



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

REPORT ON ALLEGED VIOLATIONS OF THE IDAHO OPEN MEETINGS LAW

August 28, 2020

This report is in response to an open meetings complaint referred to this office by the Ada County Prosecutor. The Ada County Prosecutor received a complaint on August 13, 2020, alleging that the Central District Health Board of Health (“Board”) violated the Open Meetings Law (“OML”) on August 11, 2020, by not allowing members of the public to attend a meeting of the Board in person in the same room as the Board’s meeting facilitator. The Board provided a meeting viewing room for the public and the meeting was also streamed over the Internet in its entirety. The Ada County Prosecutor requested that this office investigate the allegation. This report constitutes this office’s findings and recommendations in this matter.

I. AUTHORITY AND SCOPE

This office investigated this matter pursuant to a request made by the Ada County Prosecutor. “[T]he prosecuting attorneys of the various counties shall have the duty to enforce this act [OML] in relation to local public agencies within their respective jurisdictions.” Idaho Code § 74-208(5). Therefore, pursuant to the statutory authority above and the request to investigate the complaint, the scope of the investigation and this report is limited to an analysis of whether the Board’s meeting procedures concerning in-person attendance by the public for its August 11 meeting violated the OML.

This office reviewed the complainant's written description of the allegation and two videos taken by the complainant on August, 11, 2020, in or near the lobby of the Central District Health office. This office also reviewed the corresponding meeting notice and agenda for the Board's August 11 meeting and discussed the complaint with the Board's legal counsel on August 18 and 19, 2020. This report summarizes the information obtained from the discussions and materials reviewed and details the factual findings concerning the allegations identified and discussed below.

Notably, in its review of the allegations, this office has continued to be mindful of the fact that the COVID-19 pandemic has created a number of challenges, and often uncertainty, with regard to appropriate open meeting procedures and the laws applicable to public meetings in Idaho.

II. FACTS

On August 11, 2020, the Board convened to conduct a regular meeting of the Board. The complainant alleges "several citizens were denied their right to attend the board meeting of Central District Health ... [and] we were not permitted to be physically present at the meeting but were instead offered a 'viewing room' in which we experienced several audio and connection issues."

Through its review of the corresponding meeting notice and agenda, and its discussions with the Board's legal counsel, this office confirmed the following:

- The Board’s August 11 meeting was conducted via video conference only, consistent with the meeting notice and meeting agenda.¹
- The Board’s August 11 meeting was facilitated by Central District Health Director Russell A. Duke from his office at Central District Health.
- Members of the public were able to observe the August 11 meeting remotely via YouTube.²
- Members of the public could also observe the August 11 meeting from a viewing room located at Central District Health where the meeting was streamed electronically on a screen (“viewing room”).
- No members of the public were allowed to observe the August 11 meeting from within the same room as Mr. Duke or any other member of the Board.
- A copy of the recording of the August 11 meeting is available in its entirety for public viewing on the Central District Health YouTube Channel as of the date of this report.

Prior to the Board’s August 11 meeting, the Governor issued a Proclamation on June 11, 2020, (“Governor’s Proclamation”) suspending certain portions of the OML, including the

¹ See Pub. Notice of Am. Regular Bd. Meeting Schedule for CY 2020, Cent. Dist. Health (adopted Aug. 4, 2020), <https://www.cdhd.idaho.gov/pdfs/boardofhealth/Meeting%20schedule/08-04-2020-bh-schedule-amended2.pdf> (“Due to COVID 19, all meetings of the Board for the remainder of 2020 will be held via video conference unless otherwise noted. All meetings are open to the public and available to view live at: <https://www.youtube.com/channel/UC4LJ1BM5Jv3zczecnykXarw/>.”). See also Agenda, Cent. Dist. Health Bd. of Health (Aug. 11, 2020), <https://www.cdhd.idaho.gov/pdfs/boardofhealth/agendas/2020/08-11-2020-boh-agenda.pdf> (“Note: Due to COVID 19, meetings of the Board for the remainder of 2020 will be held via video conference unless otherwise noted. ... View meetings live at: <https://www.youtube.com/channel/UC4LJ1BM5Jv3zczecnykXarw/>.”).

² See footnote 1.

requirement of “allowing the public to attend a meeting in person.” *See* State of Idaho, Office of the Governor, Proclamation (Jun. 11, 2020), ¶ 6.a. and 6.c.2., available at <https://coronavirus.idaho.gov/governors-actions/>. The Governor’s suspension of this requirement expired on June 26, 2020, and was not renewed by any subsequent actions of the Governor. *See id.* ¶ 6.a. and 6.f.

III. ANALYSIS

The complaint alleges the Board violated the OML on August 11, 2020, when it held a Board meeting in which the public was “not permitted to be physically present at the meeting but were instead offered a viewing room,” where the Board’s meeting was streamed electronically on a screen, rather than the opportunity to observe the Board’s meeting from within the same room as the meeting facilitator.

