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## Sunshine Laws Behind the Clouds: Limited Transparency in a Time of National Emergency

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*The COVID-19 pandemic dramatically changed the way citizens lived their lives, businesses operated, and governments functioned. With most people forced to stay home, the pandemic also disrupted how people received their news and other essential information. Public records and public meetings had to adapt to face the growing challenges in a locked-down world. While some governmental bodies were able to keep up with the threat that COVID-19 posed against transparency, others either failed to acclimate to the new normal or actively took advantage of the circumstances to limit how much the public knew not only about the crisis, but about other public matters as well.*

*During the pandemic, many state officials radically transformed public records laws and public meetings laws through executive action. Executive orders gave governors flexibility when tackling the widespread emergency, but this unconstrained power also reduced government transparency. As a*

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result, people’s valuable insights and opinions were silenced during a time they were most needed.

States had mixed reactions to COVID-19. Some welcomed the change to remote public meetings and used technology to keep the public engaged, while others took a passive approach that cut the public off from meetings. Regarding public records, several governments restricted or eliminated in-person access and made electronic copies of records a costly and impractical option. The experience since early 2020 makes clear that states should ensure that government transparency is a top priority — even during a state of emergency in which problems are indefinite and insurmountable. This goal can be achieved by enacting laws and establishing policies that balance foreseeably limited resources with the heightened demand for openness and accountability created by a public health crisis. This Article proposes a model statute that, when implemented and followed by state and local governments, would increase transparency and reduce the likelihood that officials will use another emergency event as an excuse to conceal their actions.

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“Transparency is often most important when it is least convenient.”<sup>1</sup>

#### INTRODUCTION

In January 2020, the World Health Organization (“WHO”) announced that a disease outbreak in China was caused by a novel coronavirus (“COVID-19”).<sup>2</sup> Just two months later, the WHO characterized the viral outbreak as a pandemic, sending governments and their constituents into emergency-response mode.<sup>3</sup> In the United States, federal and state governments scrambled to address the spreading disease,<sup>4</sup> as people rushed to grocery stores to stock up on

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<sup>1</sup> Joe Hernandez, *Amid the Epidemic, It Can Be Hard to Know What’s Going on Behind Closed Doors*, NPR (Apr. 19, 2020, 3:16 PM ET), <https://www.npr.org/2020/04/19/831548200/amid-the-epidemic-it-can-be-hard-to-know-whats-going-on-behind-closed-doors> [<https://perma.cc/D69G-BHEF>] (quoting Erik Arneson, the Executive Director of the Office of Open Records, a government agency in Pennsylvania).

<sup>2</sup> *Listings of WHO’s Response to COVID-19*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/news/item/29-06-2020-covidtimeline> (last updated Jan. 29, 2021) [<https://perma.cc/AZ87-3H2Y>]. The WHO became aware of a “cluster of pneumonia cases” in Wuhan, Hubei province, China on January 4, 2020, but had reported no deaths. *Id.* On January 9, 2020, the WHO reported that the outbreak was caused by a novel coronavirus — a new variation of the virus that causes Middle East Respiratory Syndrome and Severe Acute Respiratory Syndrome. *See id.*; N. Petrosillo, G. Viceconte, O. Ergonul, G. Ippolity & E. Petersen, *COVID-19, SARS and MERS: Are They Closely Related?*, 26 *CLINICAL MICROBIOLOGY & INFECTION* 720 (2020).

<sup>3</sup> *See* Donald G. McNeil Jr., *Coronavirus Has Become a Pandemic, W.H.O. Says*, N.Y. TIMES (Mar. 11, 2020, 1:17 PM EST), <https://www.nytimes.com/2020/03/11/health/coronavirus-pandemic-who.html> [<https://perma.cc/YF5K-777V>]; *Coronavirus Confirmed as Pandemic by World Health Organization*, BBC (Mar. 11, 2020), <https://www.bbc.com/news/world-51839944> [<https://perma.cc/D9Y9-BBDA>] (reporting on Italy’s decision to close “all shops except food shops and pharmacies[,]” Denmark’s move to close schools and universities and order all public sector employees home, and multiple countries’ temporary suspension of visas for foreigners).

<sup>4</sup> *See* Richard Fausset & Julie Bosman, *What Governors Say About Trump’s Response to Coronavirus*, N.Y. TIMES, <https://www.nytimes.com/2020/03/11/us/coronavirus-governors-trump.html> (last updated Mar. 12, 2020) [<https://perma.cc/3248-28G6>]

anything and everything they thought they might need to survive this unprecedented global crisis.<sup>5</sup> The early days of the pandemic were characterized by scarcities of all kinds: from face masks, toilet paper, and disinfectant, to flour, ground beef, and onions.<sup>6</sup> And as governors proclaimed states of emergency to combat the spread of disease, a different kind of shortage emerged — an information shortage.<sup>7</sup>

National emergencies present an intensified need to keep the public apprised of the dangers that such an emergency presents. In the wake of natural disasters, such as hurricanes, floods, or snowstorms, state governments can issue boil-water orders to protect residents from a contaminated water supply,<sup>8</sup> or direct neighborhoods to evacuate before an impending storm threatens to put their houses under water. These messages often stem from the emergency powers of the governor in a particular state — a type of authority available to the executive arm of a state government after a state of emergency declaration. Warning residents of impending danger has an obvious beneficial impact; however, not all executive emergency actions provide the public with the vital information necessary to survive a disaster. States' responses during the first year of the COVID-19 pandemic<sup>9</sup> presented a unique

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(recounting various state governors' praises and criticisms of the Trump Administration's efforts to contain COVID-19 and noting that some governors, known to be outspoken critics of President Trump, were nevertheless grateful to receive federal aid).

<sup>5</sup> Frederick Kunkle & Michael E. Ruane, *Coronavirus Triggers Run on Grocery Stores, with Panic-Buying, Hoarding and Some Fighting, Too*, WASH. POST (Mar. 13, 2020, 7:24 PM EDT), <https://www.washingtonpost.com/dc-md-va/2020/03/13/coronavirus-triggers-run-grocery-stores-with-panic-buying-hoarding-some-fighting-too/> [https://perma.cc/W6D9-NEGW] (describing that panicked shoppers were buying up essential products like toilet paper, dairy, and eggs, but also admitted to buying items “they might not need at all” because they were “triggered by the sight of empty shelves and dairy cases”).

<sup>6</sup> See *id.*; Andrew Jacobs, Matt Richtel & Mike Baker, ‘At War with No Ammo’: Doctors Say Shortage of Protective Gear Is Dire, N.Y. TIMES (Mar. 19, 2020, 5:25 PM EST), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> [https://perma.cc/EHL2-4Z6K] (reporting widespread shortages of medical protective equipment such as masks, surgical gowns, and protective eye gear).

<sup>7</sup> See, e.g., Allan Smith, ‘I’m Looking for the Truth’: States Face Criticism for COVID-19 Data Cover-Ups, NBC NEWS (May 25, 2020, 3:00 AM PDT), <https://www.nbcnews.com/politics/politics-news/i-m-looking-truth-states-face-criticism-covid-19-data-n1202086> [https://perma.cc/Z3EG-FQMR] (noting several states' actions that effectively suppressed COVID-19 data from reaching the public).

<sup>8</sup> See Bill Chappell, *8.7 Million People Under Boil Water Notices in Texas*, NPR (Feb. 22, 2021, 3:53 PM ET), <https://www.npr.org/sections/live-updates-winter-storms-2021/2021/02/22/970241763/monday-update-8-7-million-people-under-boil-water-notices-in-texas> [https://perma.cc/5WBL-YU5B].

<sup>9</sup> This Article addresses only the first year of the pandemic, as states began to end their states of emergency during 2021 with different consequences for public access to

challenge, in that many of the measures intended to keep the public safe — such as social distancing, closures of public buildings, and transitions to remotely held public meetings — also undermined the dissemination of critical information to those who might need it to survive and frustrated the purpose of states’ government transparency laws by making information less available.

Government transparency and public access to information are hallmarks of a democratic society. All states have “Sunshine Laws” in place — laws that guarantee public access to government meetings and records.<sup>10</sup> Many of these laws enshrine broad policy goals and ideals;<sup>11</sup> some states have gone so far as to constitutionalize access to public meetings and records.<sup>12</sup> Despite these aspirational declarations, gaining access to public records can be difficult, given the potential for a multitude of exceptions to the rule<sup>13</sup> or a public official’s potential incentives to suppress information for privacy or national security

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government meetings and records. See, e.g., Emily Opilo, *As COVID Pandemic Abates, Maryland Officials Grapple with When and How to Face the Public Again*, BALTIMORE SUN (July 7, 2021, 4:34 PM), <https://www.baltimoresun.com/politics/bs-md-ci-baltimore-meetings-covid-in-person-20210706-244dkzibnjfwzo4hec6n27smpq-story.html> [<https://perma.cc/W4LK-SZVV>] (“Even after [the state of emergency is officially lifted on August 15, 2021], Baltimore officials could continue to argue that a public health emergency makes it too dangerous to admit the general public to meetings . . . . And that case is easier to make given confusion now around masking recommendations related to variants of the coronavirus . . . .”).

<sup>10</sup> Adam Hayes, *Sunshine Laws*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sunshinelaws.asp> (last updated Feb. 24, 2021) [<https://perma.cc/Y44N-TMJR>].

<sup>11</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431.09(A) (2022) (“It is the public policy of this state that meetings of public bodies be conducted openly . . . .”); see also ALA. CODE § 36-25A-1 (2022) (using almost identical language).

<sup>12</sup> See CAL. CONST. art. I, § 3(b)(1) (“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”); FLA. CONST. art. I, § 24(a) (“Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body . . . .”).

<sup>13</sup> See, e.g., Mark R. Caramanica, Daniela B. Abratt & Linda Riedemann Norbut, *Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/florida/> (last visited Sept. 22, 2022) [<https://perma.cc/A77U-QUXZ>] (“The exact number of statutory exemptions to [Florida’s] open records law is difficult to assess and changes often, but is estimated at over 1,100.”); cf. Douglas E. Lee, *Open Records*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/freedom-of-information-overview/open-records/> (last updated Jan. 2008) [<https://perma.cc/96M8-6FWW>] (describing the exemptions to the U.S. Government’s Freedom of Information Act as “swallow[ing] the law’s disclosure requirements”).

reasons.<sup>14</sup> And after navigating the myriad exceptions that might keep records out of the public eye, public records requesters may also find the cost of disclosure to be prohibitive.<sup>15</sup>

Obtaining public records and accessing public meetings becomes even more important during an emergency, when individuals must rely on government officials for information that will keep the public safe. One might expect that the barriers to information would yield to the greater need of the people in times of crisis, but that has not proven to be the case.<sup>16</sup> Indeed, during the COVID-19 pandemic, not only were ordinary barriers to information at play, but — intentionally or otherwise — some states also erected severe impediments to access to public information by capitalizing on broad powers enshrined in emergency and health powers to limit governmental transparency and shroud their actions in secrecy.<sup>17</sup> In many states, these emergency powers allow governors to amend or even suspend laws that are in conflict with the “expeditious execution of civil preparedness functions or the protection of the public health.”<sup>18</sup> Although many governors’ actions surely were related to protecting the public health in various

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<sup>14</sup> See *Introduction to the Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-to-the-open-government-guide/> (last visited Sept. 22, 2022) [<https://perma.cc/U4H3-EPEU>] (noting that while some public officials strive to enforce open government laws, often state governments may be working to suppress information, “usually because it is feared release of the records will violate someone’s ‘privacy’ or threaten our nation’s security”).

<sup>15</sup> See Liz Farmer, *From \$37 to \$339,000: Why the Price of Public Records Requests Varies So Much*, GOVERNING (Feb. 13, 2017), <https://www.governing.com/archive/gov-cost-open-records-requests.html> [<https://perma.cc/M8G3-JMJE>] (finding that for similar records requests, different counties in Florida charged fees from as little as \$37 to more than \$44,000 and attributing these variations to differences in local laws, access to technologies, and concerns over privacy).

<sup>16</sup> See Daniel Van Schooten, *DHS Took 9 Years to Reject FOIA Request for Katrina Records*, PROJECT ON GOV’T ACCOUNTABILITY (Mar. 18, 2016), <https://www.pogo.org/analysis/2016/03/dhs-took-9-years-to-reject-foia-request-for-katrina-records/> [<https://perma.cc/T79C-CC3F>] (recalling an almost decade-long effort to disclose public records related to FEMA’s emergency response to Hurricane Katrina that ultimately ended in a rejection of disclosure due to privacy concerns).

<sup>17</sup> For example, officials in Utah refused to release the names of businesses that may have been the original site of a COVID-19 outbreak, see *infra* notes 190–93 and accompanying text, and in Florida, officials refused to release COVID-19 death counts that conflicted with counts performed by a different agency, see *infra* notes 208–13 and accompanying text.

<sup>18</sup> CONN. GEN. STAT. § 28-9(b)(1) (2022). In Connecticut, the statutory authority to amend or suspend the laws is clear, but there is some suggestion that other governors’ suspension of laws stand on questionable authority. See Adam A. Marshall & Gunita Singh, *Access to Public Records and the Role of the News Media in Providing Information About COVID-19*, 11 J. NAT’L SEC. L. & POL’Y 199, 203-04 (2020).

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ways, the net effect of these actions also drastically crippled government transparency.<sup>19</sup>

The American people need current, accurate, and reliable information concerning government actions that directly affect their health, safety, and livelihoods; nevertheless, several states took the opposite approach during the pandemic, allowing government openness to be severely curtailed. Governors' broad powers to enact, suspend, and amend state laws pursuant to a declared state of emergency must be limited in scope to ensure that the public's access to government meetings and records is not unduly restrained. Procedures governing the format of public meetings and the furnishing of public records must maintain the public's access to essential information, particularly materials and deliberations regarding the emergency that presently affects the public's well-being.

Part I of this Article discusses gubernatorial powers during states of emergency. It explains how emergencies often expand the scope of a governor's power, while also considering the constitutional limits on that power. Part II considers the baseline requirements for open meetings under state transparency laws, how states have invoked emergency powers to alter the requirements, and the disparate impact of unequal access when public meetings become remote. Part III examines state public records laws, including a discussion of what records states are typically required to disclose and through what methods. This Part then analyzes states' alterations to public records laws to allow for flexibility during state or national emergencies, and the potential harm that could arise from such alterations. Part IV recommends a model statute for states to adopt to ensure government transparency in times of crisis.

#### I. OVERVIEW OF GUBERNATORIAL POWERS IN TIMES OF EMERGENCY

States have the authority to define emergencies as they see fit and to grant their governors broad powers for the duration of the emergency. States vary in how they define emergencies, but many modern emergency powers, at least in part, stem from the Model State Emergency Health Powers Act ("MSEHPA").<sup>20</sup> In theory, these broad

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<sup>19</sup> See Marshall & Singh, *supra* note 18, at 204 (discussing the Hawaii Governor's decision to suspend the entire Uniform Information Practices Act — that state's open records law — without explanation).

<sup>20</sup> MODEL STATE EMERGENCY HEALTH POWERS ACT 1 (CTRS. FOR DISEASE CONTROL & PREVENTION, Draft 2001), <https://www.aapsonline.org/legis/msehpa2.pdf> [<https://perma.cc/2K7L-QMBP>].

powers allow for flexibility in the emergency response; in practice during the COVID-19 pandemic, however, they allowed states to greatly diminish public access to information.<sup>21</sup>

### A. Defining “Emergency”

When a state declares an emergency, whether by the governor or the legislature, it triggers certain powers that allow for flexible and effective responses.<sup>22</sup> States define emergencies in a multitude of ways.<sup>23</sup> Broad definitions of emergencies may lend themselves to the discretion of the governor or legislature in declaring that a particular situation fits the parameters of the definition.<sup>24</sup> Minnesota, for example, defines a

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<sup>21</sup> The MSEHPA gained traction as a way to bolster state emergency responses in the wake of the September 11 terrorist attacks, the anthrax attacks shortly thereafter, and the spread of SARS. See Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 379-80 (2003). Proponents of the MSEHPA argued that broad, unchecked authority was necessary to protect the public adequately in times of crisis, while critics pointed out its lack of checks and balances on governor authority and its scant privacy and civil liberty protections. See *id.* at 380-81; see also *Q&A on the Model State Emergency Health Powers Act*, ACLU, <https://www.aclu.org/other/model-state-emergency-health-powers-act> (last visited Sept. 22, 2022) [<https://perma.cc/D2VQ-MAZ6>] (arguing that the MSEHPA needlessly extends governor powers without needed oversight).

