Kentucky Attorney General Weighs In On Open Meetings Act Video Conferencing Requirements

By: Darren Ford on April 8, 2020 on graydon.law

The COVID-19 pandemic has presented governments throughout the world with unprecedented challenges, sparking a flurry of legislation, executive orders, and other lawmaking intended to inhibit the spread of the novel coronavirus, and remediate the damages the virus has left it in its wake. Kentucky state and local governments joined this global effort on March 6 when Governor Beshear declared a state of emergency with the first confirmed COVID-19 case in the state.

With the newfound dangers of public gatherings created by the novel coronavirus, it was inevitable that questions would arise about the obligations of Kentucky public agencies to conduct their meetings in public, as required by the Kentucky Open Meetings Act. Under the OMA, "[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," subject to certain (strictly construed) exceptions. An action taken by a public agency at a meeting that did not substantially comply with the OMA may be declared void by a Kentucky court.

The exceptions to the public meetings requirement do not include a "public health" exception or any other language that could be construed to cover the present circumstances. But the OMA does permit public agencies to conduct their meetings by video conference. Problem solved? Not so fast.

To hold a meeting by video conference, the public agency must "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*." Section 61.840 requires an agency to provide "meeting room conditions, including adequate space, seating, and acoustics, which insofar as is feasible allow effective public observation of the public meetings."

But the video conference requirements do not end there. The statute further provides that "[t]he same procedures with regard to participation, distribution of materials, and other matters shall apply in all video teleconference locations" and that "[a]ny interruption in the

video or audio broadcast of a video teleconference at any location shall result in the suspension of the video teleconference until the broadcast is restored."

Given the significantly elevated health risks of public gatherings, the "primary location" requirement prompted the Kentucky Association of Counties and the Kentucky League of Cities to seek an opinion from the Kentucky Attorney General on the following question:

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.

The Attorney General answered "no," opining that a public agency must instead "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."

In reaching this opinion, the Attorney General relied on the word "feasible" in KRS 61.840, reasoning it was not "'feasible' for public agencies to be required [to] ' 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." This language in KRS 61.840 (or word, as the case may be) demonstrated in the Attorney General's view that the OMA "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.'"

But to ensure that the opinion was not construed as a blank check to public agencies to conduct their video conference meetings in secret until the end of the state of emergency, the Attorney General grafted a new requirement onto the statute that requires a public agency to instead identify "a website, television station, or other technological means by which the public may view a meeting." The Attorney General further cautioned that "if the 'video or broadcast' is interrupted for any reason, the meeting must stop until the 'broadcast' is restored," and that "'[a]ll agencies shall permit news media coverage, including but not limited to recording and broadcasting.'"

As a matter of pure statutory interpretation, the Attorney General's opinion is not particularly persuasive. The opinion writers seemed to recognize this, prefacing their discussion with an appeal to "common sense," and observing that although "it should always be feasible to provide a physical location for the public to observe a video teleconference or

attend an open meeting," the present circumstances were not "normal."

Moreover, the Attorney General's interpretation eliminates one of the safeguards provided by the "location" requirement in KRS 61.826, which is that the public agency must provide the public with the technology to view the video conference. That is, under 61.840, any member of the public may view the video conference by physically attending the location with the viewing setup, whether or not that individual owns a television, has access to the internet, or has other technological capability.

The method of compliance prescribed by the Attorney General shifts the burden to members of the public to ensure they have the means to access the video conference meeting by whatever means the public agency selects. Thus, only those who have the technology to access the video conference will be able to observe. So for instance, what would happen if a power outage affected a third of a county's population during a public meeting being conducted by video conference? It would not seem that such an event would constitute an interruption of the broadcast requiring the meeting's suspension, so long as the "broadcast" itself was still viewable in the other two-thirds of the county. Such questions are not answered in the opinion, but are sure to be raised.

Despite these criticisms of the opinion, the Attorney General was tasked with the unenviable duty of attempting to balance the need for government transparency during a time of frequent and important lawmaking, with the need to protect the public's health in the midst of a pandemic. It's hard to fault his office for making the choice that it did. But public agencies that use the method described by the Attorney General will be opening themselves up to litigation. Although the Attorney General's opinions on OMA issues are entitled to substantial deference, they are not binding on Kentucky courts. Thus, public agencies utilizing videoconferencing in the manner addressed in the Attorney General's opinion should proceed with caution, and do their best to ensure that meetings that are to be held publically under the OMA remain accessible to all members of the public.