

## Insights

### **During COVID-19 Public Health Emergency, What Constitutes an “Essential Matter,” Thus Warranting a Public Meeting by Local Governmental Entities?**

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On March 16, 2020, Indiana Governor Eric Holcomb issued Executive Order 20-04 (the “Order”). Among other particulars, the Order directs that “Public meetings conducted pursuant to Ind. Code § 5-14-1.5 et seq. [hereinafter the Open Door Law, or “ODL”] should be limited to only essential matters critical to the operations of the governmental agency or entity for the duration of this public health emergency.”<sup>1</sup>

One key question involving the Order is what constitutes “essential matters” critical to the operations of the governmental agency or entity for the duration of this public health emergency. Following the Governor’s Order, Indiana Public Access Counselor Luke Britt issued Guidance (“Guidance”) for state and local agencies that are subject to Indiana’s public access laws such as the ODL and the Access to Public Records Act (“APRA”).<sup>2</sup> The Guidance, like the Order, directed that public agencies should cancel or postpone non-essential meetings.

However, in both the Order and the Guidance, little was offered to instruct political subdivisions which public meetings were “essential,” and which public meetings were “non-essential.”

On March 23, 2020, Governor Holcomb issued Executive Order 20-08, directing Hoosiers to stay at home (the “Stay at Home Order”). Among other categories of “essential” activities, businesses, and infrastructure, identified in the Stay at Home Order, the following were identified as “Essential Governmental Functions:”

**All services provided by the State of Indiana or any municipality, township, county, political subdivision, board, commission or agency of government and needed to ensure the continuing operation of government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Governmental Functions. Each governmental body shall determine its Essential Governmental Functions and identify employees and/or contractors necessary to the performance of those functions.**<sup>3</sup>

It appears that what constitutes an Essential Governmental Function, as defined in the Stay at Home Order, is in the eye of the beholder – the state agency or political subdivision. To be sure, during the healthcare crisis caused by COVID-19, supporting “health, safety and welfare” of the public naturally includes the provision of medical care, as well as supplies, infrastructure, and the like. For these matters, if a public meeting is otherwise required by law, it would undoubtedly be considered “essential,” and thus should be held in accordance with the Order, the Guidance, and subsequent Executive Orders, including Executive Order 20-09, which slightly modifies earlier mandates concerning the ODL.

However, the analysis is not as clear when the governmental action concerns other activities pre-COVID-19 such as certain public works projects, approval of private variances, commitments, or construction, matters of taxation and other revenue collection, and other miscellaneous matters. While not specifically tied to COVID-19, any one of these matters may possibly fit into the realm of Essential Governmental Functions, as these non-COVID-19 matters likely touch and effect matters of “welfare of the public.”

Understanding that the impact of COVID-19 is changing daily, at this point the determination of what meetings are “essential,” thus warranting a public meeting, is left to the state agency or political subdivision’s discretion in line with the Home Rule, as “each governmental body shall determine its essential governmental functions and identify employees and/or contractors necessary to the performance of those functions.”<sup>4</sup> Political subdivisions would do well to balance the necessity of cancelling non-essential meetings, while still holding meetings that are supportive of the health, safety and welfare objectives of the public.

Even if a meeting is held because it is considered “essential,” executive orders, the Guidance, and public health guidance should be followed, including holding meetings remotely, shortening the length of physical meetings, limiting attendance at physical meetings, practicing proper social distancing techniques, and other procedures aimed at limiting the spread of COVID-19.

If you have questions pertaining to information found in this alert please contact **Christopher W. Bloomer** or reach out to any member of Krieg DeVault’s **Public Finance and Municipal Law team**.

[1] <https://www.kriegdevault.com/insights/indianas-open-door-law-odl-partially-suspended-response-covid>.

[2] <https://www.kriegdevault.com/insights/indianas-public-access-counselor-provides-open-door-law-odl-guidance>.

[3] *Stay at Home Order*, ¶ 12.

[4] *Stay at Home Order*, ¶ 12 (*internal capitalization and underlining omitted*).