<sup>22</sup> See John Haughey, *The Rise of State Governors and the Executive Powers They've Started to Wield*, FISCALNOTE (June 22, 2020), <https://fiscalnote.com/blog/the-rise-of-state-governors-and-the-extraordinary-powers-theyre-starting-to-wield> [<https://perma.cc/24LP-NNDP>] (stating that in forty-one states “the governor can declare an emergency without consent of the legislature . . . [with a]t least seven states requir[ing] the Legislature [to] approve any extension of emergency declarations and two — Georgia and Oklahoma — requir[ing] the legislature [to] approve any emergency declaration”).

<sup>23</sup> See, e.g., IOWA CODE § 135.140 (2022) (“‘Public health disaster’ means a state of disaster emergency . . . which specifically involves an imminent threat of an illness or health condition that meets any of the following conditions of paragraphs . . . .”); N.D. CENT. CODE ANN. § 37-17.1-0.4 (West 2021) (defining “disaster” as “the occurrence of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause”).

<sup>24</sup> See generally Emma G. Fitzsimmons, *Cuomo Declares a State of Emergency for New York City Subways*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/nyregion/cuomo-declares-a-state-of-emergency-for-the-subway.html> [<https://perma.cc/2ASY-36KD>] (describing how, in response to New York commuters' continued criticism of the subway's deteriorating conditions, Governor Cuomo declared a state of emergency); Morgan Lee, *New Mexico Declares Security Emergency Ahead of Inauguration*, U.S. NEWS (Jan. 14, 2021), <https://www.usnews.com/news/best-states/new-mexico/articles/2021-01-14/new-mexico-declares-security-emergency-ahead-of-inauguration> [permalink unavailable] (highlighting the state of emergency declared by the New Mexico Governor in advance of then President-elect Joseph Biden's inauguration).



disaster that provokes a state of emergency as “a situation that creates an actual or imminent serious threat to the health and safety of persons, or a situation that has resulted in or is likely to result in catastrophic loss to property or the environment” where “traditional” response efforts are insufficient.<sup>25</sup> In contrast, although its provisions encapsulate a broad range of circumstances, Texas specifies that only the following instances constitute “catastrophes” for purposes of its Public Information Act: “(A) fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm; (B) power failure, transportation failure, or interruption of communication facilities; (C) epidemic; or (D) riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.”<sup>26</sup> Because definitions of emergencies vary by state, and local needs may differ, there are some situations that one state would categorize as a state of emergency, but another state would not.<sup>27</sup> Nevertheless, all fifty states declared some form of emergency related to COVID-19 by March 13, 2020, and the federal government had approved disaster declarations in all fifty states by April 11, 2020.<sup>28</sup>

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<sup>25</sup> MINN. DEP’T OF HEALTH, MINNESOTA’S STATUTES AND RULES ON EMERGENCY PREPAREDNESS, DISEASE OUTBREAKS, AND VOLUNTEER PROTECTIONS 1 (2019), <https://www.health.state.mn.us/communities/ep/legal/epstatutes.pdf> [<https://perma.cc/T9ZB-P4RM>].

<sup>26</sup> TEX. GOV’T CODE ANN. § 552.2325(a)(1) (2021).

<sup>27</sup> See, e.g., Erin Mershon & Andrew Joseph, *These States Declared an Emergency over the Opioid Crisis. Here’s What Happened*, PBS (Aug. 10, 2017, 10:02 AM EDT), <https://www.pbs.org/newshour/health/states-declared-emergency-opioid-crisis-heres-happened> [<https://perma.cc/GC8V-NJPK>] (discussing strategies some states took to address opioid addiction prior to the Trump Administration’s declaration of a health emergency to fight the opioid epidemic). State officials may not see the need to declare a state of emergency if their constituents are not yet at risk. See Lainie Rutkow, *An Analysis of State Public Health Emergency Declarations*, 104 AM. J. PUB. HEALTH 1601, 1602-03 (2014) (finding that only seven states declared a public health emergency after the Obama Administration declared a public health emergency in response to H1N1 (“swine flu”) outbreaks); see also *Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic*, WHITE HOUSE (Oct. 24, 2009), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0> [<https://perma.cc/L5YT-F3GW>]. But see Justine Coleman, *All 50 States Under Disaster Declaration for First Time in US History*, HILL (Apr. 12, 2020, 4:31 PM ET), <https://thehill.com/policy/healthcare/public-global-health/492433-all-50-states-under-disaster-declaration-for-first> [<https://perma.cc/NY7P-NBAB>] (stating that after Wyoming’s state of emergency declaration for coronavirus was authorized, all fifty states were under a disaster declaration for the first time in United States history).

<sup>28</sup> See Emma Newburger, *Every US State Is Now Under a Major Disaster Declaration amid Coronavirus Pandemic*, CNBC, <https://www.cnbc.com/2020/04/11/every-state-in-the-us-is-now-under-a-major-disaster-declaration-amid-coronavirus-pandemic.html> (last updated Apr. 11, 2020, 4:00 PM EDT) [<https://perma.cc/P65C-5SKA>]; *Coronavirus*

Once a state of emergency is declared, emergency and public health laws come into force, delegating a broad range of authority so that the state can respond to the emergency as the public officials see fit.

### B. State Legislative Power During Emergencies

State governors are typically the ones with the broadest grant of authority pursuant to a declared state of emergency, but legislatures have their own independent power to make, amend, or suspend laws in the face of an emergency.<sup>29</sup> Legislatures restrict the length of time that emergency legislation will be effective, after which point it will expire unless renewed.<sup>30</sup> This self-imposed deadline reflects the legislature's understanding that emergency legislation is temporary, and it must reconvene to assess the law's effectiveness in responding to a continued state of emergency. Legislatures also serve a crucial role "in making sure [governors' emergency powers] are not abused and that they do not undermine the separation of powers vital to our democratic system of government."<sup>31</sup>

Most states allow their governors broad authority over laws that could affect the government's response to emergencies.<sup>32</sup> Governors modify a

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*State Actions*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/coronavirus-state-actions-all/> (last visited Sept. 22, 2022) [<https://perma.cc/976S-SMJJK>] (listing state actions chronologically through July 31, 2020).

<sup>29</sup> See, e.g., ARK. CODE ANN. § 25-19-106 (2022) (passing temporary legislation that allows public meetings by teleconference until the governor's state of emergency ends or until the end of 2020); COLO. REV. STAT. § 22-32-108(7)(VI) (2022) (passing a bill that allows school board members to attend meetings electronically and also requires that the public have access); DEL. CODE ANN. tit. 29, § 10006A (2022) (enabling teleconferencing meetings temporarily during a state of emergency and requiring adherence to other open meeting statutes).

<sup>30</sup> See, e.g., Coronavirus Support Emergency Amendment Act of 2020, D.C. ACT 23-405, § 808 (effective through Oct. 8, 2020) (amending both the Open Meetings Act and the Open Records Act); COVID-19 Response Emergency Amendment Act of 2020, D.C. ACT 23-247, § 503 (repealed 2020) (indicating that days of closure due to COVID-19 do not count as business days for purposes of public records requests).

<sup>31</sup> *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES (June 14, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> [<https://perma.cc/2V9C-CQ2M>]. Governors' powers are necessarily limited because "[they] cannot promulgate emergency rules that grant themselves authority beyond the statutory limits . . ." *Id.*

<sup>32</sup> Gregory Sunshine, Kelly Thompson, Akshara Narayan Menon, Nicholas Anderson, Matthew Penn & Lisa M. Koonin, *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 156, 158-59 (2019) (researching and categorizing the breadth of state powers during declared emergencies, explaining that "42 states explicitly permit the governor to change statutes or regulations during an emergency[.]" and discussing the potential

significant number of state laws through the promulgation of executive orders.<sup>33</sup> They derive this power from emergency powers statutes, many of which adopt language from the MSEHPA.<sup>34</sup> For example, Indiana's statute states that governors may "[s]uspend the provisions of any regulatory statute . . . if strict compliance with any of [the] provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency."<sup>35</sup> Iowa law provides almost identical language.<sup>36</sup> Furthermore, governors may use their broad authority to delegate significant power to various state agencies.<sup>37</sup>

Governors' broad authority under emergency powers acts is intended to activate emergency resources and facilitate more efficient and autonomous operations.<sup>38</sup> Many statutory and rule suspensions have a clear nexus with protecting the health and well-being of the state's citizens, but some suspensions seem arbitrary and attenuated. The broad emergency response and lack of transparency had consequences on mundane and day-to-day issues. In Arkansas, for example, the governor allowed "state agencies to identify provisions of any regulatory statute, agency order or rule" that would hinder their ability to assist

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benefits of this breadth in that "[g]ubernatorial emergency powers to change both statutes and regulations have also proved useful in infectious disease emergencies and have served as a vital force-multiplier by expanding healthcare providers' scopes of practice to distribute medical countermeasures").

<sup>33</sup> Haughey, *supra* note 22 (noting that state governors issued 1,968 executive orders in the ten weeks between March and June 2020).

<sup>34</sup> MODEL STATE EMERGENCY HEALTH POWERS ACT § 403(a) (CTRS. FOR DISEASE CONTROL & PREVENTION, Draft 2001), <https://www.aapsonline.org/legis/msehpa2.pdf> [<https://perma.cc/2K7L-QMBP>] (providing language that many states have adopted into their own code).

<sup>35</sup> IND. CODE § 10-14-3-12(d)(1) (2022).

<sup>36</sup> See IOWA CODE § 29C.6(6) (2022) (providing that the governor may "[s]uspend the provisions of any regulatory statute . . . if strict compliance with the provisions of any statute, order or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency"). Not all states that adopted the Model Act used the same language, however. Compare *id.*, with N.J. STAT. ANN. § App.A:9-34 (West 2022) (granting broad powers to the governor to "utilize and employ all the available resources of the State Government and of each and every political subdivision of this State").

<sup>37</sup> See, e.g., Ohio Exec. Order No. 2020-01D (Mar. 9, 2020), <https://governor.ohio.gov/media/executive-orders/executive-order-2020-01-d> [<https://perma.cc/ATU7-UBTN>] ("State agencies shall develop and implement procedures, including suspending or adopting temporary rules within an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public health threat.").

<sup>38</sup> See generally MODEL STATE EMERGENCY HEALTH POWERS ACT § 102 (a), (d)-(e) (highlighting that State governments "must [be able] to respond, rapidly and effectively, to potential or actual public health emergencies[,]") which may require "the exercise of extraordinary government powers and functions").

the public during the COVID-19 emergency and to “post any identified statutes, orders, and rules to their websites.”<sup>39</sup> By posting, the agency suspended the selected statutes, orders, and rules.<sup>40</sup> Pursuant to this framework, the Department of Elementary and Secondary Education suspended provisions for physical education requirements.<sup>41</sup> But the Department also used the same language to suspend hearings for ethical violations by teachers.<sup>42</sup> Idaho waived telehealth requirements to enable doctors to meet with patients remotely, an action that had a clear connection with the protection of the public health.<sup>43</sup> In the same Proclamation, Governor Brad Little suspended the Idaho Potato Commission’s rules requiring “No. 2 Idaho Potato” markings for the cardboard boxes in which potatoes are packaged.<sup>44</sup> There does not appear to be a clear link between the COVID-19 pandemic and the waiver of the use of Idaho potato boxes. The impact of suspending potato-packaging regulations may seem innocuous, but applying these broad powers — particularly to laws regulating government transparency — can have widespread and serious consequences.<sup>45</sup>

Broad delegations of emergency power to governors are not without constraints, however. In limited circumstances, courts have held that governors abused their broad emergency powers in response to the COVID-19 crisis. Even though California Governor Gavin Newsom had been attempting to promote voter turnout while avoiding the risk of in-person voting by enabling mail-in ballots, the California Superior Court held that he abused his authority by issuing an Executive Order mandating that all registered voters receive mail-in-ballots.<sup>46</sup> Eventually

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<sup>39</sup> Ark. Exec. Order No. 20-06 (Mar. 17, 2020), [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-06\\_.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-06_.pdf) [<https://perma.cc/L68N-B6PG>].

<sup>40</sup> *Id.*

<sup>41</sup> DIV. OF ELEMENTARY & SECONDARY EDUC., DESE SUSPENDED PROVISIONS 3 (Apr. 15, 2020), [https://web.archive.org/web/20201220211903/http://dese.ade.arkansas.gov/public/userfiles/Communications/COVID-19%20Information/DESE\\_Suspended\\_Provisions\\_04152020.pdf](https://web.archive.org/web/20201220211903/http://dese.ade.arkansas.gov/public/userfiles/Communications/COVID-19%20Information/DESE_Suspended_Provisions_04152020.pdf) [<https://perma.cc/4MDN-NPN8>] (suspending educational provisions requiring physical education during the outbreak of the COVID-19 pandemic).

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> Idaho Proclamation (Apr. 2, 2020), [https://www.eatrightidaho.org/app/uploads/2020/04/pdf/p/proclamation\\_additional-rule-waivers\\_040220.pdf](https://www.eatrightidaho.org/app/uploads/2020/04/pdf/p/proclamation_additional-rule-waivers_040220.pdf) [<https://perma.cc/WU5G-5PVN>].

<sup>44</sup> *Id.*; see also IDAHO ADMIN. CODE r. 29.01.01.102.10.b (2022) (establishing branding rules for boxes in which number 2 grade Idaho potatoes can be packed).

<sup>45</sup> See *infra* notes 95–101 and accompanying text (discussing the Hawaii Governor’s extensive suspension of Hawaii’s sunshine laws in response to the COVID-19 pandemic).

<sup>46</sup> See Order Granting Declaratory Relief and Temporary Restraining Order and Order to Show Cause, *Gallagher v. Newsom*, No. CVCS20-0912 (Cal. Super. Ct. June

the trial court found the Executive Order unconstitutional under the California Constitution, holding that Governor Newsom exceeded his authority by amending the statute, as opposed to merely suspending it.<sup>47</sup> Vital to the court's decision was the idea that, were the California Legislature unhappy with the Governor's statutory amendment, it would be forced to terminate the state of emergency, despite that California — like the rest of the country — was on the cusp of experiencing an exponential increase in new COVID-19 cases.<sup>48</sup> And in Michigan, Governor Gretchen Whitmer attempted to renew a previous declaration of emergency, but the Michigan Supreme Court held that the Emergency Powers of the Governor Act violated the Michigan Constitution, so any gubernatorial powers derived from that Act were impermissible.<sup>49</sup> In premising their decision on governors' illegal use of legislative powers, several courts recognized that governors could not contravene state constitutions and the essential tenet of separation of powers.<sup>50</sup> These examples illustrate both the importance of maintaining

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12, 2020) (finding that Governor Newsom had abused his power because Executive Order N-67-20 was an “impermissible use of legislative powers in violation of the California Constitution and the laws of the State of California”), *vacated* 265 Cal. Rptr. 3d 582 (Ct. App. 2020) (rescinding the injunction for failure to show harm).

<sup>47</sup> *Gallagher v. Newsom*, No. CVCS20-0912, 2020 WL 6507259, at \*4 (Cal. Super. Ct. Nov. 2, 2020).

<sup>48</sup> *See id.*; *Tracking Coronavirus in California: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html> (last visited Sept. 22, 2022) [<https://perma.cc/U7ES-YZUZ>] (illustrating that on November 2 the number of new cases in California was 5,258, which increased nearly four-fold to 18,174 new cases by December 2).

<sup>49</sup> *In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 31 (Mich. 2020) (holding that the Governor did not have the authority to declare a state of emergency under the Emergency Management Act of 1976 and “that the [Emergency Powers of the Governor Act of 1945] is in violation of the Constitution of [Michigan] because it purports to delegate to the executive branch the legislative powers of state government — including its plenary police powers — and to allow the exercise of such powers indefinitely”); Steven H. Hillfinger, Robert Nederhood, Ann Marie Uetz, Nicholas J. Ellis, Christopher A. DeGennaro & Kenneth A. Johnson, *Michigan Supreme Court Sets Limits on Emergency Powers of Governor: Impacts on Residents and Businesses*, FOLEY & LARDNER LLP (Oct. 4, 2020), <https://www.foley.com/en/insights/publications/2020/10/michigan-supreme-court-limits-powers-governor> [<https://perma.cc/9CGW-T8VM>] (explaining the impact of the order by the Michigan Supreme Court that limits the Michigan Governor's “authority to issue and renew executive orders relating to the COVID-19 pandemic”).

<sup>50</sup> *See* Luke Wake, *The Limits of a Governor's Emergency Powers*, PAC. LEGAL FOUND. (July 14, 2020), <https://pacificlegal.org/the-limits-of-a-governors-emergency-powers/> [<https://perma.cc/34A8-QGH8>] (“Exploiting emergency powers to micro-manage the economy and our private lives is deeply troubling, because it amounts to an assertion of unchecked authority . . . . Even in the midst of a pandemic emergency . . . governors

a legislative check on emergency powers and the potential peril that may result if state governments rely too heavily on an emergency powers law that may be unconstitutional. Nevertheless, challenges to governors' powers did not focus on their alterations to public records and meetings laws<sup>51</sup> because most emergency powers are broad enough to allow suspension of any law that could "hinder[] or delay necessary action in coping with the emergency."<sup>52</sup> The COVID-19 pandemic undoubtedly justified the temporary suspension of some sunshine laws to prevent the spread of the disease, such as the requirements that open meetings be held in person, but courts may be powerless to undo such suspensions, even when they severely limit government transparency.

