

Litigation Alert: Tell Me More – Compliance with Open Records Laws Amidst the Coronavirus

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As the impact of the novel coronavirus (COVID-19) outbreak increases, local, state, and federal governments are tasked with responding to unrepresented obstacles. During this time of crisis, government power, and the likelihood for government intervention, is at its peak. Also at its peak is the public's need - and right - for information from the government. Such information particularly includes access to the government meetings deciding what extreme measures will be taken, as well as the documentation upon which those decisions are based. Open records law such as freedom of information acts, state "sunshine" laws, and open meeting acts, protect the public's right to this information by ensuring transparency and an open government.

In the United States, the federal government has declared the COVID-19 outbreak a national emergency, and at least 48 states have followed suit by declaring a state of emergency. These declarations permit the activation of emergency response plans, as well as the release of emergency funding to combat the spread of COVID-19. Absent from most, if not all, of these emergency declarations, however, is authorization for government bodies to deviate from the applicable sunshine laws.

New Challenges to Accessing Information

The societal changes caused by COVID-19 have rendered compliance with open records laws increasingly challenging. Most directly affected by the reduced compliance with such laws is the media. The spread of COVID-19 has caused government bodies to meet more frequently, with less notice, and via electronic means. These changes have caused government meetings to occur without adequate notice and access to the public. Additionally, mandatory disclosures (such as the members in attendance, matters discussed, and votes cast) have been withheld from public following the adjournment of such meetings.

Another challenge the media faces is timely access to documentation regarding COVID-19. The spread of COVID-19 is rapid. It has caused countless aspects of society to shut down in mere days. Thus, the need for prompt information regarding COVID-19 is paramount. But unless government bodies are proactively releasing documentation related to COVID-19, the media can only obtain such information via a public records request. Needless to say, in a time of crisis, this process is not fast enough, as the information will likely be irrelevant by the time it reaches the hands of the requestor.



Last, as "Shelter in Place" and "Stay at Home" orders are issued throughout the country, media personnel are left wondering whether, and how, such orders apply to them.

Government Responses to COVID-19 and Open Records Requirements

Government bodies have addressed the interplay between COVID-19 and compliance with open records laws in varied ways. For instance, at the federal level, the FBI declared it is not accepting electronic Freedom of Information Act (FOIA) requests during the outbreak. Additionally, at least one federal agency has held private meetings related to COVID-19. State governments have likewise employed a range of responses. With respect to document requests, some states have implemented mild changes, such as suspending walk-in requests or creating a separate avenue for the submission of requests related to COVID-19. While other states have taken more drastic measures by expressly declaring document requests will be addressed on a delayed basis. With respect to public meetings, one state suspended its requirement the public's attendance must be in person. And State Attorneys General across the country have issued guidance regarding the requirements of holding government meetings electronically. Locally, at least one city council passed an emergency act expressly permitting delayed responses to document requests during the pandemic.

As the COVID-19 outbreak continues to evolve, additional government responses are likely to surface. Whether any particular course of action is compliant with the relevant state and federal laws, however, is a case specific inquiry.

Lathrop GPM regularly assists media companies with the submitting requests for public records under state and federal laws. For more information, please contact Bernard J. Rhodes, Danielle N. Twait or Brooke Parsons.