persons with underlying health conditions to remain home. Consequently, we believe the Order represents an appropriate measure to limit the community spread of COVID-19 by eliminating public gatherings but still enable public bodies to conduct public business. We would urge public bodies that conduct meetings under the Order to keep in mind that we are all operating under an emergency situation. We recommend that only essential, time-sensitive matters that require action by the public body be considered.

Finally, this guidance has been issued to assist public bodies to understand the impact of the Order on the Open Meetings Act, over which we share concurrent enforcement authority with the state's county attorneys. However, it is up to each public body to decide whether to conduct meetings electronically. The Attorney General does not represent local governmental entities, and cannot provide these entities legal advice. All local governmental entities should confer with their legal counsel to determine the best way to reconcile compliance with the Open Meetings Act with the interests of public health and safety.