In the face of "conventional" natural disasters, such as storms and flooding, state governments have frequently declared emergencies that are limited in time and geography, thus naturally restricting governors' powers to the period necessary to respond to the immediate effects of the present emergency.<sup>53</sup> Rarely do state emergencies involve long-term

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should respect the constitutional limits on their powers, and work with legislators to craft and enact laws that serve the people.").

<sup>51</sup> *But see* Kirk Allen & John Kraft, *Illinois Governor's Executive Order Attempts to Invoke Power Not Given Re: Open Meetings*, ILL. LEAKS (Mar. 16, 2020), <https://edgarcountywatchdogs.com/2020/03/illinois-governors-executive-order-attempts-to-invoke-power-not-given-re-open-meetings/> [<https://perma.cc/7NTQ-8QMV>] (arguing that the Illinois Governor's executive order suspending parts of the Illinois Open Meetings Act for public bodies is beyond the scope of the Governor's emergency powers, which are limited to statutes and regulations pertaining to state business and state agencies and thus does not include local government meetings).

<sup>52</sup> IND. CODE § 10-14-3-12(d)(1) (2022).

<sup>53</sup> *See, e.g.*, Fla. Exec. Order No. 92-220-E (Aug. 23, 1992), <https://portal.floridadisaster.org/SERT/Events/Documents/EO%2092-220.pdf> [<https://perma.cc/LM4M-Y22B>] (declaring a state of emergency lasting sixty days, in anticipation of Hurricane Andrew). The emergency declaration was extended twice, officially lasting 180 days. *See* Fla. Exec. Order No. 92-299 (Oct. 22, 1992), <https://portal.floridadisaster.org/SERT/Events/Documents/EO%2092-299.pdf> [<https://perma.cc/6RH5-E6CB>]; Fla. Exec. Order No. 92-354 (Dec. 21, 1992), <https://portal.floridadisaster.org/SERT/Events/Documents/EO%2092-354.pdf> [<https://perma.cc/DG8K-TR3B>] (extending the emergency declaration to February 19, 1993); *see also* La. Exec. Order No. 48 KBB 2005 (Aug. 26, 2005), <https://justfacts.votesmart.org/public-statement/120527/proclamation-no-48-kbb-2005-state-of-emergency-hurricane-katrina> [<https://perma.cc/466A-BMF3>] (declaring a state of emergency set to terminate on September 25, 2005, under the power given to the governor through the Homeland Security and Emergency Assistance and Disaster Act, R.S. 29:721, in anticipation of Hurricane Katrina); La. Exec. Order No. 60 KBB 2005 (Oct. 31, 2005) (extending the state of emergency until December 31, 2005); *see also* Fitzsimmons, *supra* note 24 (describing a New York state of emergency in response to deteriorating subway conditions, highlighting the broad scope of emergency declarations); N.Y. Exec. Order No. 168 (June 29, 2017), <https://www.governor.ny.gov/sites/default/files/atoms/files/EO%20%23168.pdf> [<https://perma.cc/4ADM-CTY4>].

modifications of government transparency laws, because the nature of the emergency does not require such a response.<sup>54</sup> But the opposite was true for the COVID-19 pandemic; its pervasive impact covered the entire country,<sup>55</sup> and with the federal and state governments scrambling to decode the virus itself, the duration of the emergency in the United States was indefinite at its onset and remained that way, even after a year had elapsed, at least in the United States.<sup>56</sup> And although statutes may expressly limit executive emergency powers, many of those laws simply allow governors to renew emergency declarations for as long as necessary.<sup>57</sup> On the one hand, the government — particularly state

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<sup>54</sup> See, e.g., Molly Mulshine, *City Officials Recap Relief Efforts at Town Meeting*, ASBURY PARK SUN (Nov. 15, 2012), <http://asburyparksun.com/city-officials- Recap-relief-efforts-at-town-meeting/> [<https://perma.cc/GU94-52K7>] (reporting that during Hurricane Sandy in 2012, public meetings in Asbury Park, New Jersey were cancelled for two weeks, but city officials still held an information session at City Hall).

<sup>55</sup> See Coleman, *supra* note 27 (explaining that all fifty states were under a disaster declaration during the COVID-19 pandemic).

<sup>56</sup> See Sayuri Gavaskar, *COVID-19 Is Here. Now How Long Will It Last?*, YALE SCH. OF MED. (Mar. 27, 2020), <https://medicine.yale.edu/news-article/23446/> [<https://perma.cc/85KS-A89V>] (quoting Virginia Pitzer, an infectious disease specialist, as predicting the COVID-19 pandemic would likely last “months rather than weeks” and suggesting that outbreaks of the disease would come in waves). *But see Coronavirus: Trump Hopes US Will Shake Off Pandemic by Easter*, BBC (Mar. 25, 2020), <https://www.bbc.com/news/world-us-canada-52029546> [<https://perma.cc/W54V-P8Q6>] (quoting President Trump claiming that “[w]e’re going to be opening relatively soon” and that he was “beginning ‘to see the light at the end of the tunnel’”). More than a year later, the national emergency persisted, despite former President Trump’s lofty hopes. See *A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, WHITE HOUSE (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/> [<https://perma.cc/L6T2-2FCG>] (declaring that the national emergency will continue “beyond March 1, 2021”). Other countries, however, empowered by diminishing cases, hospital admissions, and deaths related to COVID-19, began lifting emergency declarations around the one-year mark. See, e.g., Chang-Ran Kim & Tetsushi Kajimoto, *Japan to Lift Tokyo Area Emergency on Sunday but Warns Against Complacency*, REUTERS (Mar. 17, 2021, 5:33 PM), <https://www.reuters.com/article/us-health-coronavirus-japan/japan-to-lift-tokyo-area-emergency-on-sunday-but-warns-against-complacency-idUSKBN2BA01L> [<https://perma.cc/QY9V-39MV>] (reporting Japan’s intention to lift the state of emergency affecting Tokyo, but that some businesses would nevertheless be asked to restrict operating hours).

<sup>57</sup> See, e.g., ARK. CODE ANN. § 12-75-107(b)(2)(B) (2022) (“A statewide state of disaster emergency . . . shall not continue for longer than sixty (60) days unless renewed by the Governor . . . .”); 20 ILL. COMP. STAT. ANN. 3305/7 (2022) (“[T]he Governor shall have and may exercise for a period not to exceed 30 days the . . . emergency powers . . . .”); MD. CODE ANN. PUB. SAFETY § 14-3A-02(c)(2) (2022) (“Unless renewed, the [Governor’s emergency] proclamation expires 30 days after issuance.”); see also *Legislative Oversight of Emergency Executive Powers*, *supra* note 31 (characterizing state

governors — should have access to the tools and resources necessary to respond to an ongoing crisis; on the other hand, these measures pose a significant risk of reduced accountability and oversight due to the limitations placed on government transparency through suspension of sunshine laws.

Many states modify public records and open meetings requirements following nationwide emergencies. After the September 11, 2001 terrorist attack, this practice became increasingly prevalent as states and federal agencies limited transparency in an attempt to protect the nation from future attacks.<sup>58</sup> For example, several states revised their statutes exempting disclosure of information concerning critical infrastructure to include terms such as “terrorism” or “counterterrorism.”<sup>59</sup>

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emergency statutes as granting “authority normally reserved for legislatures,” but only “temporarily and only as needed to respond to the emergency situation”). *But cf.* Steven Aftergood, *The Longest “Emergency”: 40 Years and Counting*, FED’N OF AM. SCIENTISTS (Mar. 22, 2019), <https://fas.org/blogs/secrecy/2019/03/longest-emergency-crs/> [<https://perma.cc/R9QQ-NVTZ>] (explaining a national state of emergency that has been in force since the Carter administration and allows the president to regulate certain economic activities); CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE*, at ii (2020) (explaining “the first state of emergency declared under the NEA [National Emergencies Act] and IEEPA [International Emergency Economic Powers Act], which was declared in response to the taking of U.S. embassy staff as hostages by Iran in 1979, may soon enter its fifth decade”).

<sup>58</sup> After September 11, 2001, nearly twenty states passed new open meetings exceptions that allow for closed meetings when a nonpublic or confidential record would be discussed. Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884, 912-14 (2013). In addition, several states passed exceptions to open records laws for records related to public safety threats, which could be started by terrorism or another kind of disaster. *Id.* at 913-14 (“Thus, many of these laws now allow closed meetings in virtually any imaginable disaster scenario because many security plans and emergency response measures have been deemed nonpublic records.”); *see also* Jenna Bourne, *How COVID-19 Is Clouding Government Transparency*, 10 TAMPA BAY, <https://www.wtsp.com/article/news/investigations/10-investigates/how-covid-19-is-clouding-government-transparency/67-45737a12-9b68-4d77-bb57-cd6d2ece314f> (last updated May 22, 2020, 9:49 PM EDT) [<https://perma.cc/A9MM-5QB7>] (reporting the Florida Department of Education’s refusal to disclose its pandemic plan for schools because the information falls under a “security and fire safety” exemption under Florida law).

<sup>59</sup> Emily Dowd, *Open Government Laws and Critical Energy Infrastructure*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 30, 2018), <https://www.ncsl.org/research/energy/open-government-laws-and-critical-energy-infrastructure.aspx> [<https://perma.cc/USC9-ZBBH>] (noting that the states included Indiana, Kentucky, Louisiana, North Carolina, Pennsylvania, and Washington); *see, e.g.*, IND. CODE § 5-14-3-4 (2022) (indicating which public records cannot be disclosed, including “[a] record or a part of a record,



Underpinning these exemptions is the “post-September 11 fear that terrorists would exploit the public availability of such information to hone in on identified weaknesses in public security and public infrastructure or otherwise identify potential targets.”<sup>60</sup>

Emergency and public health acts provide state governors with broad discretion to amend laws, and the requirements for public records and meetings are no exception. Allowing flexibility and broad gubernatorial control are often necessary during times of emergency. However, unrestricted power resulted in less transparency and arbitrary changes. The problem of unfettered gubernatorial power has shown itself more clearly in the long-lasting COVID-19 pandemic, especially regarding access to public meetings and records.

## II. PUBLIC MEETINGS

This Part analyzes the COVID-19 pandemic’s impact on government transparency — specifically in public access to government meetings. First, it considers how states changed their public meetings laws in past emergencies. Next, this Part identifies several reasonable measures states took to amend laws while still ensuring public access. This Part then examines the unreasonable measures taken by states. Finally, it looks at the policy implications that resulted from these changes.

Open meetings laws require governing bodies to allow the public to view and participate in their meetings.<sup>61</sup> The laws act as a system of checks and balances to prevent public officials from abusing power.<sup>62</sup> Public meetings allow people to comment in real time on government decisions that affect their lives and to hold the politicians in attendance accountable.

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the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack”).

<sup>60</sup> Sun & Jones, *supra* note 58, at 912.

<sup>61</sup> The country’s first open meetings law was established in Utah in 1898. Michael K. McLendon & James C. Hearn, *Why “Sunshine” Laws Matter: Emerging Issues for University Governance, Leadership, and Policy*, 15 GOVERNING URB. & METRO. UNIVS. 67, 67 n.3 (2004). The Utah Supreme Court’s interpretation of the statute is as relevant today as it was more than a hundred years ago. *Acord v. Booth*, 93 P. 734, 735-36 (Utah 1908) (finding that the council meeting “shall sit with open doors” so that “the public might know what the councilmen thought about the matters in case they expressed an opinion upon them. Moreover, the public have the right to know just what public business is being considered, and by whom and to what extent it is discussed”).

<sup>62</sup> Patience A. Crowder, “Ain’t No Sunshine”: *Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 625 (2007).

During previous states of emergency, any alteration or flexibility afforded to public meetings laws was relatively short, to comport with the length of the emergency. For example, following New Jersey's State of Emergency declaration in response to Hurricane Sandy in 2012, cities along the east coast cancelled public meetings to direct resources toward recovery, but these cancellations were temporary.<sup>63</sup> Furthermore, New Jersey never suspended its open government laws.<sup>64</sup> In contrast, within the first year of the COVID-19 pandemic, the state of emergency continued with no clear end in sight; so too did the restrictions on public access to government meetings.<sup>65</sup>

#### A. *Pandemic-Induced Changes to Public Meetings Requirements*

In times of non-emergency, interested members of the public are able to assemble in a room for an open meeting, providing them with valuable insight into the current operations of governing bodies and the opportunity to have their comments heard. Once COVID-19 emerged in the United States, however, governing bodies had to adapt their procedures for hosting public meetings, as it became impossible or prohibitively dangerous for the public to congregate in a confined meeting space.<sup>66</sup> Most, if not all, public meetings transitioned to a virtual format for the duration of the pandemic.<sup>67</sup> Government

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<sup>63</sup> See, e.g., Mulshine, *supra* note 54 (“In the wake of Hurricane Sandy, public meetings in Asbury Park were cancelled for two weeks while the region got back on its feet.”).

<sup>64</sup> Colin Lecher, *States Are Suspending Public Records Access Due to COVID-19*, THE MARKUP (May 1, 2020, 10:00 ET), <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19> [https://perma.cc/LFF7-4QMM].

<sup>65</sup> See *id.* (describing the unique nature of the COVID-19 pandemic where states that did not adjust public meetings requirements during previous emergencies are now suspending some requirements indefinitely and comparing it to past emergencies in saying “[t]here’s little precedent for such sweeping changes, even in times of crisis”).

<sup>66</sup> *Considerations for Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://web.archive.org/web/20210109225045/https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last updated Jan. 8, 2021) [https://perma.cc/2TRH-YT3U] (describing how the rate of infection and spread of COVID-19 increases in indoor spaces with little social distancing and no mask use).

<sup>67</sup> See generally *COVID-19: State Actions Related to Legislative Operations*, NAT'L CONF. OF STATE LEGISLATURES (June 21, 2022), <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx> [https://perma.cc/QY44-RU35] (tracking state legislatures' changes to operating procedures, including transitions to remote public meetings, throughout the COVID-19 pandemic); Jed Pressgrove, *Pandemic Forces Local Governments' Hands into Era of*

transparency is essential during times of emergency;<sup>68</sup> the transition to remote meetings allows some semblance of public participation that might otherwise have been lost. Some governors did not have to take any actions to enable the continuation of public meetings online, as their state's laws already allowed for virtual or other types of meetings.<sup>69</sup> But other states had to modify significantly how their public transparency laws functioned.<sup>70</sup> These changes included elimination of physical quorum requirements, facilitation of two-way communication during meetings, and posting of meeting notes and recordings online. While these changes were not a perfect substitute for in-person meetings, they were at least a reasonable concession during a time of emergency.<sup>71</sup>

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*Virtual Public Meetings*, GOVERNING (Apr. 7, 2020), <https://www.governing.com/now/Pandemic-Forces-Local-Governments-into-Virtual-Public-Meetings.html> [<https://perma.cc/KTL3-Q97W>] (discussing early challenges local governments faced in transitioning to virtual public meetings).

<sup>68</sup> See *Transparency, Communication and Trust: The Role of Public Communication in Responding to the Wave of Disinformation About the New Coronavirus*, OECD, <https://www.oecd.org/coronavirus/policy-responses/transparency-communication-and-trust-bef7ad6e/> (last updated July 3, 2020) [<https://perma.cc/6LYU-CKDT>] (analyzing the importance of government transparency during the COVID-19 era as the spread of disinformation, or “misleading content[,]” about the virus made the battle against the “infodemic” critical to controlling the pandemic).

<sup>69</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431(4) (2022) (defining “meeting” as a gathering in person “or through technological devices[] of a quorum of the members of a public body”); COLO. REV. STAT. ANN. § 24-6-402(1)(b) (West 2022) (“Meeting’ means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.”); GA. CODE ANN. § 50-14-1(g) (West 2022) (allowing meetings by teleconference when there exist “emergency conditions involving public safety or the preservation of property or public services . . . so long as the notice required by this chapter is provided and means are afforded for the public to have simultaneous access to the teleconference meeting”).

<sup>70</sup> See, e.g., Conn. Exec. Order No. 7B (Mar. 14, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7B.pdf> [<https://perma.cc/T4FQ-SDUW>] (suspending provisions of the Connecticut General Statutes in addition to open meeting provisions of municipalities “to the extent necessary to permit any public agency to meet and take such actions authorized by the law without permitting or requiring in-person, public access to such meetings”); Fla. Exec. Order No. 20-69 (Mar. 20, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-69.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-69.pdf) [<https://perma.cc/2YAL-6E3B>] (suspending “any Florida statute that requires a quorum to be present in person or requires a local government body to meet at a specific public place”).

