



Please Unmute Yourself: Virtual School Board Meetings and Electronic Communications

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One year ago this month, Governor Pritzker issued Executive Order 2020-07 which suspended the provisions of the Open Meetings Act (OMA) requiring in-person attendance by members of an Illinois public body and limiting when remote participation by such members is permitted. That Executive Order “encouraged” public bodies to postpone consideration of public business. Expecting this to be a short-term concern, many school districts cancelled their March or April 2020 board of education and school board committee meetings.

As the pandemic lingered, school districts could not further postpone their meetings. Some continued to meet in person while others cobbled together virtual meetings. These early remote meetings were wrought with technical difficulties including the risk of being hijacked by outsiders seeking to create havoc. Stories abounded of virtual meetings being interrupted by individuals yelling obscenities or showing pornography. Throughout the next few months, the platforms used for virtual public meetings enhanced their security features to prevent virtual hijacking and “Zoom bombing.” Once other technical problems were resolved, many school districts began conducting remote public meetings efficiently and effectively on a regular basis.

Nevertheless, convening a public meeting where all members of the public body and all members of the public may attend in-person remains an elusive concept as different regions within Illinois move among the various mitigation Tiers, all striving to reach Phase 5 of the State’s Restore Illinois Plan. As we begin year two of potentially limited in-person meetings, let’s review the legal issues currently surrounding virtual public meetings.

OMA Requirements for a Public Meeting Without a Quorum Physically Present

Effective June 12, 2020, what Governor Pritzker had previously “encouraged” became law. Public Act 101-640 amended the OMA to allow Illinois school boards (and those committees subject to the OMA) to convene a meeting without a quorum being physically present as long as the following 10 enumerated conditions listed in Section 7(e) of the OMA (5 ILCS 120/7(e)) are satisfied:

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1. The Governor or Director of the Illinois Department of Public Health has issued a disaster declaration related to public health concerns in an area within the public body’s jurisdiction.
2. The school board president (or committee chair) determines that an in-person meeting is not practical or prudent because of a disaster. In his February 5, 2021 Executive Order, Governor Pritzker found that the then-current public health concerns render in-person attendance of more than 10 people at the regular meeting location of any meeting subject to the OMA “not feasible.” Yet, even if in-person attendance of more than 10 people is “feasible,” it may not be “practical.” Certain members of the board may have health or safety concerns that make in-person attendance of a quorum of the board members not possible. Even if all members of the school board and necessary administrators are in-person, it may not be feasible to allow members of the public to attend the meeting in-person. Depending on the school board’s technical capabilities, it may be easier for everyone to participate via a remote videoconference platform rather than having some individuals in-person and others participating virtually.
3. All school board members participating in the meeting, whether in person or remotely, are verified and can hear one another and hear all discussion and testimony.
4. For open meetings, members of the public present at the regular meeting location can hear all discussion, testimony and votes by the school board members. If attendance at the regular meeting location is not feasible due to the disaster, the school board must make alternative arrangements to ensure that any interested member of the public has access to contemporaneously hearing all discussion, testimony, and roll call votes, such as by offering a telephone number or a web-based link. While members of the public have the right to contemporaneously hear all discussion, public comment does not need to be “live;” a school board can ask for comments to be submitted in writing in advance and entered into the meeting record.
5. At least one member of the school board, chief legal counsel, or school superintendent is physically present at the regular meeting location, unless unfeasible due to the disaster.
6. All votes must be conducted by roll call, so each member’s vote on each issue can be identified and recorded. This requirement extends to votes that are typically conducted by voice vote such as the vote to adjourn a meeting.

¹ Since March 2020, Governor Pritzker has issued a monthly reaffirmation that all Illinois counties remain in a disaster area.

² Once the school board opts for an in-person meeting, the normal OMA rules govern. Under Section 7 of the OMA, 5 ILCS 120/7, when a quorum of the members is physically present at the meeting site, a member may be allowed to participate by video or audio conference *only* if they are prevented from physically attending because of (i) personal illness or disability; (ii) employment purposes or school board business; or (iii) a family or other emergency.

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7. 48 hours' notice must be given for all meetings that do not meet in-person except in the event of a bona fide emergency, in which case the OMA's notice and mandates for emergency meetings must be followed.
8. A quorum is determined by including all school board members participating by audio or video conference. All such members may participate in all proceedings of the meeting once a quorum has been established.
9. An audio or video recording shall be maintained for all open meetings occurring under this subsection 7(e) and shall be available to the public. The Attorney General has advised that, similar to closed session recordings, those records should be maintained for at least 18 months.
10. The school board bears all costs associated with compliance with these requirements.

Many school boards have efficiently convened virtual meetings under OMA's Section 7(e) over this past year. While some school boards had already been livestreaming their open meetings prior to the pandemic, others have incurred new costs associated with the obligation to ensure that all interested members of the public have contemporaneous access to hearing all discussion, roll call votes and testimony during open meetings. The requirement to make the audio or video recordings of such open meetings available to the public ensures a level of transparency that doesn't exist with in-person meetings outside of a pandemic.

