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Office of the Attorney General

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**OAG 20-05**

*Subject:* Whether, under the current state of emergency declared by the President of the United States and the Governor of Kentucky, caused by the global COVID-19 pandemic, a public agency must identify a primary physical location for a video teleconference at which the public may attend and view a public meeting conducted through video teleconference under the Open Meetings Act.

*Requested by:* Jim Henderson, Executive Director  
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and

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*Written by:* Carmine G. Iaccarino, Executive Director  
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*Syllabus:* At this time and given the extraordinary circumstances public agencies are confronting, it is not “feasible” under KRS 61.840 to precisely identify a primary physical location for a video teleconference at which the public may attend and view a public meeting conducted through video teleconference under the Open Meetings Act. Instead, because of the public health necessity of imposing social distancing to help stop the spread of COVID-19, a public agency should precisely identify a website, television

station, or other technological means by which the public may view a meeting conducted under the Act until the conclusion of the state of emergency.

### ***Opinion of the Attorney General***

In December 2019, the Hubei Province of the People’s Republic of China began experiencing an outbreak of a never-before-seen disease, COVID-19, caused by a novel coronavirus known as SARS-CoV-2. According to the Center for Disease Control and Prevention, the novel coronavirus appears to be a highly contagious virus that spreads “[b]etween people who are in close contact with one another (within about 6 feet).”<sup>1</sup> Since December, COVID-19 has spread at an exponential rate throughout the world, crippling the healthcare systems and economies of multiple nations.<sup>2</sup> The United States reported its first infection in mid-January 2020, and has now seen more than 4,000 cases. On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak has reached pandemic status.<sup>3</sup>

In response to this novel coronavirus, the Governor of Kentucky issued Executive Order 2020-215, declaring a State of Emergency under KRS Chapter 39A and activating the Kentucky Emergency Operations Plan. Similarly, the President of the United States issued a Proclamation Declaring a National Emergency on March 13, 2020. Both the Governor and the President have activated their emergency authority to respond to this public health crisis. In Kentucky and many other states, governors have issued executive orders that mandate the closure of many privately owned businesses to the public. Similarly, schools and churches have closed.<sup>4</sup> As of

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<sup>1</sup> See Center for Disease Control, *How it Spreads*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last visited March 17, 2020).

<sup>2</sup> See Jason Horowitz, *Italy’s Health Care System Groans Under Coronavirus—a Warning to the World* (New York Times March 12, 2020), available at <https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html> (last visited March 17, 2020).

<sup>3</sup> See World Health Organization, *WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020*, available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited March 17, 2020).

<sup>4</sup> See, e.g., LEX18, *Fayette County Schools, other counties close around state*, available at <https://www.lex18.com/news/covering-kentucky/boyle-county-schools-close-from-march-15-until-apr-10> (last accessed March 18, 2020); Courier Journal, *Catholic Masses in Louisville suspended amid spread of coronavirus*, available at <https://www.courier-journal.com/story/news/local/2020/03/16/catholic-masses-suspended-louisville-starting-monday/5058755002/> (last accessed March 18, 2020).

March 17, 2020, the Kentucky Capitol and many state agencies have also been closed to the public.

The potential crisis facing the Commonwealth is of unparalleled magnitude. Yet, public agencies must continue providing critical public services. And in doing so, agencies subject to the Open Meetings Act (the “Act”) must conduct public business in open meetings to deliver those services. *See* KRS 61.810(1) (mandating subject to certain exceptions that “[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times . . .”). The Act plainly permits public agencies to conduct meetings through video conferencing under KRS 61.826. At issue, however, is whether a public agency conducting a meeting through video teleconference must provide a *physical* location at which the public may gather to view the video teleconference. Given this Office’s role in enforcing the Act under KRS 61.846, and the exceptional circumstances that public agencies must confront as they strive to comply with the Act and deliver critical public services during this global pandemic, this Office renders the following opinion.<sup>5</sup>

We start with the text. Under the Act, a public agency “may conduct any meeting through video teleconference.” KRS 61.826(1). To do so, an agency must provide notice, “[c]learly stat[ing] that the meeting will be a video teleconference.”<sup>6</sup> KRS 61.826(2)(a). If the agency chooses to conduct a meeting through a video teleconference, the Act also requires that the agency “precisely identify a primary location of the video teleconference where all members can be seen and heard and the public may attend in accordance with KRS 61.840.” KRS 61.826(2)(b).

By its terms, KRS 61.826(2)(b) incorporates the “conditions for attendance” contained in KRS 61.840 and applicable to all meetings under the Act. Among other requirements, a public agency must “provide meeting room conditions, including adequate space, seating, and acoustics, which *insofar as is feasible* allow effective public observation of the public meetings.” KRS 61.840 (emphasis added).

KRS 61.840 requires public agencies to provide meeting room conditions that allow the effective observation of public meetings, regardless of whether the meeting is conducted in-person or by video teleconference. While the requirement is limited

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<sup>5</sup> On March 16, 2020, Secretary of the Finance and Administration Cabinet, Holly M. Johnson, issued a memorandum providing guidance to “Kentucky Boards and Commissions.” The memorandum declared certain portions of the Act to be suspended. By its terms, the memorandum does not apply to all public agencies subject to the Act. *Compare* Secretary Johnson’s March 16, 2020 Memorandum *with* KRS 61.805(2) (broadly defining “public agency” to include a wide variety of state and local boards, commissions, authorities, and other bodies).

<sup>6</sup> Under KRS 61.826(2), the notice for a special meeting must also comply with KRS 61.823.

by the “insofar as is feasible” clause, this Office has never had occasion to interpret this clause in the context of a state of emergency declared for a highly contagious virus. Under virtually all other circumstances, it should always be feasible to provide a physical location for the public to observe a video teleconference or attend an open meeting.