<sup>71</sup> But see Scott Beyer, *The Case for Making Virtual Public Meetings Permanent*, GOVERNING (Sept. 1, 2020), <https://www.governing.com/now/The-Case-for-Making-Virtual-Public-Meetings-Permanent.html> [<https://perma.cc/WTP4-YVR8>] (highlighting the benefits and drawbacks of remote public meetings, and proposing a hybrid

Due to the ease of COVID-19 transmission and the Centers for Disease Control and Prevention's ("CDC") guidelines on social distancing, many states suspended physical quorum requirements under their open meetings acts.<sup>72</sup> Pursuant to states' sunshine laws, for a gathering to constitute a "meeting," a majority of a public agency's members must be present.<sup>73</sup> Once COVID-19 restricted individuals' abilities to physically occupy the same space, a majority of states, including California and Florida, suspended physical quorum requirements altogether, authorizing meetings by electronic means, including teleconferencing.<sup>74</sup> Rather than merely suspend physical quorum requirements, the Illinois Legislature passed an amendment to the open meetings act, enabling remote meetings while still upholding the principles of government transparency.<sup>75</sup> Illinois' open meetings laws stipulate that public meetings must be "convenient and open to the public."<sup>76</sup> The amendment remains faithful to that standard,<sup>77</sup> by requiring that "all members of the body . . . can hear one another and can hear all discussion and testimony."<sup>78</sup> In addition, votes must be taken by roll call to ensure observers can identify and record each

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alternative that allows people to attend public meetings in-person while also offering the option to submit comments virtually).

<sup>72</sup> *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last updated Aug. 11, 2022) [<https://perma.cc/66LU-UW8C>] (outlining the CDC's guidelines on social distancing). A quorum is the minimum number of members of an assembly or society that must be present at any of its meetings to make the proceedings of that meeting valid. *Quorum*, DICTIONARY.COM, <https://www.dictionary.com/browse/quorum> [<https://perma.cc/L989-KFGP>].

<sup>73</sup> See, e.g., ALA. CODE § 36-25A-2(6), (12) (2022) (defining a "meeting" as the "prearranged gathering of a quorum of a governmental body" and a "quorum" as "a majority of the voting members of a governmental body").

<sup>74</sup> Cal. Exec. Order No. N-29-20 (Mar. 17, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-N-29-20-EO.pdf> [<https://perma.cc/3W66-LSFC>]; Fla. Exec. Order No. 20-69, *supra* note 70 (asserting that the order "does not waive any other requirement under the Florida Constitution and 'Florida's Government in the Sunshine Laws,' including Chapter 286, Florida Statutes"). California's Governor removed additional requirements under the state's sunshine laws, including posting notice of the physical location and providing agendas at the meeting location. Cal. Exec. Order No. N-29-20, *supra*.

<sup>75</sup> S.B. 2135, 101st Gen. Assemb., 1st Spec. Sess. (Ill. 2020).

<sup>76</sup> 5 ILL. COMP. STAT. ANN. § 120/2.01 (West 2022).

<sup>77</sup> See *id.* § 120/7(e)(3), (6); Ill. S.B. 2135. *But see infra* note 124 (describing an action against the Chicago City Council that claimed it had held telephone meetings without providing notice or allowing public comments).

<sup>78</sup> COMP. STAT. ANN. § 120/7(e)(3).

member's vote.<sup>79</sup> These measures also allow body members to participate remotely.<sup>80</sup>

Many states altered their notice requirements to reflect the public's need to know the relevant meeting URL and passcode, in addition to the subject and timing of meetings.<sup>81</sup> California, for example, passed an order that specifically required the posting of meeting times and the means through which the meetings will take place (e.g., using Zoom).<sup>82</sup> While "emergency meetings" sometimes allow for flexibility regarding notice requirements,<sup>83</sup> Maine maintained that, even for emergency meetings, governmental bodies shall provide notice to the public and contain instructions for them to join remotely.<sup>84</sup> During an emergency such as the COVID-19 pandemic, in which public bodies' decisions directly affect the lives and well-being of the state's population, it is essential that the public have adequate notice of meetings so they can attend if they so desire. Maine's establishment of a notice requirement for emergency meetings is a leading example of what is necessary during times of crisis.

The transition from in-person to remote meetings required state and local agencies to grapple with the creation of an adequate equivalent to in-person meetings — namely, how to provide two-way communication between the public in attendance and the agencies convening the meetings.<sup>85</sup> For instance, an amendment to the Illinois Public Meetings

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<sup>79</sup> *Id.* § 120/7(e)(6).

<sup>80</sup> The Illinois amendment additionally prescribes that, before any meeting may be held remotely, the Governor must declare an emergency *and* the Attorney General must declare that physically held public meetings are not feasible because of the disaster. *Id.* § 120/7(e)(1)-(2). This specification limits the Governor's authority to alter the operating procedures of open meetings unilaterally.

<sup>81</sup> Under states' open meeting laws, public agencies are required to post notice of their meetings' date, time, and location. *See generally Open Meetings Notice Requirements*, BALLOTPEDIA, [https://ballotpedia.org/Open\\_meetings\\_notice\\_requirements](https://ballotpedia.org/Open_meetings_notice_requirements) [<https://perma.cc/KCK5-EZCD>] (listing the notice requirements in all fifty states and the District of Columbia). Although notice requirements vary by state, they typically require notice of a meeting to be posted sufficiently in advance and in an accessible location so that interested members may join the scheduled meeting. *See id.*

<sup>82</sup> Cal. Exec. Order No. N-29-20, *supra* note 74.

<sup>83</sup> *See* MINN. STAT. ANN. § 13D.04(3)(a) (West 2022) (only requiring public bodies to make "good faith efforts to provide notice of [an emergency] meeting").

<sup>84</sup> Act of Mar. 18, 2020, ch. 617, § G-1, 2020 Me. Laws 1714 (codified at ME. REV. STAT. ANN. tit. 1, § 403-A (2022)); *see also Your Right to Know: The Maine Freedom of Access Act*, MAINE.GOV, <https://www.maine.gov/foaa/index.htm> (last visited Sept. 22, 2022) [<https://perma.cc/B53G-ZJUL>].

<sup>85</sup> Providing two-way communication was not always guaranteed following the early orders and responses to the pandemic in March 2020, as some public bodies, including the Michigan Department of Health and Human Services, waited many

Act requires that, if an in-person meeting is not feasible, the public body must make alternative arrangements to “allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes.”<sup>86</sup> Although many individuals used computer software to attend remote meetings, several government entities created provisions that allowed individuals to dial into a meeting with a cell phone, recognizing that not everyone has access to a strong Internet connection.<sup>87</sup> However, for a virtual open meeting to maintain the same transparency and facilitate similar dialogue as an in-person meeting, agencies must provide more than just a means for the public to hear deliberations; the public needs to be able to communicate actively with the agencies during the meeting, including by submitting votes and direct oral or written comments. In the spirit of transparency, New Mexico’s Attorney General provided guidance to state agencies, suggesting that they adjourn meetings if the live feed is interrupted, rather than reconvene without assurance that the public was able to regain access.<sup>88</sup> While remote meetings could not hope to replicate the experience of in-person meetings perfectly, the provisions for two-way communication, such as allotted time slots to submit oral comments during meetings, safeguard the public’s right to participate.

Recognizing that not all interested members of the public can attend remote open meetings live, several states require agencies to post the recordings and minutes of their meetings online, allowing citizens to

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months (i.e., until December 2020), to permit this type of communication in meetings. Leslie A. Dickinson, Laura J. Genovich & Ashley A. Poindexter, *COVID Impacts on Electronic Public Meetings – Emergency Order and Open Meetings Act Updates*, FOSTER SWIFT (Dec. 23, 2020), <https://www.fosterswift.com/communications-covid-impact-electronic-public-meetings.html> [<https://perma.cc/HQZ4-EZH7>].

<sup>86</sup> 5 ILL. COMP. STAT. ANN. § 120/7(e)(4) (2022).

<sup>87</sup> See, e.g., Letter from James P. Sullivan, Deputy Gen. Couns., Off. of Governor Greg Abbott, to Off. of Att’y Gen., <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/COVID-19-OMA-Suspension-Letter.pdf> [<https://perma.cc/RR92-5B2N>] (authorizing the suspension of various open meeting provisions of Texas law and stating, inter alia, that “members of the public would still be entitled to participate and address the governmental body during the telephonic or videoconference meeting, perhaps through dial-in number or videoconference software”; also providing that “the online notice [of a public meeting] must include a toll-free dial-in number or a free-of-charge videoconference link, along with an electronic copy of any agenda packet”).

<sup>88</sup> Hector H. Balderas, Att’y Gen., State of N.M. Off. Of the Att’y Gen., Open Government Division Advisory During COVID-19 State of Public Health Emergency, (URL unavailable) (last visited Sept. 22, 2022) [<https://perma.cc/B3Z6-R9WU>] (“[W]e believe [the open meetings laws] would require that public bodies cancel or reschedule their meetings whenever possible and opt for a virtual format only as a matter of last resort during the pendency of the public health emergency.”).

engage with public meetings at a later time. In Texas, public entities must post an electronic copy of any agenda before the meeting and a recording after.<sup>89</sup> Similarly, Alabama public bodies must post meeting summaries within twelve hours that recount the deliberations and actions of the meeting.<sup>90</sup> In addition, although Maine does not require meeting recordings to be posted, the government used its discretion to post them as part of “additional measures . . . [that] support government efforts to remain open and accessible.”<sup>91</sup>

In theory, posting audio and video recordings of remote meetings provides a method to guarantee that community members who were unable to attend live meetings can still access the meetings’ deliberations. However, several state legislatures provided public agencies with broad discretion by only requiring agencies to take “reasonable” measures to ensure public access, which, in turn, was utilized to make many public meetings less public.<sup>92</sup> By relaxing requirements that ensure that everyone has access to the meetings in real-time, many agencies were able to lessen the meaningful transparency that public meetings laws are intended to preserve.<sup>93</sup>

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<sup>89</sup> Press Release, Off. of the Tex. Governor, Governor Abbott Allows Virtual and Telephonic Open Meetings to Maintain Government Transparency (Mar. 16, 2020), <https://gov.texas.gov/news/post/governor-abbott-allows-virtual-and-telephonic-open-meetings-to-maintain-government-transparency> [<https://perma.cc/6J6B-6DJS>].

<sup>90</sup> Ala. Exec. Order (Mar. 18, 2020), <https://arc-sos.state.al.us/PPC/VOL15P1775.pdf> [<https://perma.cc/MDK6-7HH9>]. Some states’ statutes require officials, upon request, to make meeting minutes or summaries publicly available regardless of emergency. *See, e.g.*, ARK. CODE ANN. § 25-19-106(d)(2) to -(3) (West 2022) (mandating public meeting recordings be maintained for one year and reproduced upon request); COLO. REV. STAT. § 24-6-402(2)(d)(I) to -(II) (West 2022) (requiring that meeting minutes of state local public bodies “shall be open to public inspection”); GA. CODE ANN. § 50-14-1(e)(2)(A) (2022) (directing public bodies to create a summary of present members and actions taken to be made available within two business days of a public meeting).

<sup>91</sup> *Virtual Public Meetings and Other COVID-19 Changes*, LINCOLN CNTY. REG’L PLAN. COMM’N, <https://www.lcrpc.org/stories/virtual-public-meetings-and-other-covid-19-changes> [<https://perma.cc/W5G7-GGNS>].

<sup>92</sup> *See, e.g.*, Ala. Exec. Order, *supra* note 90 (“encourag[ing]” but not requiring governmental bodies to enable the public to listen or participate in meetings); Tenn. Exec. Order No. 16 (Mar. 20, 2020) (extended by Executive Order No. 60), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee16.pdf> [<https://perma.cc/4QM9-7WM9>].

<sup>93</sup> In Washington, meetings must be held remotely and provide a means for the public to participate, if only audibly. Wash. Proclamation 20-28.11 (Oct. 2, 2020), [https://www.governor.wa.gov/sites/default/files/proclamations/proc\\_20-28.11.pdf](https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-28.11.pdf) [<https://perma.cc/KX4Z-YR7J>] (extending Proclamation 20-71 of September 4, 2020, which remained in effect until October 4, 2020). The Governor of Washington did not leave it up to the discretion of an agency to provide only access that is “practicable” or

B. *Muting the Public: Changes to Open Meetings Laws Lessened Public Access*

State governors used their broad emergency powers to suspend various provisions of their state's sunshine laws to facilitate the transition to remote public meetings.<sup>94</sup> Several suspensions resulted in reduced public access and failed to adequately replicate the public participation that is characteristic of open meetings. Whether the governors' orders intentionally decreased government transparency or simply responded to the CDC's guidelines for COVID-19, the effect was the same: less government openness.

At the start of the pandemic, Hawaii initially suspended its statute regarding open meetings to enable boards and agencies to meet remotely.<sup>95</sup> Governor David Ige issued an Executive Order allowing public meetings to continue — but without public attendance, even through videoconferencing.<sup>96</sup> One critic called the Order “one of the most extreme anti-transparency measures taken by any U.S. governor in response to the coronavirus pandemic”; in response, the Governor issued a subsequent executive order.<sup>97</sup> This later Order reinstated some of the basic requirements of open meetings, such as proper notice, acceptance of written testimony, posting meeting minutes, and quorum requirements, while allowing board members to meet remotely.<sup>98</sup>

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when “reasonably” available; rather, the alterations by the governor's proclamations make it clear that agencies are *expected* to provide access. *Id.*

<sup>94</sup> *But see* Jeff Roberson, *State Lawmakers are Pushing to Curb Governors' Emergency Powers Used to Contain COVID-19*, CNBC (Jan. 28, 2021, 12:40 PM EST), <https://www.cnbc.com/2021/01/28/lawmakers-push-to-curb-governors-powers-to-issue-orders-to-contain-covid-19.html> [<https://perma.cc/DG2K-JGDY>] (reporting that more than half of the state legislatures have proposed bills to curtail gubernatorial power during a state of emergency).

<sup>95</sup> Haw. Exec. Order No. 20-02 (Mar. 29, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003219-ATG\\_Executive-Order-No.-20-02-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003219-ATG_Executive-Order-No.-20-02-distribution-signed.pdf) [<https://perma.cc/5MNR-K7SK>] (stating that “boards shall consider reasonable measures to allow public participation . . . [but n]o board deliberation or action shall be invalid . . . if such measures are not taken.”). *But see* Ill. Exec. Order No. 2020-07 (Mar. 16, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-07.pdf> [<https://perma.cc/YUQ6-CXDA>] (suspending the requirement for a physical quorum, but not allowing board deliberations to be invalid if action was not taken).

<sup>96</sup> Nick Grube, *Ige Backs Off His Suspension of State Open Government Laws*, HONOLULU CIV. BEAT (May 6, 2020), <https://www.civilbeat.org/2020/05/ige-backs-off-his-suspension-of-state-open-government-laws/> [<https://perma.cc/C8YU-46ZA>].

<sup>97</sup> *Id.*

<sup>98</sup> Haw. Proclamation (May 5, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/05/2005024-ATG\\_Seventh-Supplementary-Proclamation-for-COVID-19-distribution-signed-1.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/05/2005024-ATG_Seventh-Supplementary-Proclamation-for-COVID-19-distribution-signed-1.pdf) [<https://perma.cc/T72J-9XFX>].



Importantly, the Order required that boards with sufficient resources to hold a secure video-teleconference “must in good faith attempt to provide the public with the opportunity to observe the meeting . . . and to provide oral testimony,” but that “[n]o board action shall be invalid if the board’s good faith efforts to implement remote technology . . . do not work.”<sup>99</sup> The state’s amendment to the March Executive Order shows that the elimination of the open meetings statute was not truly necessary; the Governor could have taken less drastic measures, such as carving out exceptions to the teleconferencing statute.<sup>100</sup> In response to Governor Ige’s executive orders, Hawaii lawmakers proposed a bill to limit his emergency powers, thus enhancing the state government’s checks and balances.<sup>101</sup>

Other states made similar changes, including Alabama and Idaho. Alabama’s initial proclamation allowed meetings relating to COVID-19 or “essential minimum functions” of the governmental body to be held remotely.<sup>102</sup> The proclamation stipulated that “[g]overnmental bodies conducting a meeting pursuant to this section are *encouraged*, to the maximum extent possible, to use communication equipment that allows members of the public to listen to, observe, *or* participate in the meeting.”<sup>103</sup> This provision’s relaxed language encouraged governmental bodies to allow the public to either listen or participate; it did not mandate that the public be able to participate actively, so long as they were able to observe the proceedings through sufficient means.<sup>104</sup> Essentially, the public’s ability to participate in a public meeting is decided by the whims of governing bodies, akin to an

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<sup>99</sup> *Id.* (noting that those without sufficient resources “must provide the public with the opportunity to listen . . . and should make a good faith effort to provide the public with the opportunity to provide oral testimony”).