No Portion of a Virtual Open Meeting May Be Muted

On November 24, 2020, the Attorney General issued a binding opinion (Public Access Opinion No. 20-007; 2020 PAC 64741 (2020)), finding that the Village of Roanoke violated the new Section 7(e)(4) of the OMA during a virtual open meeting by muting a discussion of public business. During a September 8, 2020 remote open meeting, the Village President directed that all microphones be muted during a brief discussion between the Mayor and Village Clerk. The "sidebar" discussion lasted one minute and dealt with a sensitive personnel matter that was to be discussed during closed session later in the meeting.

The Village argued that the 60-second muting of the mics was significantly less disruptive than it would have been to take the time to go into closed session for that same 60-second conversation. Moreover, members of a public body frequently have brief, inaudible exchanges with another individual during in-person meetings. Although the PAC Opinion acknowledged that such sidebars are permissible during in-person meetings, it concluded that the newly enacted Section 7(e)(4) requires that the public be allowed to contemporaneously hear *all* discussion, including such sidebars, during virtual meetings. As a remedy, the PAC Opinion ordered the Village to make

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available to the public the complete verbatim record of the open session of the September 8, 2020 meeting, including the sidebar.

Personal Texts and Emails May Be Subject to Public Disclosure

This one isn't new, but it bears repeating. A year into the pandemic, we know that individuals participating remotely in meetings sometimes take certain liberties that they wouldn't take if they were at an in-person meeting. Wearing sweatpants, eating snacks, and texting or emailing all occur more frequently during a virtual meeting than at an in-person meeting. Texting one's spouse or child to ask them to put the wet laundry into the dryer is not a matter of public concern. Texting or emailing someone else about the public business of the meeting is a matter of public concern, and that electronic communication is subject to disclosure under the Freedom of Information Act (FOIA) even if that communication is on an individual's personal device.

In *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, the Fourth District Appellate Court affirmed a binding opinion issued by the Attorney General (Public Access Opinion No. 11-006; 2011 PAC 15916), finding that electronic communications sent and received during city council meetings from the mayor and council members pertaining to public business were subject to disclosure under FOIA. The City was obliged to turn over copies of those electronic communications to a local newspaper reporter regardless of whether they were sent and received on personal or City-issued electronic devices. Because the texts and emails were sent during a public meeting, they are, by definition, public records subject to FOIA.

According to the *City of Champaign* court, communications from an individual elected official's personal electronic device qualify as 'public records' subject to FOIA if they (1) pertain to public business, and were (2) prepared by, (3) prepared for, (4) used by, (5) received by, (6) possessed by, or (7) controlled by the "public body." An electronic communication sent to or received by just one school board member during a board of education meeting is, by law, received by the entire public body. That same communication, if sent to an individual board member's personal electronic device outside of a public meeting, is not a 'public record' and would not need to be disclosed unless that individual school board member sends the communication to his/her publicly issued device or sends the communication to a quorum of the school board. The bottom line: remind school board members and administrators to remain mindful that any texts or emails pertaining to public business that they send or receive during school board meetings—whether virtual or in-person—are subject to FOIA.

The *City of Champaign* ruling was recently expanded by the First District Appellate Court in *Better Government Association v. The City of Chicago Office of Mayor*, 2020 IL App (1st) 190038. In this recent decision issued in August 2020, the Better Government Association filed a FOIA request for records regarding the lead in drinking water at the Chicago Public Schools. The

request sought communications between the Public Health Commissioner and specific individuals in the Mayor's Office. The court ruled that because certain officials (such as the mayor and director of the Chicago Department of Public Health) can make binding decisions on behalf of the public body, the emails and texts that pertain to public business on the personal accounts of such officials are within the possession of the public body and subject to FOIA. Otherwise, public employees could avoid the purposes of FOIA by maintaining all communications about public business on their personal accounts.

How to Respond to a FOIA Request When Personal Devices Are Involved

While a school district cannot demand that its employees or officials turn over personal devices to be searched for records responsive to a FOIA request, the school district can direct its employees and officials to search their own personal devices and turn over responsive records. In the *Better Government Association* case, the Mayor's Office was aware of which employees conducted public business on personal email accounts. Upon receiving a FOIA request, a school district should identify those employees and officials who might have used personal email accounts or personal phone numbers to communicate about public business relevant to the FOIA request. The district should ask those individuals if their personal accounts contain responsive records to the FOIA request and consider obtaining a written affidavit from the identified employees or officials. The affidavit would acknowledge that the individual has completed the search of their personal accounts, that the responsive records have been provided to the school district to be turned over in response to the FOIA request, or that their personal accounts contained no records responsive to the request.

Conclusion

Will Illinois boards of education have the option to meet remotely in the future, once the pandemic is behind us? Perhaps, but this would require a change to the current law that allows remote meetings only in the event of a disaster declaration. For now, when virtual meetings remain an option and a necessity in certain locales throughout Illinois, ensure that your school board and its committees are compliant with the laws identified in this article.

For nearly 30 years, Ottosen DiNolfo Hasenbalg & Castaldo, Ltd., has been dedicated to serving those who serve others by providing legal assistance to Illinois school districts, municipalities and other local governments, public pension board and public safety organizations.