

The Firehouse Lawyer

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May 2020

TECHNICAL DIFFICULTIES

For those of you who subscribe to our newsletter, we had some technical difficulties with our site that prevented us from sending the April 2020 newsletter. Some of the information in the April issue is outdated due to the rapidly changing nature of the pandemic response.

However, the April issue has useful information pertaining to the receipt of Grant funds, which is especially valuable during this pandemic. Here is the link to the article: <https://firehouselawyer.com/Newsletters/April2020FINAL.pdf>. You can also locate the article by going to our website, www.firehouselawyer.com, searching under "Newsletter", and searching under "Emergency Management Act: RCW 38.52", subtopic "Grants."

And now for the May article:

WHEN DOES THE BUCK STOP ON THE OPMA RESTRICTIONS?

Some of our clients have been asking what they should do if Governor Inslee's Proclamation 20-28 pertaining to the Open Public Meetings Act and the Public Records Act expires (set to

expire May 31¹ but stay tuned on whether the order is extended).

The original Proclamation 20-28 reads as follows:

“Any public agency, subject to RCW 42.30, is prohibited from conducting any meeting, subject to RCW 42.30 unless (a) the meeting is **not** conducted **in-person**...Subject to the conditions for conducting any meeting as required above, agencies are further prohibited from taking “action,” as defined in RCW 42.30.020, unless those matters are **necessary and routine** matters or are matters necessary to respond to the COVID-19 outbreak and the current public health emergency, **until** such time as **regular public participation** under the Open Public Meetings Act is possible.” (emphasis added).

Our answer is that if Proclamation 20-28 expires, the “necessary and routine” restrictions

¹ See the link to the latest extension of Proclamation 20-28 (May 31):
https://www.governor.wa.gov/sites/default/files/20-28.3%20-%20COVID-19%20Open%20Govt%20Waivers%20Ext%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery

expire with it, but the in-person-meeting restriction does *not*.²

The in-person restriction would still apply because Proclamation 20-05 (the original proclamation of a State of Emergency), and the phased re-opening that comes with it (which is implemented county-by-county as to when certain functions and businesses may resume), precludes “gatherings” of more than five people outside of the household until “Phase Three” begins. (When Phase 3 begins, “gatherings” of no more than 50 people outside of the household are permissible.)³

Some might argue that the “necessary and routine” restriction does not appear to have a date certain for expiration. Instead, some would argue, this restriction only expires when “regular public participation” is possible, and “regular public participation” must be construed as *in-person* meetings. Thus, the “necessary and routine” restriction must still apply until *in-person* meetings are possible.

This interpretation would be based on a broad application of the language of Proclamation 20-

² See the link to the original Proclamation 20-28 here:
https://www.governor.wa.gov/sites/default/files/proclamations/20-28%20-%20COVID-19%20Open%20Govt%20Laws%20Waivers%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery

³ See more here on the “Safe Start” Plan:
<https://medium.com/wagovernor/inslee-signs-new-covid-19-order-for-phased-re-opening-of-washingtons-economy-ad5ea919ab56>

28. We would disagree with this interpretation. We would disagree because government must be able to *do something* beyond approving vouchers.

Furthermore, “regular public participation” is in fact *already occurring* given the progression of the Covid-19 era and many agencies’ use of technology that has come with that.⁴

Here are some steps an agency might take to encourage “regular public participation”, therefore permitting the agency to discuss “new initiatives”, i.e. matters that are “necessary” but might not be “routine”, without holding in-person meetings:

- Allowing public comment by email, at least up to the start of the meeting;
- Allowing public comment during remote meetings, for example, during a public comment period at some point in the virtual meeting
- Providing easy access to observe and listen to the proceedings on Zoom, WebEx or some similar virtual meeting software

Our fundamental point is that to operate a functional government, your agency must be

⁴ Of course, we caution that each agency’s means of using technology to encourage “regular public participation” is different, so whether an agency can resume, or has already resumed, “regular public participation” must be considered on a -case-by-case basis. In other words, consult your agency’s attorney if you have questions.

able to *do something* beyond approving vouchers and passing resolutions that were already “on the table.” Governments must be able, at some point, to discuss “new initiatives.” Agencies should not get hung up on the term “regular public participation” so much that it precludes them from involving the public remotely while at the same time *doing something*.

We live in a different age, and although agencies may be operating in a “gray area” pursuant to our thoughts above, if agencies always operate in a “black” or “white” area, government becomes nothing more than a rubber stamp.

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