<sup>100</sup> Prior to the coronavirus pandemic, Hawaii enabled teleconference meetings via HAW. REV. STAT. ANN. § 92-3.5 (2022). Because the statute requires that physical locations be made available to the public for remote meetings, some executive action likely would be necessary to enable fully remote meetings. *See id.*

<sup>101</sup> Blaze Lovell, *Hawaii Lawmakers Are Considering Clamping Down on Gov’s Emergency Powers*, HONOLULU CIV. BEAT (Feb. 16, 2021), <https://www.civilbeat.org/2021/02/hawaii-lawmakers-are-considering-clamping-down-on-govs-emergency-powers/> [https://perma.cc/M67L-NRL6] (describing the proposed bill, which would “limit emergency proclamations to 60 days and require two-thirds of the members of the House and Senate to approve any extensions”).

<sup>102</sup> Ala. Proclamation (Mar. 18, 2020), <https://arc-sos.state.al.us/PPC/VOL15P1775.pdf> [https://perma.cc/7ACX-MXMM].

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *Id.*

undemanding “good faith effort.”<sup>105</sup> Similarly, Idaho’s Governor amended a previous proclamation to state that public bodies are “encouraged, but not required,” to improve public attendance and participation during government meetings.<sup>106</sup> These proclamations effectively gave broad leeway to forgo public participation and observation.<sup>107</sup>

### 1. Can You Hear Me Now?

Many states did not adequately ensure that the public was able to participate in the new public meetings forum. Some states’ alterations of notice requirements allowed agencies to conduct meetings without notice, or with substantially less notice compared with times of non-emergency.<sup>108</sup> By using provisions that relaxed notice requirements when a meeting concerned a present emergency, many states enabled governmental bodies to do away with the notice requirement altogether<sup>109</sup> or require that notice be posted only a few hours prior to the meeting.<sup>110</sup> Without proper notice, many individuals may have

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<sup>105</sup> See *id.* But see Conn. Exec. Order No. 7B, *supra* note 70 (ordering that the state’s in-person open meeting requirements are suspended so long as public access is available for the virtual meetings).

<sup>106</sup> Idaho Proclamation (Mar. 18, 2020), [https://cdn.ymaws.com/idahocities.org/resource/dynamic/blogs/20200319\\_173815\\_10751.pdf](https://cdn.ymaws.com/idahocities.org/resource/dynamic/blogs/20200319_173815_10751.pdf) [<https://perma.cc/8MHK-HZBV>].

<sup>107</sup> See *id.* But see Ala. Proclamation (Mar. 13, 2020), <https://arc-sos.state.al.us/PPC/VOL15P1775.pdf> [<https://perma.cc/7ACX-MXMM>] (noting that entities were still required to issue post-meeting summaries within twelve hours of the meeting).

<sup>108</sup> Under Texas’ open meetings act, notice must be posted seventy-two hours prior to a regularly scheduled meeting, while notice of any meeting convened to discuss an emergency or urgent public necessity must be posted only one hour in advance. Compare TEX. GOV’T CODE ANN. § 551.043(a) (2021) (specifying that, for regularly scheduled open meetings, “[t]he notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting”), with *id.* § 551.045(a) (“In an emergency or when there is an urgent public necessity, the notice of a meeting to deliberate or take action on the emergency . . . is sufficient if . . . posted for at least one hour before the meeting is convened.”).

<sup>109</sup> See, e.g., OFF. OF THE PUB. ACCESS COUNSELOR, HANDBOOK ON INDIANA’S PUBLIC ACCESS LAWS 20 (2017), <https://www.in.gov/pac/files/PAC-Handbook-2017.pdf> [<https://perma.cc/YH2Q-L449>] (“If a meeting is called to deal with an emergency . . . then the time requirements of notice under this section shall not apply . . .”).

<sup>110</sup> See, e.g., N.H. REV. STAT. ANN. § 91-A:2 (2022) (allowing exceptions for public notice and quorum during an emergency and simply requiring public bodies to “post a notice of the time and place of such meeting as soon as practicable”); see also UTAH CODE ANN. § 52-4-202(5)(a) (2022) (suspending notice requirements for public meetings about emergencies if a public body gives “best notice practicable”).

missed meetings they otherwise would have attended. Moreover, several jurisdictions limited the public's live access to meetings, which deprived them of their ability to comment in real time.<sup>111</sup> The District of Columbia, for example, required agencies only to take "steps reasonably calculated" to allow the public live access to the meetings, or "if doing so is not technologically feasible, as soon thereafter as reasonably practicable."<sup>112</sup> Even if a state issues guidelines concerning when a recording must be posted, posting recordings after the fact does not afford the public the same level of involvement as live access to meetings.

One of the many benefits of open meetings is that the public can voice their concerns face-to-face before agency members, ensuring that their comments are heard and acknowledged. By limiting the public's live access to virtual meetings, however, states relegated the public to submitting written comments that would be read into the record before or after the meeting. An Executive Order in Tennessee, for example, declared that the public's submissions of written comments that are read into the record during a meeting satisfy public participation requirements.<sup>113</sup> If live access is not provided unless "reasonably

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<sup>111</sup> See, e.g., Randi Hildreth, *People Denied Entry into City Council Meeting, Leaders Cite COVID-19 Concerns*, WBRC (June 10, 2020, 7:47 AM PDT), <https://www.wbrc.com/2020/06/10/people-denied-entry-into-city-council-meeting-leaders-cite-covid-concerns/> [<https://perma.cc/V8NJ-QK45>] (describing a Birmingham, Alabama City Council meeting that limited the number of people allowed to attend due to COVID-19 concerns, while fifteen medical students with prepared statements were not allowed to speak, virtually or otherwise). *But see* Guidance Regarding Public Meetings, Right-to-Know Law and COVID-19, from N.H. Mun. Ass'n (Sept. 17, 2020), [https://www.nhmunicipal.org/sites/default/files/uploads/legal/public\\_meetings\\_rtk\\_covid-19\\_2020-09-17.pdf](https://www.nhmunicipal.org/sites/default/files/uploads/legal/public_meetings_rtk_covid-19_2020-09-17.pdf) [<https://perma.cc/Z5AJ-GVDH>] ("[I]f the meeting capacity of your meeting room is exceeded, whether due to the normal meeting room capacity or due to the reduced capacity due to C[OVID]-19, the meeting must be adjourned. It would be improper to deny a person entry under such circumstances and continue conducting the meeting in the physical location.").

<sup>112</sup> Coronavirus Support Emergency Amendment Act of 2020 § 809(a)(4), D.C. Act 23-405 (codified as amended at 67 D.C.R. § 10235) (effective Aug. 19, 2020). D.C. did not set a time frame in which a recording must be posted, but other jurisdictions were not as lenient. *Compare id.*, and R.I. Exec. Order No. 20-05 (Mar. 16, 2020), <https://governor.ri.gov/executive-orders/executive-order-20-05> [<https://perma.cc/CCN7-ZLQE>] (requiring recordings be posted "as soon as practicable" without a strict deadline), *with* Tenn. Exec. Order No. 16, *supra* note 92 (extended by Tenn. Exec. Order No. 60) (requiring that the government body must post a clear audio or video recording of the meeting within two business days of the public meeting).

<sup>113</sup> Tenn. Exec. Order No. 60 § B(1)(f) (Aug. 28, 2020), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee60.pdf> [<https://perma.cc/Q37Z-LMFL>]; *see also* *Are City Councils and Similar Public Bodies Required to Have Periods for Public Comment at Meetings?*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/>

practicable,” comments read into the record can only be drafted in anticipation of discussions yet to occur; as such, members of the public are restricted in their ability to participate, as they are unable to raise concerns or make comments in response to the statements made at the meeting.<sup>114</sup> Furthermore, members of the public who do not have live access to a meeting can only receive assurances that their concerns were heard after the meeting has concluded, and only if the relevant agency posts the meeting notes or recording online. In San Diego County, public comments “submitted in writing, by letter or email” can be read into the record.<sup>115</sup> Nevertheless, several weeks into the lockdown, the county’s third-largest city, Oceanside, had not read any of the written comments or phone messages submitted in advance of its meetings.<sup>116</sup> Although the city posted the written comments on its website sometime after the meeting, members of the League of Women Voters of North San Diego County were concerned that public input was not being handled adequately.<sup>117</sup>

In violation of state sunshine laws’ characteristic prohibition of secret meetings, some government officials used the pandemic as an excuse to hold private meetings under the guise of keeping the public safe.<sup>118</sup> For

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about/faq/are-city-councils-and-similar-public-bodies-required-to-have-periods-for-public-comment-at-meetings/ (last visited Sept. 22, 2022) [<https://perma.cc/8VSZ-58XV>] (finding that “[m]ost states do not expressly require, via statutes or legal precedent, time for public participation in public meetings, although it has become a customary practice to allow individuals to speak”). *But see, e.g., March 25, 2021 CLP and Authorizer Fee Rulemaking Hearing*, TENN. STATE BD. OF EDUC. (Mar. 25, 2021), <https://www.tn.gov/sbe/meetings/meetings-calendar/2021/3/25/clp-authorizer-rulemaking.html> [<https://perma.cc/WY6B-2AC7>] (providing three-minute speaking slots for individuals who wish to publicly comment during the meeting, both in-person and virtually, and allowing submissions of additional written comments after the meeting’s adjournment).

<sup>114</sup> See Tenn. Exec. Order No. 60, *supra* note 113, § B(1)(f).

<sup>115</sup> Phil Diehl, *Public Struggles to Participate in Online Meetings*, GOV’T TECH. (Apr. 20, 2020), <https://www.govtech.com/policy/Public-Struggles-to-Participate-in-Online-Meetings.html> [<https://perma.cc/U7PM-H6F4>].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*; see also Jason Ruiz, *After Months of Silence, the Public Can Again Comment During City Meetings — But Is It Enough?*, LONG BEACH POST (June 12, 2020, 11:29 AM), <https://lbpost.com/news/public-comment-covid-19> [<https://perma.cc/CK7B-LZ6C>] (commenting on the protests from Long Beach residents that led to the city’s implementation of a phone call system for live comments during public meetings).

<sup>118</sup> See, e.g., Ryan J. Foley, *Key Iowa COVID-19 Vaccine Panel Holding Secret Meetings on Who Should Get First Vaccinations, Circumventing Open Meetings Law, Experts Say*, CHI. TRIB. (Dec. 17, 2020, 9:14 AM), <https://www.chicagotribune.com/midwest/ct-iowa-covid-19-vaccine-panel-secret-meetings-20201217-x3ai5fyxljechlziwazk6oq4vq-story.html> [<https://perma.cc/ZK33-8JDJ>] (relating how an Iowa Department of Public Health panel to determine which groups should receive the COVID-19 vaccine met twice “without

instance, Waterville, Maine created a City Council subcommittee to combat the pandemic; the subcommittee then met in secret and did not allow public access to its deliberations, citing the need to “be able to speak openly and freely” about decisions to protect the public health and welfare of the city.<sup>119</sup> The City Council instead should have included the public in decisions affecting their health and safety, particularly during an international health crisis that necessitated unprecedented changes to government operations. Similarly, in Florida some mayors and county officials held weekly closed meetings on how to approach and combat COVID-19.<sup>120</sup> Moreover, five county board members in Piatt County, Illinois were charged with a misdemeanor after allegedly violating the Illinois Open Meetings Act.<sup>121</sup> The board members had disconnected their online meeting in favor of a closed session to discuss a public official’s salary, then failed to allow members of the public to reconnect after the board returned to the open session.<sup>122</sup> It is unclear whether this failure to allow the public to rejoin

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giving prior notice to the public, publishing an agenda or allowing the public to participate as required by the Iowa Open Meetings Act”).

<sup>119</sup> Amy Calder, *City Solicitor: Waterville Coronavirus Panel Illegally Met in Secret, Made Unlawful Decisions*, CENT. ME., <https://www.centralmaine.com/2020/03/19/waterville-coronavirus-panel-illegally-met-in-secret-made-unlawful-decisions/> (last updated Mar. 20, 2020) [<https://perma.cc/BE7Y-TSPS>]; see also Scott Thistle, *Mills Administration Held Secret Meetings on Pandemic with State Lawmakers*, PORTLAND PRESS HERALD, <https://www.pressherald.com/2020/04/16/mills-administration-held-secret-coronavirus-meetings-with-lawmakers/> (last updated Apr. 16, 2020) [<https://perma.cc/NWS5-NTL6>] (referencing that Governor Janet Mill’s administration held nine remote meetings between March 20 and April 15 without issuing public notice of the meetings or creating recordings).

<sup>120</sup> Lisa J. Huriash, *Most Mayors Agree Broward Must Stop Secret COVID-19 Discussions*, S. FLA. SUN-SENTINEL (Sept. 16, 2020, 7:31 PM), <https://www.sun-sentinel.com/local/broward/fl-ne-mayors-private-coronavirus-meetings-20200916-w6s5krhndvf5fodbid3vo5cxyq-story.html> [<https://perma.cc/8LQY-SBLY>]; see also Janet Begley, *Gilliams, Parris Will Stand Trial Together Next Month, Charged with Sunshine Law Violations*, TC PALM, <https://www.tcpalm.com/story/news/2020/10/28/former-sebastian-city-council-members-gilliams-parris-stand-trial-together/3752061001/> (last updated Oct. 30, 2020, 4:39 PM ET) [<https://perma.cc/PQ4T-QU67>] (describing the charges against three city council members who were recalled and then charged with violating Florida’s sunshine laws when they held a secret meeting to replace the mayor).

<sup>121</sup> Steve Hoffman, *Special Prosecutor Appointed for Piatt County Board Members Accused of Open Meetings Violation*, NEWS-GAZETTE (July 8, 2020), [https://www.news-gazette.com/news/local/courts-police-fire/special-prosecutor-appointed-for-piatt-county-board-members-accused-of-open-meetings-violation/article\\_d507ce16-1d57-59f8-be42-9552de93f149.html](https://www.news-gazette.com/news/local/courts-police-fire/special-prosecutor-appointed-for-piatt-county-board-members-accused-of-open-meetings-violation/article_d507ce16-1d57-59f8-be42-9552de93f149.html) [<https://perma.cc/APQ5-CKNG>].

<sup>122</sup> *Id.*; see also *County OMA Violation Case in Review by Special Prosecutor*, WCIA, <https://www.wcia.com/news/local-news/county-oma-violation-case-in-review-by-special-prosecutor/> (last updated July 10, 2020, 5:31 PM CDT) [<https://perma.cc/SH6C->

the meeting was a gross oversight or a calculated move on the part of the board members. Nevertheless, the public was unable to hear or participate in the remainder of the meeting. Dissatisfied with the lack of transparency, the public and the press challenged these meetings as violative of states' sunshine laws.<sup>123</sup> Secret meetings inherently contradict the openness and transparency that are contemplated by public meetings laws. Yet several agencies purposefully shrouded their deliberations in secrecy because the meetings concerned COVID-19-related matters — the precise reason why it was essential for the public to have access in the first place.

Even when the public had live access, online meetings were regularly interrupted by technical difficulties, making it difficult or impossible for members of the public to view the meetings.<sup>124</sup> Because of Zoom's default 100-person limit on participants, Chicago Public Schools community members were denied access to public meetings in violation of the Illinois Open Meetings Act, which states that when meetings cannot happen in person, "the public body must allow any interested member of the public access to hear the discussion."<sup>125</sup> In Pennsylvania,

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CJGJ] (reporting that the Illinois State's Attorney's Appellate Prosecutor ("ISAAP") was chosen to handle the misdemeanor charges, but ISAAP may choose not to "prosecute the OMA-related charges against them").

<sup>123</sup> See, e.g., BGA, *BGA Sues Chicago City Council Over Open Meetings Act Violations*, BETTER GOV'T ASS'N (June 12, 2020, 10:00 AM), [https://www.bettergov.org/news/bga-sues-chicago-city-council-over-open-meetings-act-violations/?utm\\_source=opa-violation&utm\\_medium=email&utm\\_campaign=opa-violation&eType=EmailBlastContent&eId=ef2993b5-4365-4ce3-a331-719b0544ef1a](https://www.bettergov.org/news/bga-sues-chicago-city-council-over-open-meetings-act-violations/?utm_source=opa-violation&utm_medium=email&utm_campaign=opa-violation&eType=EmailBlastContent&eId=ef2993b5-4365-4ce3-a331-719b0544ef1a) [<https://perma.cc/MBV4-TSZC>] (reporting a lawsuit filed by the Better Government Association claiming the Chicago City Council held telephone meetings without notice, public comment, and "convenience" and "openness" to the public).