But these are not normal circumstances. In the words of Justice Palmore, “[w]hen all else is said and done, common sense must not be a stranger in the house of the law.” *Cantrell v. Ky. Unemployment Ins. Comm’n*, 450 S.W.2d 235, 237 (Ky. 1970). The President of the United States, the Governor, and health care professionals have strongly urged all Americans to modify and limit their social interactions and to engage in social distancing. Governors across the country have had to take the extraordinary step of ordering the closure of private businesses to prevent unnecessary social interaction. For a public agency to identify a primary *physical* location to conduct a video teleconference and invite public attendance at that location would contravene all of the guidance from the President of the United States, the Governor, and public health officials like Dr. Anthony S. Fauci, the Director of the National Institute of Allergy and Infectious Diseases.<sup>7</sup>

In this state of a proclaimed national emergency and under a similar declaration by the Governor, it is the opinion of this Office that it is not currently “feasible” for public agencies to be required “provide meeting room conditions”—in the sense of a *physical* location where observers would be in close proximity to each other—“which . . . allow effective public observation of the public meetings.” KRS 61.840. Thus, under these exceptional circumstances in which public agencies are confronting a worldwide pandemic while nevertheless needing to accomplish critical public business, KRS 61.840 excuses agencies from providing a primary *physical* location for public viewing because it is not “feasible” to do so in the face of a highly contagious virus that spreads “[b]etween people who are in close contact with one another (within about 6 feet).”<sup>8</sup>

Importantly, however, the General Assembly has declared that “the formation of public policy is public business and shall not be conducted in secret[.]” KRS 61.800.

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<sup>7</sup> See, e.g., Dr. Anthony Fauci Press Briefing on Coronavirus Outbreak at 3:30, *available at* <https://www.c-span.org/video/?470338-1/dr-fauci-press-briefing-coronavirus-outbreak> (March 17, 2020); *see also* House Oversight and Reform Committee Hearing on Coronavirus Response, Day 1 at 35:01–36:15; 11:37–1:38:09; 1:47–48:19, *available at* <https://www.c-span.org/video/?470224-1/dr-fauci-warns-congress-coronavirus-outbreak-worse> (last accessed March 17, 2020) (endorsing “aggressive containment and mitigation” measures); Centers for Disease Control and Prevention, *How to Protect Yourself*, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (last accessed March 17, 2020) (recommending the avoidance of “close contact with people who are sick” and putting “distance between yourself and other people”).

<sup>8</sup> See footnote 1.

The fact that a worldwide pandemic caused by a highly contagious infectious disease makes a physical meeting location for the public infeasible does not mean that an otherwise open meeting can be conducted in executive or closed session. For that reason, an agency for which it is not feasible to provide the specific conditions set forth in KRS 61.840 should “precisely identify” the website, television station, or other technological means by which members of the public may access “the video teleconference where all members can be seen and heard.”<sup>9</sup> KRS 61.826(2)(b). Any agency proceeding in this manner should consider and make available technological means that permit the public to observe what remains an “open meeting” under the Act unless there is a specific exception for closing the meeting or portion thereof. *See* KRS 61.810 (providing specific exceptions to the open meeting requirements that are strictly construed under KRS 61.800).

The Act reasonably anticipates that there may be circumstances in which it is not “feasible” for a public agency to “provide meeting room conditions . . . which . . . allow effective public observation of the public meetings.” KRS 61.840. Thus, the flexibility provided by the General Assembly during this time of emergency may be relied upon by a public agency. An agency for which it is not feasible to offer a primary physical location should consider memorializing in its minutes the reason it is not feasible: COVID-19 and the declared state of emergency that has resulted. To exercise such option, a public agency should comply with the notice requirements for special meetings under KRS 61.823. Furthermore, agencies are reminded that the Act provides no authority to conduct meetings *merely* by telephonic conference without the use of video “where all members can be seen and heard.” KRS 61.826(2)(b). And a public agency conducting any meeting through a video teleconference must, under the express provisions of the Act, suspend the video teleconference in the event of “[a]ny interruption in the video or audio broadcast.” KRS 61.826(4). Thus, if the “video or audio broadcast” is interrupted for any reason, the meeting must stop until the “broadcast” is restored. *Id.* Moreover, regardless of whether it is feasible to provide appropriate meeting conditions to the general public—the Act is explicit that “[a]ll agencies shall permit news media coverage, including but not limited to recording and broadcasting.” KRS 61.840.

Finally, nothing in this Opinion should be read to require public agencies to close their meetings to the general public. Such a decision is best left to the public agencies in consultation with health officials, subject to any lawful emergency orders or directives.<sup>10</sup>

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<sup>9</sup> This Office is not equipped to render an opinion, and it is not this Office’s intent, to offer any guidance on what specific technology may be effectively utilized for this purpose.

<sup>10</sup> For example, it may be possible for a public agency to meet necessary health protocols by meeting with only a limited number of citizens in the audience so that all persons may avoid contact and keep a distance of at least six feet from one another.

COVID-19 has created extraordinary circumstances. Yet neither we nor any public agency is at liberty to add to or subtract from the statute based on our perceived wisdom, thereby substituting it for the text that the General Assembly adopted on behalf of the people. Under KRS 61.840, there is a narrow exception to what are otherwise clear and mandatory requirements. We have never had reason to consider application of this exception in this way, and we assume that such a scenario is unlikely to occur again in the foreseeable future. The provision of a public meeting room to allow effective public observation is a vital element of the Act, and only truly extraordinary circumstances—in this case a state-wide public health emergency demanding social distancing to stop the spread of a highly infectious contagion—permit a finding of infeasibility under KRS 61.840.

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