The OML specifically provides:

All meetings may be conducted using telecommunications devices which enable all members of a governing body participating in the meeting to communicate with each other. Such devices may include, but are not limited to, telephone or video conferencing devices and similar communications equipment. Participation by a member of the governing body through telecommunications devices shall constitute presence in person by such member at the meeting; provided however, that **at least one (1) member of the governing body, or the director of the public agency, or the chief administrative officer of the public agency shall be physically present at the location designated in the meeting notice**, as required under section 74-204, Idaho Code, **to ensure that the public may attend such meeting in person**. The communications among members of a governing body must be audible to the public attending the meeting in person and the members of the governing body.

Idaho Code § 74-203(5) (emphasis added).

As stated above, the Governor’s Proclamation suspended the requirement in Idaho Code § 74-203(5) for “allowing the public to attend a meeting in person.” *See* Governor’s


Proclamation, ¶ 6.a. and 6.c.2. However, the Governor’s suspension of the in-person meeting requirement for the public expired on June 26, 2020, well in advance of the Board’s August 11 meeting. *See id.*, ¶ 6.a. and 6.f. In addition, the Governor’s suspension of the in-person meeting requirement was not renewed by any subsequent actions of the Governor. While this office is not aware of any press releases, or similar correspondence to public agencies, publicizing the expiration of the Governor’s suspension of the in-person meeting requirement for the public, the Governor’s Proclamation nonetheless did not provide any basis for the Board to forego allowing the public to attend its August 11 meeting in person.

The Board’s use of a viewing room in lieu of allowing any members of the public to be physically present in the same room as Mr. Duke, who was facilitating the Board’s August 11 meeting, was confirmed by the Board’s legal counsel. Thus, the issue is whether the Board’s use of the viewing room satisfied the OML requirement that “the public may attend such [Board] meeting in person.” *See* Idaho Code § 74-203(5).

Despite being located within the same building as Mr. Duke, the Board’s viewing room was only an alternate form of electronic (telecommunication) participation for the public rather than an opportunity for the public to attend the meeting in person. Observing an electronically streamed version of the Board’s meeting constitutes remote, rather than in-person, participation regardless of the location of the viewing screen. Thus, the Board’s use of the viewing room for its August 11 meeting did not provide members of the public with an opportunity to attend the meeting in person, as required by Idaho Code § 74-203(5), although the Board did provide the public with several alternate means of observing the meeting remotely, including the recording and continued availability of the meeting as of the date of this report.

IV. CONCLUSION AND RECOMMENDATION

Given the challenges and uncertainty created by the COVID-19 pandemic, combined with a potential lack of clarity around the expiration or extension of the Governor's Proclamation and the Board's efforts to make observation of the meeting available remotely, within its offices, and through retaining the meeting recording online, this office concludes the totality of the circumstances do not warrant finding the Board in violation of the OML for having utilized a viewing room in lieu of in-person public attendance for its August 11 meeting.³

This office recommends that the Board, in consultation with its own attorney, conduct future board meetings in a manner that allows for some form of in-person public attendance where members of the public and one or more members of the Board or its director are in the same meeting room. All provisions of Idaho's OML should be complied with moving forward. In turn, meeting notices and agendas should also clearly identify the physical location of the meeting, and any capacity limits or other requirements for in-person attendance, in addition to any remote access procedures. In-person public attendance at Board meetings would still be subject to any applicable public health orders issued by cities, counties, public health districts, the Department of Health & Welfare, or the Governor. Under current circumstances, in-person public attendance would appear to be limited to those individuals wearing appropriate face coverings while maintaining adequate social distancing within the meeting room. *See* Order of the Dist. Bd. of Health, Cent. Dist. Health, State of Idaho (Aug. 11, 2020), available at 

³ This office also notes that the Board and its staff participated in an OML training session provided by this office on August 21, 2020, during which there was discussion and education on the issue of in-person public meeting attendance by the public.

[https://www.cdhd.idaho.gov/pdfs/cd/Coronavirus/Order/8-11-](https://www.cdhd.idaho.gov/pdfs/cd/Coronavirus/Order/8-11-20/CDH%20Quarantine%20and%20Restriction%20Order%20Ada%20County%2008-11-20.pdf)

[20/CDH%20Quarantine%20and%20Restriction%20Order%20Ada%20County%2008-11-](https://www.cdhd.idaho.gov/pdfs/cd/Coronavirus/Order/8-11-20/CDH%20Quarantine%20and%20Restriction%20Order%20Ada%20County%2008-11-20.pdf)

[20.pdf](https://www.cdhd.idaho.gov/pdfs/cd/Coronavirus/Order/8-11-20/CDH%20Quarantine%20and%20Restriction%20Order%20Ada%20County%2008-11-20.pdf)). As a practical matter, maintaining adequate social distancing during the Board meeting will reduce the standard capacity for any meeting locations utilized by the Board, which may prevent some members of the public from attending in person. The Board, in consultation with its own attorney, should establish meeting attendance procedures in anticipation of such issues.

Further, this office recommends that Central District Health staff continue its efforts to ensure that any remote board meeting access is free from any audio or visual connection issues that prevent members of the public from remotely observing Board meetings in their entirety.