<sup>124</sup> See, e.g., Mary Grace Keller, *'An Embarrassment': Carroll Delegates Displeased with General Assembly's Last-Minute Passage of Kirwan, Other Bills*, BALTIMORE SUN (Mar. 18, 2020, 6:34 PM), <https://www.baltimoresun.com/maryland/carroll/news/cc-coronavirus-kirwan-carroll-general-assembly-20200318-nccmnpobljeqlmn3rx2usjxcve-story.html> [<https://perma.cc/RQ53-3T6A>] (noting that a county's General Assembly "debates over bills was cut short, the online streaming of the session had technical difficulties, [and] hearings aren't being held," thus limiting the public's input on the debate).

<sup>125</sup> *Zoom Limitations Have Denied Teacher, CPS Community Members Access To Public Meetings*, CBS CHI. (July 30, 2020, 6:06 AM), <https://chicago.cbslocal.com/2020/07/30/zoom-limitations-have-denied-teacher-cps-community-members-access-to-public-meetings/> [<https://perma.cc/ZPF4-K3V7>] (internal quotation marks omitted) (reporting that a teacher who was not allowed to attend the meeting suggested upgrading the venue for online meetings, even "[i]f that means paying a few more bucks for a different version of Zoom, if that means switching over to another version like Google Meets, they need to figure this out"); see also *Choose a Plan*, ZOOM, <https://zoom.com/pricing> (last visited Sept. 22, 2022) [<https://perma.cc/FJQ5-BD45>] (listing prices and restrictions for various Zoom subscriptions).

the public enjoined the actions taken by the Board of School Directors of Scranton after its virtual meeting had technical difficulties.<sup>126</sup> During the meeting, the Board moved to furlough more than 200 education employees and terminate their health care benefits.<sup>127</sup> The Board held the meeting on Zoom and allowed some people to provide public comment, while also livestreaming the meeting on YouTube.<sup>128</sup> A Pennsylvania court found that the meeting violated the state's sunshine laws<sup>129</sup> and issued an injunction against the Board, prohibiting it from terminating the employees' health insurance.<sup>130</sup> The result in this case provides a stark contrast between Pennsylvania and some other states that relaxed their public meetings laws even further. In Alabama and Hawaii, for example, loss of Internet connection would not have been an obstacle — these states merely encouraged participation by teleconference, and expressly permitted government action despite unreliable broadcast of the meeting.<sup>131</sup>

Online platforms have a plethora of idiosyncrasies that government officials capitalized on to exclude the public from important meetings.<sup>132</sup> As previously discussed, state sunshine laws require

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<sup>126</sup> *McGrath v. Bd. of Sch. Dirs. of Scranton*, No. 20 CV 3698, 2020 WL 5904514, at \*1 (Pa. Com. Pl. Oct. 4, 2020).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*1-2.

<sup>129</sup> 65 PA. STAT. AND CONS. ANN. §§ 701-716 (2022).

<sup>130</sup> *McGrath*, 2020 WL 5904514, at \*3.

<sup>131</sup> See *supra* notes 95–107 and accompanying text (describing open meetings law changes in Alabama and Hawaii).

<sup>132</sup> For example, a council member turned off his video in an attempt to end a meeting prematurely because a key vote was not going his way. Wheeler Cowperthwaite, *Bad Manners, Tech Problems and Violations: Virtual Public Meetings Come with Challenges*, ENTERPRISE (Aug. 19, 2020, 7:00 AM ET), <https://www.enterpriseneews.com/story/news/politics/county/2020/08/19/bad-manners-tech-problems-and-violations-virtual-public-meetings-come-with-challenges/114521506/> [https://perma.cc/2TDH-UKVH]. In California, an entire school board resigned after they were overheard mocking parents without realizing that their comments were still being broadcast. See Maria Cramer, *Entire School Board Resigns After Members Are Caught Mocking Parents on Livestream*, N.Y. TIMES, <https://www.nytimes.com/2021/02/20/us/oakley-school-board-hot-mic.html> (last updated Oct. 10, 2021) [https://perma.cc/K6KR-NUMA]. “Zoombombing,” where “hackers scrawl offensive comments, or post pornographic or racist images,” also became a problem during virtual meetings. Shannon Bond, *‘Zoombombing’ City Hall: Online Harassment Surges as Public Meetings Go Virtual*, NPR (Apr. 9, 2020, 11:13 AM ET), <https://www.npr.org/2020/04/09/829265445/zoombombing-city-hall-the-struggle-to-keep-public-meetings-going-virtually> [https://perma.cc/7U72-MGEN]. In a more humorous case, a lawyer’s virtual court appearance went viral when he accidentally used a cat filter to change his appearance, sparking the famous line, “I’m here live. I’m not a cat.” Lee Brown, *Lawyer-Turned-Cat in Zoom Court Hearing Wants to Cash in on Viral*

agencies to satisfy certain notice requirements to ensure that the public has access to the information necessary to attend meetings. Consequently, many states altered their notice requirements to mandate the provision of meeting URLs so individuals could attend remotely.<sup>133</sup> Several months into the pandemic, however, many online platforms began to require attendees to enter a unique meeting passcode, and dissemination of this information was not always reliable.<sup>134</sup> In Idaho, the State Department of Education held a meeting without providing the public with the passcode.<sup>135</sup> Although the Department was notified five minutes after the meeting began that the public could not access the meeting, it did not circulate the passcode until forty minutes later.<sup>136</sup> While meeting passcodes are a security feature intended to prevent “zoombombing,”<sup>137</sup> their exclusion from agencies’ posted notice of an

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*Fame*, N.Y. POST (Feb. 15, 2021, 9:01 AM), <https://nypost.com/2021/02/15/lawyer-who-appeared-in-zoom-hearing-as-cat-wants-to-cash-in/> [<https://perma.cc/UA33-2F85>].

<sup>133</sup> See *Attorney General Guidance on Executive Order No. 20-36 Coronavirus — Public Meetings Requirement Limited Waiver*, NEB. ATT’Y GEN. (Mar. 19, 2020), <https://ago.nebraska.gov/news/attorney-general-guidance-executive-order-no-20-36-coronavirus-%E2%80%94-public-meetings-requirement> [<https://perma.cc/9P4J-9QHT>] (prompting public agencies to “clearly state how the members of the public and the media may access the meeting” in the posted notice).

<sup>134</sup> *But see* JENNIE HOELSCHER, ATT’Y GEN. OF TEX., CONDUCTING VIRTUAL MEETINGS DURING THE COVID-19 EMERGENCY, <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/conference/12-10ConductingVirtualMeetings.pdf> [<https://perma.cc/V2DD-UM2N>] (“If conducting a teleconference or videoconference meeting, the meeting notice should clearly identify exactly how to access the meeting remotely, including any needed passcodes or hyperlinks.”). See generally *May 2020: Passcode and Security Settings*, ZOOM SUPPORT, <https://support.zoom.us/hc/en-us/articles/360042647952-May-2020-Updated-passcode-and-security-settings> (last updated Mar. 22, 2022) [<https://perma.cc/P3TQ-JQDT>] (“To provide additional security and privacy for Zoom meetings and webinars, we are updating our default passcode settings for all account types. Zoom will require passcodes for meetings and webinars, including previously scheduled events.”).

<sup>135</sup> Clark Corbin, *Public Blocked from First SDE Standards Review Committee Meeting*, IDAHOANS FOR OPENNESS IN GOV’T (June 29, 2020), <http://www.openidaho.org/2020/06/public-blocked-from-first-sde-standards-review-committee-meeting/> [<https://perma.cc/HH4H-8NRD>].

<sup>136</sup> *Id.*

<sup>137</sup> *Zoom Meeting and Webinar Passcodes*, ZOOM SUPPORT, <https://support.zoom.us/hc/en-us/articles/360033559832-Meeting-and-webinar-passwords> (last updated Aug. 2, 2022) [<https://perma.cc/NE6H-QFUA>] (referring to passcodes as “an added layer of security”); Dan Grabham, *Zoom Meeting Passwords Explained: Why Are They Now on By Default?*, POCKET-LINT (Dec. 15, 2021), <https://www.pocket-lint.com/apps/news/151741-why-are-zoom-meeting-passwords-now-on-by-default> [<https://perma.cc/M9MG-PNQH>] (explaining that continued instances of “zoombombing” prompted Zoom’s chief executive to issue a heartfelt apology for the



upcoming open meeting led to abuse that limited government transparency.

Some localities did not subject their residents to technical difficulties, but not because their remote meetings were problem-free; rather, they chose not to host meetings online, citing lack of funding<sup>138</sup> or limited access to high-speed Internet.<sup>139</sup> Their responses belie these justifications, though, and manifest an unwillingness to adapt to present circumstances or to prioritize the public's right to an open government.<sup>140</sup> The cost of using modern platforms to host online

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security issues and an assurance that the issues would be fixed, resulting in the creation of a default setting for meetings to require a passcode).

<sup>138</sup> R.I. Sup. Ct. Exec. Order No. 20-05, *supra* note 112 (stating that government transparency and public involvement are essential purposes, but, “for reasons of economic hardship,” allowing public bodies to post the videos or a complete transcript of the meeting following the proceedings); *see also* Meghan Friedmann & Claire Dignan, *Soulemane Lawyer Says West Haven Cops Ignored Requests for Info*, CT INSIDER, <https://www.ctinsider.com/news/nhregister/article/Soulemane-lawyer-says-West-Haven-cops-ignored-15328441.php#photo-19528281> (last updated June 10, 2020, 11:29 AM) [<https://perma.cc/H65C-4BTS>] (reporting that West Haven police failed to acknowledge an information request and that West Haven's counsel “called [the Connecticut FOIA law] an unfunded mandate” that the city could not support due to severely limited resources).

<sup>139</sup> Ted C. Fishman, *America's Next Crisis Is Already Here*, ATLANTIC (May 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/state-and-local-governments-are-plunging-crisis/611932/> [<https://perma.cc/HN5R-ZADX>] (reporting that Providence, Rhode Island Mayor Jorge Elorza stated his intent to invest in remote public meetings, but that he is “concerned less about the technology than about the equity and how we can support people without high-speed internet”; Mayor Elorza added that “[l]arger cities have the resources to use the tech better; smaller ones do not”). *But see* *City of Champaign Announces Dates for Community Listening Sessions*, CITY OF CHAMPAIGN (Sept. 10, 2020), <https://champaignil.gov/2020/09/10/city-of-champaign-announces-dates-for-community-listening-sessions/> [<https://perma.cc/58W3-ARTR>] (broadcasting town meetings on a dedicated television channel as well as via Zoom and allowing viewers to call in by telephone).

<sup>140</sup> The City of Overland, located in the suburbs of St. Louis, Missouri, announced the intention to proceed with an in-person meeting despite the COVID-19 pandemic because “the City does not have the technical capabilities to implement the [teleconferencing] alternatives in the short-term.” Letter from Hon. Michael T. Schneider, Mayor, Overland, Mo., to Ladies & Gentlemen 1 (Mar. 23, 2020), [https://www.overlandmo.org/AgendaCenter/ViewFile/Agenda/\\_03232020-367](https://www.overlandmo.org/AgendaCenter/ViewFile/Agenda/_03232020-367) [<https://perma.cc/38U5-326Y>]. The Mayor's decision to hold the City Council meeting in person came just days after a countywide stay-at-home order, putting the interests of Overland's residents at odds: meaningfully participate in community governance or heed the county's mandate to stay home to reduce risk of COVID-19 transmission. *See* St. Louis Cnty. Exec. Order No. 15 (Mar. 21, 2020), <https://stlouiscountymo.gov/st-louis-county-government/county-executive/our-work-so-far/county-executive-orders/executive-order-15/> [<https://perma.cc/57HM-U5FX>]. Eventually, Overland began posting videos of its City Council meetings and held at least one meeting via

public meetings can vary widely depending on the platform,<sup>141</sup> thereby creating the potential to put some government bodies in a bind regarding how to cover the sometimes sudden and unexpected additional costs. Alarming, a provision in Minnesota’s public records law allows an agency or governing body to charge an individual for the cost of electronic access to a public meeting when an in-person meeting “is not practical or prudent because of a health pandemic or an emergency.”<sup>142</sup> The Minnesota Legislature passed this law prior to the COVID-19 pandemic, but when states primarily hold meetings remotely the law might preclude people with limited resources from attending any and all meetings pertinent to their very lives.

Remote meetings have been plagued with connection issues and other problems that complicated the public’s ability to receive the information they were hoping for, assuming they could even find the meeting details to join remotely. Considering many states’ alteration of notice requirements, even if the public did receive that information, it was typically insufficient or incomplete. In some circumstances, the public

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teleconference, but it is unclear why these options were not made available sooner. See *Agenda Center*, OVERLAND, MO., <http://www.overlandmo.org/AgendaCenter> (last visited Sept. 22, 2022) [<https://perma.cc/4JKP-9E3W>] (listing video recording links for City Council meetings beginning June 8, 2020); Tentative Agenda, City Council Meeting, Overland, Mo. (Nov. 23, 2020, 6:00 PM), [http://www.overlandmo.org/AgendaCenter/ViewFile/Agenda/\\_11232020-408](http://www.overlandmo.org/AgendaCenter/ViewFile/Agenda/_11232020-408) [<https://perma.cc/MHE8-FWRW>] (providing audio teleconference meeting information for a City Council meeting); see also Bob Young, Reply to City of Overland, Missouri’s Post, FACEBOOK (Nov. 23, 2020), <https://www.facebook.com/OverlandMO> [<https://perma.cc/UFT9-AX4D>] (replying to another user’s report that the phone number malfunctioned by saying, “How convenient considering the questionable items on the agenda”).

<sup>141</sup> See Maggie Mayer & Claire Treu, *Virtual OC Government Meetings Come at a Price, What the Lockdown Can Teach Us*, VOICE OF OC, <https://voiceofoc.org/2020/06/virtual-oc-government-meetings-come-at-a-price-what-the-lockdown-can-teach-us/> (last updated Dec. 8, 2020) [<https://perma.cc/Z6V6-ZRQ6>] (specifying various Orange County cities’ costs for video conferencing services and reporting that the City of Newport Beach spends \$120,000 annually on such services).

<sup>142</sup> MINN. STAT. ANN. § 13D.021 (2007) (“If telephone or another electronic means is used to conduct a meeting, to the extent practical, the body shall allow a person to monitor the meeting electronically from a remote location. *The body may require the person making a connection to pay for documented marginal costs that the public body incurs as a result of the additional connection.*” (emphasis added)); see also N.C. GEN. STAT. § 143-318.13 (2020) (allowing public bodies to charge listeners “[a] fee of up to twenty-five dollars (\$25.00) . . . to defray in part the cost of providing the necessary location and equipment”). But see Frayda Bluestein, *Meetings and Public Hearings Under the Coronavirus State of Emergency*, COATES’ CANONS: NC LOC. GOV’T L. (Mar. 13, 2020), <https://canons.sog.unc.edu/meetings-and-public-hearings-under-the-coronavirus-state-of-emergency/> [<https://perma.cc/7HD2-WJ2J>] (recommending that the public bodies waive the fee during the pandemic).

did not even get the chance to muddle through the maze of finding and connecting to online meetings, because government bodies held secret meetings both inadvertently and purposefully. Restricting the public's access to meetings reduced government transparency and demonstrated a critical need for infrastructure improvement, because in many places the public does not have the Internet connection speeds that are necessary to attend meetings remotely.

### C. *Attenuated Access: Not as Simple as Clicking "Join Now"*

The inability of citizens to attend public meetings in person emphasized the need for widespread high-speed Internet access.<sup>143</sup> Individuals in low-income areas were impacted disproportionately.<sup>144</sup> In rural communities and low-income neighborhoods, high-speed Internet service may be unavailable or too expensive, "forc[ing] people into parking lots outside libraries, schools and coffee shops to find a reliable signal."<sup>145</sup> Internet companies exacerbate the problem by

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<sup>143</sup> See The Editorial Board, *Internet Disconnect: Pandemic Amplifies Broadband Access Limits*, POST-GAZETTE (May 26, 2020, 5:52 AM), <https://www.post-gazette.com/opinion/editorials/2020/05/26/Internet-access-rural-limits-pandemic-broadband/stories/202005140038> [<https://perma.cc/LB7F-SL4F>] (stating that one in four Americans does not have high-speed Internet access at home because of limited availability or the expense of the service); Joyce Winslow, *America's Digital Divide*, PEW (July 26, 2019), <https://www.pewtrusts.org/en/trust/archive/summer-2019/americas-digital-divide> [<https://perma.cc/S6M6-85M9>] (explaining that more than twenty-one million Americans still do not have access to an Internet connection).

<sup>144</sup> John Rouse, *COVID-19 Exposed the Digital Divide. Here's How We Can Close It*, WORLD ECON. F. (Jan. 27, 2021), <https://www.weforum.org/agenda/2021/01/covid-digital-divide-learning-education/> [<https://perma.cc/73RG-WBFY>] (explaining that lack of reliable Internet is a common problem for individuals in low-income or rural communities); see also John Lai & Nicole O. Widmar, *Revisiting the Digital Divide in the COVID-19 Era*, 43 APPLIED ECON. PERSPS. & POL'Y 458, 459 (2020) (arguing that the pandemic has worsened the already present digital divide).

<sup>145</sup> The Editorial Board, *Doing Schoolwork in the Parking Lot Is Not a Solution*, N.Y. TIMES (July 18, 2020, 7:42 AM EST), <https://www.nytimes.com/2020/07/18/opinion/sunday/broadband-internet-access-civil-rights.html> [<https://perma.cc/76Q8-8QZF>]; see also Boone Ashworth, *COVID-19's Impact on Libraries Goes Beyond Books*, WIRED (Mar. 25, 2020, 11:35 AM), <https://www.wired.com/story/covid-19-libraries-impact-goes-beyond-books/> [<https://perma.cc/M3C4-8AYF>] (finding that more than 3,000 libraries have closed since the pandemic began, thereby eliminating the free Internet access of disadvantaged children and seniors in rural communities). Students faced many dilemmas in completing school work remotely in the first months of the pandemic; two sisters in central Massachusetts, for example, were forced to spend three hours in a parking lot every day to complete their assignments, a pre-med student at the University of New Mexico drove forty miles several times a week to obtain reliable Internet to watch her class lectures, and a child of a low-income Latinx family in Los Angeles had to use his father's phone to do his homework,

overlooking certain localities when expanding Internet access, leading to “digital redlining” — where lower income areas remain without Internet, while wealthy neighborhoods’ Internet improves.<sup>146</sup> This process is akin to residential redlining, with its “disparate racial impact: Black Americans are less likely than white Americans to have a broadband connection at home.”<sup>147</sup>

In certain areas of the country, the number of citizens who attended open meetings actually increased during the pandemic.<sup>148</sup> But this

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putting more stress on the family’s finances after his father previously lost his construction job due to the pandemic. See Carrie Jung, *When Your Remote Classroom Is Your Car: How Some Rural Students Without Broadband Are Connecting*, WBUR (May 8, 2020), <https://www.wbur.org/edify/2020/05/08/pandemic-learning-without-internet> [<https://perma.cc/7L4X-YYEP>] (reporting that a high school principal assigned work to students that could be done without high speed Internet and delivered physical copies of homework to eighty students); Maria Elena Salinas, *Without Wi-Fi, Low-Income Latino Students Resorted to Doing Homework in Parking Lots to Access Public Hotspots*, WINK, <https://www.winknews.com/2020/07/18/without-wi-fi-low-income-latino-students-resorted-to-doing-homework-in-parking-lots-to-access-public-hotspots/> (last updated July 18, 2020, 10:54 PM EDT) [<https://perma.cc/93B9-MZ9H>].

<sup>146</sup> Olga Khazan, *America’s Terrible Internet Is Making Quarantine Worse*, ATLANTIC (Aug. 17, 2020), <https://www.theatlantic.com/technology/archive/2020/08/virtual-learning-when-you-dont-have-internet/615322/> [<https://perma.cc/EQ6U-7PC7>]; see also Miranda S. Spivack, *Digital Redlining*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE L.A. (June 6, 2021), <https://naacplosangeles.org/news/f/naacpladigital-redlining?blogcategory=News> [<https://perma.cc/87YF-9Q99>] (noting that “many broadband providers require you to pass a credit check,” which establishes a vicious cycle of oppression because the credit industry itself has “a long history of systemic racism”). During the Trump administration, the FCC failed to address the systemic inequalities with Internet access and further entrenched the disparity by deregulating Internet service providers (“ISPs”). Ernesto Falcon, *The FCC and States Must Ban Digital Redlining*, ELEC. FRONTIER FOUND. (Jan. 11, 2021), <https://www.eff.org/deeplinks/2021/01/fcc-and-states-must-ban-digital-redlining> [<https://perma.cc/65LL-JAMH>]. When cities have direct control over ISPs, that gap tends to diminish, as when New York City forced Verizon to create 500,000 more fiber connections in 2020 for low-income users. *Id.* The debate over how regulated ISPs should be has sparked interest in making the Internet a public utility — like water, electricity, education, and public transportation. Spivack, *supra*.

<sup>147</sup> Khazan, *supra* note 146. The racial divide of Internet access also exists among children, as one in three Black, Latino, and Native American students, totaling 4.7 million children, do not have high-speed Internet. Petula Dvorak, *When ‘Back to School’ Means a Parking Lot and the Hunt for a WiFi Signal*, WASH. POST (Aug. 27, 2020, 4:47 PM EDT), [https://www.washingtonpost.com/local/when-back-to-school-means-a-parking-lot-and-the-hunt-for-a-wifi-signal/2020/08/27/0f785d5a-e873-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/local/when-back-to-school-means-a-parking-lot-and-the-hunt-for-a-wifi-signal/2020/08/27/0f785d5a-e873-11ea-970a-64c73a1c2392_story.html) [<https://perma.cc/645D-K2AV>]. The cost of getting everyone on broadband and remedying the disparate racial impact found in Internet access would be roughly 80 billion dollars. *Id.*

<sup>148</sup> See, e.g., Tom Gordon, *Gordon: One Good Thing About Pandemic? Local Government’s More Open, Accessible*, BALT. SUN (Oct. 3, 2020, 6:00 AM),

coincidental increase in attendance<sup>149</sup> should not be confused with an increase in government transparency. These changes to the public meetings laws were an emergency response, not a concerted effort by states to increase turnout or enable equal access. The people who were

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<https://www.baltimoresun.com/maryland/carroll/opinion/cc-op-gordon-100320-20201003-ut57e5ars5awfn2iuxedxmimaq-story.html> [https://perma.cc/79P2-SACP] (noting that a small Maryland town's City Council meeting was live streamed 5,100 times, "far exceed[ing] the days prior to COVID-19 when one could only attend a meeting in person and might find a dozen or so citizens on average in attendance"); Sadeq Ali Kully, *For City's Public Meetings, Shift to Virtual Format Has Meant Attendance Boost — & Complications*, CITY LIMITS (Dec. 14, 2020), <https://citylimits.org/2020/12/14/for-citys-public-meetings-shift-to-virtual-format-has-meant-attendance-boost-complications/> [https://perma.cc/BWR7-5JZF] (finding that a virtual New York City Department of City Planning rezoning proposal meeting drew 200 more members than a similar in-person meeting the year before); Deanna Weniger, *Local Leaders See Rising Interest in Public Meetings Conducted Virtually*, TWINCITIES.COM, <https://www.twincities.com/2020/12/30/mn-covid-local-leaders-enjoying-surge-of-resident-feedback-during-pandemic-in-virtual-town-hall-meetings/> (last updated Dec. 31, 2020, 10:59 PM) [https://perma.cc/S2SL-Q3YB] ("Pre-COVID, attendance at Atkins' in-person [town] meetings at libraries and parks saw between four and 33 people. Since March, he's seen that number grow to 153, with an average of 76 attending."); Noah Zweifel, *State May Soon Require All Open Meetings to Be Livestreamed*, ALTAMONT ENTER. REG'L (Aug. 18, 2020, 7:03 PM), <https://altamontenterprise.com/08182020/state-may-soon-require-all-open-meetings-be-livestreamed> [https://perma.cc/SMM8-AAKC] (finding that a small New York town with a population of 10,000 had more than 1,000 people registered to watch a City Council meeting live, and the Buffalo Common Council had 18,000 people watch one of their meetings); see also Craig McDonald, *As COVID-19 Drives Licking County Governments Online, Public Participation Climbs*, NEWARK ADVOC. (Dec. 5, 2020, 5:22 AM ET), <https://www.newarkadvocate.com/story/news/local/pataskala/2020/12/05/covid-drives-local-governments-online-public-participation-climbs/3786532001/> [https://perma.cc/Z2CP-PGLK] (quoting a school superintendent who believes that a "positive of having Zoom meetings . . . [is that] you have several hundred people attending those meetings now, you have that greater transparency, and that's ultimately our goal").

<sup>149</sup> See Jane Green, *Could Public Meetings Be Better Online than They Were in Person?*, GREATER GREATER WASH. (Apr. 22, 2020), <https://ggwash.org/view/77235/government-public-meetings-input-online-equity-coronavirus> [https://perma.cc/8KYE-SAS3] (suggesting that more people from diverse backgrounds now have the opportunity to participate in government meetings, but also recognizing the increased challenges that come with virtual meetings such as lack of technology or Internet access); cf. *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 624 (W.D. La. 2020) (finding a violation of the Americans with Disabilities Act because the city council refused to allow a disabled council member to attend remotely, even though the legislature enacted a law allowing remote meetings during the COVID-19 pandemic). The uptick in attendance at public meetings in 2020 may have been influenced by the ease of clicking on a Zoom link instead of commuting to an in-person meeting, the heightened calls for social justice and civil rights reform that sparked political engagement, the various school closures and subsequent openings that prompted parents to attend more school board meetings to voice their opinion, among various other reasons.

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privileged to attend public meetings before the pandemic are the same individuals who can participate during a countrywide state of emergency, while others inherently faced great difficulties.<sup>150</sup>

In unprecedented times, such as the COVID-19 pandemic, the public's access to the inner workings of state governments and governing bodies is essential. The public deserves insight into how the agencies tasked with representing their best interests are handling the emergency. Furthermore, individuals must be able to participate actively in the decisions being made, by expressing their concerns and presenting obstacles that need to be considered. States had varied responses to the pandemic, with some embracing the change to remote public meetings, capitalizing on pre-existing statutes to foster the necessary transition, while others depended on legislatures to craft new statutes to empower adaptation.

However, several states demonstrated their inability — and for some, unwillingness — to adapt their technology and procedures for holding public meetings virtually. Moreover, many well-intentioned jurisdictions enforced statutes and operating procedures that resulted in individuals falling through the cracks: victims of “digital redlining.” Access to the Internet is a luxury that people did not have during previous global pandemics; nevertheless, the increase in technological capabilities presented a myriad of problems that need to be addressed to ensure that equitable access is maintained throughout all future national or state emergencies.

### III. PUBLIC RECORDS

Public records laws allow people to access government documents and information.<sup>151</sup> Upon request, governmental bodies must provide certain documents immediately, while other documents may be exempt from disclosure.<sup>152</sup> Typically, the individual or organization that

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<sup>150</sup> See Patrick Sisson, *Public Meetings Are Broken. Here's How to Fix Them.*, CURBED (Feb. 12, 2020, 11:30 AM EST), <https://archive.curbed.com/2020/2/12/21132190/neighborhood-development-democracy-city-council-local-meeting> [https://perma.cc/FKW5-HVWJ] (discussing the effect of holding meetings during the workday, when many may be unable to attend, effectively “exclud[ing] many groups before [the meetings] even start”).

<sup>151</sup> See, e.g., HAW. REV. STAT. § 92-1 (2022) (“[I]t is the policy of this State that the formation and conduct of public policy . . . shall be conducted as openly as possible.”).

<sup>152</sup> Compare N.Y. PUB. OFF. LAW § 84 (2022) (declaring that the public “should have access to the records of government”), with N.Y. PUB. OFF. LAW § 87(c)(2) (2022) (denoting the exceptions to public records access — for example, excluding records that “would constitute an unwarranted invasion of personal privacy” if released). State

requests the records must pay for the costs of acquiring and producing them, including fees for printing and redacting.<sup>153</sup> Fees and exemptions act as their own barriers to government transparency, but the nature and length of the COVID-19 pandemic presented novel challenges to records disclosure, and government responses to these challenges came in various forms. Some of these responses can be fairly characterized as reasonable efforts to prevent the spread of disease while striving to maintain government transparency; others, however, had profoundly negative effects on the public's ability to gain access to records.<sup>154</sup>

A. *Attempts at Normalcy: States' Reasonable Changes to Preserve Transparency*

Many states made reasonable modifications to their public records laws in light of COVID-19 and previous states of emergency. These modifications are considered reasonable for the purposes of this Article because they attempted to preserve government transparency even in the midst of a declared public health emergency that necessarily strained some government capabilities.<sup>155</sup> Some public entities did not initially follow the spirit of open records laws, but later tempered their responses to more reasonably abide by the stated purposes of the law.<sup>156</sup>

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open records laws are distinct from the Freedom of Information Act, which concerns the disclosure of federal government records. 5 U.S.C. § 552 (2018).

<sup>153</sup> See David A. Lieb, *Emails Show Businesses Held Sway Over State Reopening Plans*, AP NEWS (Aug. 23, 2020), <https://apnews.com/article/a9b056df95d41034064923612e4193d9> [<https://perma.cc/A7WU-GWYC>] (finding that the cost for producing public records was dramatically different after the same request was sent to all fifty states, with at least fifteen states providing records at no cost while a “few states wanted hundreds or thousands of dollars to supply copies of the communications that could reveal how governors were making decisions” during the pandemic); Farmer, *supra* note 15 (noting that a records request for similar information can range from \$37 in one Florida's county to \$339,000 in another because of differences in public domain laws that force counties to spend thousands of dollars blurring people out of police body camera footage).

<sup>154</sup> See Ira P. Robbins, *Explaining Florida Man*, 49 FLA. ST. U. L. REV. 1, 22-44 (2021) (reviewing variables among states' open records laws).

<sup>155</sup> See generally Off. Mo. Att'y Gen., *Sunshine Law Guidance for Responding to Public Records Requests During a Public Health Crisis or State of Emergency*, [https://ago.mo.gov/docs/default-source/press-releases/2019/sunshine-law-compliance-for-public-records-requests-2.pdf?sfvrsn=fe658167\\_2](https://ago.mo.gov/docs/default-source/press-releases/2019/sunshine-law-compliance-for-public-records-requests-2.pdf?sfvrsn=fe658167_2) [<https://perma.cc/A9F7-FD64>] (encouraging “all public governmental bodies with a website to inform the public about limited or suspended governmental operations and any delays this might cause to the processing of public records requests[,]” and requiring public governmental bodies to “[p]rovide as many updates as possible to the public on the status of fulfilling records requests”).

<sup>156</sup> See, e.g., Gregory Pratt, *Chicago Mayor Lori Lightfoot Reverses Course, Says Administration Will Fulfill Public's Open Records Requests During Ongoing*

### B. Limited Access in an Emergency: Public Records on Lockdown

Despite the good intentions of a few states, others either purposely or unwittingly made accessing records more difficult for the public. In response to the COVID-19 pandemic, some states took actions to protect their citizens — such as shutting down access to government buildings, which ultimately limited governmental openness. Other actions seem, at best, tangentially related to the safety of citizens — such as delaying deadlines to respond to requests or charging high fees to access electronic copies. In some cases, states took advantage of exceptions in their statutes to limit information about the pandemic response itself. No matter what the reason, the result was the same: limited transparency during a time when it was needed most.<sup>157</sup>

#### 1. Restricted In-Person Access to Public Records

In the context of a public health emergency involving a highly contagious disease, restricting the public from viewing records in person is a logical, safe step to prevent the spread of the disease. If restrictions go too far, however, they may needlessly inhibit public access.<sup>158</sup> Several states, counties, and municipalities completely

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*Coronavirus Disruptions*, CHI. TRIB. (Mar. 18, 2020, 7:58 PM), <https://www.chicagotribune.com/politics/ct-chicago-suspends-fulfilling-foia-requests-20200318-wfftqzyzrrdx5fgn2rgn65fu74-story.html> [https://perma.cc/XAE8-376Z] (describing Chicago Mayor Lori Lightfoot’s initial policy to automatically refuse public records requests and her reversal following an opinion from the Illinois attorney general’s office, asserting that “[p]ublic bodies should continue to comply with FOIA and respond to each request promptly”); Julia Shanahan, *Gov. Tom Wolf Will Allow Transparency Bill to Become Law Despite Veto Threat*, PHILA. INQUIRER (July 26, 2020), <https://www.inquirer.com/politics/pennsylvania/spl/tom-wolf-public-open-records-requests-unanimous-approval-20200726.html> [https://perma.cc/H2TK-Y2M3] (noting that Pennsylvania’s lack of transparency early in the pandemic resulted in the state’s legislature passing a law requiring agencies to respond to records requests during disaster situations even when physical offices are closed).

<sup>157</sup> See The Associated Press, *Pa. Among States Limiting Access to Records During COVID-19 Pandemic*, LEHIGH VALLEY LIVE, <https://www.lehighvalleylive.com/coronavirus/2020/05/pa-among-states-limiting-access-to-records-during-covid-19-pandemic.html> (last updated May 15, 2020, 8:36 AM) [https://perma.cc/6WK8-YZ7A] (quoting Pennsylvania State Representative Seth Grove as saying that “[g]overnment transparency cannot stop during times of crisis”).

<sup>158</sup> During Hurricane Katrina, many public records were inaccessible or destroyed due to massive flooding, making in-person access impossible. See Kevin McGill, *Group: Courthouse Flooded by Katrina Still Houses Evidence*, AP NEWS (May 3, 2016), <https://apnews.com/article/659230212bab45d4803a56c355870faa> [https://perma.cc/8ADR-FMYG] (stating that Hurricane Katrina’s flooding destroyed records and evidence for approximately 3,000 criminal cases). Public health emergencies like



curtailed in-person inspection of public records, while others severely limited such access.<sup>159</sup> Many localities implemented an appointment system to accommodate in-person viewing of public records;<sup>160</sup> these limitations, however, can be abused in a manner that unduly restricts the public access.<sup>161</sup>

## 2. Exploitative Fees for Online Access

Many states transitioned to providing only electronic access to documents, because the pandemic forced them to close government buildings and thus prohibited physical access to records. In certain government offices, access to public records is free when an individual physically peruses documents, but to request an actual copy the individual must pay a fee — a fee that can be exorbitant and

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COVID-19, however, present a more existential problem, limiting access to records for a span not seen in previous disasters. *See supra* notes 53–57; *see also infra* note 247 (noting that the previous record for a national public health emergency was one year).

<sup>159</sup> *See, e.g.,* Iowa Proclamation of Disaster Emergency (Apr. 10, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.04.10%20%28%29.pdf> [<https://perma.cc/8FDJ-JLC3>] (suspending the ability to inspect public records in-person while Iowa is in a state of the emergency); Pamela Aguilar, *City Clerk*, REDWOOD CITY, CAL., <http://web.archive.org/web/20210415073031/http://www.redwoodcity.org/departments/city-clerk> (last visited Apr. 20, 2021) [<https://perma.cc/S3SV-B59W>] (explaining that while the city will still try to respond in a timely manner to public records requests, there will likely be delays, as “in-person inspections and pickup of records are on hold until City Hall re-opens”); MINN. DEP’T OF ADMIN., DATA PRACTICES AND OPEN MEETING REQUIREMENTS DURING A STATE OF EMERGENCY, [https://mn.gov/admin/assets/Data%20Practices%20and%20Open%20Meeting%20Requirements%20During%20a%20State%20of%20Emergency\\_tcm36-423398.pdf](https://mn.gov/admin/assets/Data%20Practices%20and%20Open%20Meeting%20Requirements%20During%20a%20State%20of%20Emergency_tcm36-423398.pdf) (last visited Oct. 10, 2022) [<https://perma.cc/RU9E-6YEC>] (explaining that in-person access to public records may be limited, and that entities *may* — but are not required to — waive copy fees); *Public Records*, SEMINOLE CNTY. SHERIFF’S OFF., <https://www.seminolesheriff.org/page.aspx?id=38> (archived June 1, 2020) [<https://perma.cc/EDW5-J35L>] (refusing in-person access to public records prior to September 28, 2020); Balderas, *supra* note 88 (“[P]ublic entities should suspend all in-person inspection of public records during the pendency of the state of emergency. . . . [However,] IPRA all [sic] deadlines should still be satisfied.”).

<sup>160</sup> *See, e.g.,* *Clerk of Circuit Court*, CITY OF ALEXANDRIA, VA., <https://web.archive.org/web/20210303013553/https://www.alexandriava.gov/ClerkOfCircuitCourt> (last updated Feb. 16, 2021, 10:10 AM) [<https://perma.cc/H7U9-QDJ7>] (eliminating drop-in access and implementing an appointment system to view public records); *FOIL Requests*, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/administrative/document-production-foil-requests.page> (last visited Sept. 22, 2022) [<https://perma.cc/Q4X3-T56X>] (“As of July 6, 2020, the Freedom of Information Law Unit is now accepting in-person requests for records on an appointment basis only.”).

<sup>161</sup> *See infra* notes 163–64 and accompanying text.

exploitative.<sup>162</sup> For example, a journalist in Memphis, Tennessee attempted to access records of police misconduct in the police department's physical office because he was told that copies of the documents would cost \$6,000.<sup>163</sup> During his research, however, the department changed its in-person viewing policies, cutting his normal, eight-hour sessions to only three, and completely prohibiting visits on days when other journalists viewed the same documents.<sup>164</sup> Beyond Memphis, journalists, as well as the public in general, depend on free or reduced cost of records.<sup>165</sup> But when in-person records review was

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<sup>162</sup> See Brian Witte, *Coronavirus Records Request in Maryland Said to Cost Thousands*, BALT. SUN (Aug. 23, 2020, 2:34 PM), <https://www.baltimoresun.com/coronavirus/bs-md-covid-record-request-20200823-jmgm2x52pfd2hd7zy5dqhxpq54-story.html> [<https://perma.cc/C8BZ-LXMJ>] (noting that the cost to produce 5,700 documents from a records request was \$5,800); see also GOV'T RECS. COUNCIL, THE OPRA ALERT: HURRICANE SANDY'S IMPACT ON OPRA 1 (2012), [https://www.nj.gov/grc/news/alerts/OPRA%20Alert%20Vol%204%20Issue%202%20\(November%202012\).pdf](https://www.nj.gov/grc/news/alerts/OPRA%20Alert%20Vol%204%20Issue%202%20(November%202012).pdf) [<https://perma.cc/H7ZQ-AHQG>] (outlining a New Jersey provision used after Hurricane Sandy that allowed for the delayed release of records due to a special service charge placed on public records requests, while that the state was still recovering from the emergency); David Wickert, *Georgia Wants \$22,434 for COVID-19 Records, Says They'll Be Ready Next Spring*, ATLANTA J.-CONST. (Sept. 1, 2020), <https://www.ajc.com/politics/georgia-demands-22434-for-covid-19-records-says-theyll-be-ready-next-spring/LPSSDEWO3RE6NOHGIRKJOMRH2Y/> [<https://perma.cc/B96C-H96S>] (indicating that previous requests for Georgia's records, which produced a similar number of pages, cost thousands of dollars less and were produced in half the time of the request at issue).

<sup>163</sup> Deborah Fisher, *Memphis Police Limits Media Requests to View Public Records to One Journalist Per Day*, TENN. COAL. FOR OPEN GOV'T (July 9, 2020), <https://tcog.info/memphis-police-limits-media-requests-to-view-public-records-to-one-journalist-per-day/> [<https://perma.cc/AA97-EB5D>]. See generally Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/> [<https://perma.cc/45T4-CG3R>] (detailing the varying standards for police records, with almost half of the states classifying a police officer's disciplinary history as confidential and unavailable through public records requests; only twelve states provide that officers' disciplinary records should be generally available to the public).

<sup>164</sup> Fisher, *supra* note 163. At the same time that the department was charging thousands of dollars for police reports, Memphis Mayor Jim Strickland announced the launch of a new website that will eventually allow reporters to see those reports online. *Id.* The very existence of the website calls into question why such exorbitant fees would be necessary if the same documents could be made available online.

<sup>165</sup> See Ann. E. Marimow, *Federal Judiciary Is Overcharging for Access to Public Records Online, Court Says*, WASH. POST (Aug. 6, 2020, 12:00 PM EDT), [https://www.washingtonpost.com/local/legal-issues/federal-judiciary-is-overcharging-for-access-to-public-records-online-court-says/2020/08/06/3a8d7930-d7ed-11ea-aff6-220dd3a14741\\_story.html](https://www.washingtonpost.com/local/legal-issues/federal-judiciary-is-overcharging-for-access-to-public-records-online-court-says/2020/08/06/3a8d7930-d7ed-11ea-aff6-220dd3a14741_story.html) [<https://perma.cc/W9RM-WKUA>] ("If large swaths of the public cannot afford the fees required to access court records, it will diminish the public's ability 'to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.'").

severely limited, journalists had no choice but to access these records through the Internet and face the associated fees, when pre-pandemic they could have reviewed them in-person for free or requested them at a lower cost.<sup>166</sup>

### 3. Lengthened Delays of Responses to Records Requests

Accommodations for COVID-19, including changes to state open records laws, have resulted in lengthened delays in agencies' responses to public records requests, at times for several months.<sup>167</sup> Some states have delayed responses to records requests until after "the state of emergency has been lifted."<sup>168</sup> In Delaware, the governor's disaster declaration extended all current and future public records requests deadlines "until 15 business days following the termination of any

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<sup>166</sup> See, e.g., MINN. STAT. § 13.03(3)(a)-(b) (2022) (imposing a fee for electronic access to documents, while no fee is associated with in-person viewing of the same documents). Online databases charging fees for their records has been a consistent issue for journalists, especially smaller news organizations that cannot afford the costs. One example of an online records portal is Pacer, a thirty-year-old database that houses documents from the federal court system. The Editorial Board, *Public Records Belong to the Public*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/opinion/pacer-court-records.html> [<https://perma.cc/Q8LL-MREY>]. "Pacer charges 10 cents per page to view electronic court documents — or up to \$3 for documents exceeding 30 pages, which are common." *Id.* The New York Times alone regularly spends tens of thousands of dollars on Pacer just for federal court documents. *Id.* In 2016, Pacer brought in \$146 million, when it cost far less than that amount to operate. *Id.* Instead of taking the profit generated from Pacer to improve an "unwieldy" database and increase public access, it has used the money to spruce up courtroom technology with unnecessary flat-screen TVs for jurors. *Id.*

<sup>167</sup> See, e.g., *City of New Orleans Public Record Requests*, CITY OF NEW ORLEANS, <https://nola.nextrequest.com/> [<https://perma.cc/MP22-LL56>] (stating that "the City may not be able to fulfill your request at this time due to reduced staffing"); Special Statement of the Government Records Council 2020-01 from Frank F. Caruso, Exec. Dir., State of N.J. Dep't of Cmty. Affs. (Mar. 26, 2020) (quoting N.J. STAT. ANN. § 47:1A-5(i) (2022)), [https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20\(Final\).pdf](https://www.state.nj.us/grc/news/alerts/GRC%20Special%20Statement%202020-01%20(Final).pdf) [<https://perma.cc/4SHN-XDM8>] (maintaining that, under the pre-COVID statute, a state agency had seven business days to respond to a records request, while the revised statute eliminated all deadlines during states of emergency and only required the agency to "make a reasonable effort, as the circumstances permit").

<sup>168</sup> Hannah Gaskill, *Some State Agencies Pause Access to Public Information During COVID-19 Pandemic*, WTOP NEWS (May 6, 2020, 9:38 PM), <https://wtop.com/maryland/2020/05/some-state-agencies-pause-access-to-public-information-during-covid-19-pandemic/> [<https://perma.cc/2UM3-TP9D>] (describing how Maryland's "Department of Public Safety and Correctional Services and the Department of Juvenile Services have suspended the processing of all public records requests until the state of emergency has been lifted").

active Declaration of a State of Emergency.”<sup>169</sup> In response to Pennsylvania Governor Tom Wolf’s guidance on COVID-19 mitigation, the Pennsylvania Department of Transportation (“PennDOT”) closed its headquarters on March 16, 2020, and declared that public records requests will not be considered received until the building reopened.<sup>170</sup> Not only was there no in-person access to the files because the building was closed, but the Department also effectively froze access to public records because it refused to acknowledge newly submitted requests until after the office reopened.<sup>171</sup> Keeping records, as well as the public, hostage until the state of emergency has been lifted — a tactic seen not only in Delaware and Pennsylvania, but also in other jurisdictions across the country<sup>172</sup> — leaves the public with no option but to wait out the emergency, because government bodies can make records unavailable indefinitely.

In other places, residents sued governments for their failure to respond promptly to records requests in accordance with public records laws.<sup>173</sup> Following denials of public records requests in San Diego,

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<sup>169</sup> Del. Exec. Order (Mar. 22, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf> [<https://perma.cc/LMD3-3K47>]; see *supra* note 28 and accompanying text (highlighting that all states were in a state of emergency since March 2020). But see *Requests, MUCKROCK*, [https://www.muckrock.com/foi/list?q=&status=&jurisdiction=236-False&has\\_embargo=&has\\_crowdfund=&minimum\\_pages=&date\\_range\\_min=&date\\_range\\_max=&file\\_types=&sort=date\\_submitted&order=desc](https://www.muckrock.com/foi/list?q=&status=&jurisdiction=236-False&has_embargo=&has_crowdfund=&minimum_pages=&date_range_min=&date_range_max=&file_types=&sort=date_submitted&order=desc) (last visited Sept. 22, 2022) [<https://perma.cc/PDV3-76RE>] (indicating that while many Delaware FOIA requests remained pending early in the pandemic, a few requesters received responses, despite the state’s extended deadline).

<sup>170</sup> *Right to Know Law (Request Records)*, PENNDOT, <http://web.archive.org/web/20210226061211/https://www.penndot.gov/ContactUs/Pages/Right-to-Know.aspx> [<https://perma.cc/68G2-T3EV>] [hereinafter *Right to Know*]. PennDOT maintained its notice that it would not acknowledge requests until the Keystone building reopened or until at least February 26, 2021, see *id.*, even though some parts of the Keystone building reopened to the public in June 2020, then closed again in December. Tegan Simonton, *Pennsylvania’s Capitol Complex to Close for COVID Concerns*, TRIB LIVE (Dec. 3, 2020, 4:31 PM), <https://triblive.com/news/pennsylvania/pennsylvanias-capitol-complex-to-close-for-covid-concerns/> [<https://perma.cc/9USR-D88X>]. This complicated circumstance likely caused confusion about when requesters would receive even an acknowledgement of their request, much less receive the actual records.

<sup>171</sup> *Right to Know*, *supra* note 170.

<sup>172</sup> See generally *Press Freedom and Government Transparency During COVID-19*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/covid-19/> (last visited Sept. 22, 2022) [<https://perma.cc/346Z-6253>] (providing a spreadsheet listing measures taken by states, cities, and counties, in response to COVID-19, that affected public records and open meetings).

<sup>173</sup> See, e.g., Jeffrey A. Roberts, *Lawsuit: Colorado Health Department Missed CORA Deadline to Provide Requested Coronavirus Records*, COLO. FREEDOM OF INFO. COAL. (Apr.

California,<sup>174</sup> and a four-month delay surrounding local document retention policies, a local newspaper filed suit for disclosure of COVID-19 investigation information.<sup>175</sup> The lack of transparency frustrated journalists throughout San Diego, as KPBS San Diego and the San Diego Union-Tribune joined the Voice of San Diego's lawsuit against the county.<sup>176</sup> One of the main concerns was that the county's health officials had been providing only vague terms for where COVID-19 outbreaks had occurred — such as “‘bar/restaurant,’ ‘business’ or ‘social club.’”<sup>177</sup> When requesting more details, local journalists were outright denied data that, according to the news organizations, would have

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20, 2020), <https://coloradofoic.org/lawsuit-colorado-health-department-missed-cora-deadline-to-provide-requested-coronavirus-records/> [https://perma.cc/6BFV-7YYC] (reporting a requester's lawsuit after ten days had passed before he received a response, despite the Department of Health and Environment informing him that the records would be reviewed and delivered in just over twenty-four hours).

<sup>174</sup> Jeff McDonald, *San Diego County Suspends Responses to Some Public Records Act Requests Due to COVID-19 Outbreak*, SAN DIEGO UNION-TRIB. (May 10, 2020, 6:00 AM PT), <https://www.sandiegouniontribune.com/news/watchdog/story/2020-05-10/san-diego-county-suspends-responses-to-public-records-act-requests-due-to-covid-19-outbreak> [https://perma.cc/D9NF-D47D] (reporting that San Diego County officials are not fulfilling some California Public Records Act requests, while claiming that “[a]nything not COVID-related is being fulfilled”).

<sup>175</sup> Scott Lewis & Jesse Marx, *We're Suing for COVID-19 Data*, VOICE OF SAN DIEGO (Aug. 14, 2020), <https://www.voiceofsandiego.org/topics/news/were-suing-for-covid-19-data/> [https://perma.cc/Z3MX-T92K]; see also Max Blau, *Ga. Health Agency Stymies Requests for Public Records During Pandemic*, ATLANTA J.-CONST., <https://www.ajc.com/news/state—regional-govt—politics/health-agency-stymies-requests-for-public-records-during-pandemic/LfgsuGcoQz6AeyNE0ZMdtL/> (last updated July 14, 2020) [https://perma.cc/7K4U-YXDQ] (reporting that Georgia's failure to respond to public records requests is “a clear violation of the law,” according to an expert, and noting that no emergency exemption applied to public records requests).

<sup>176</sup> See Claire Trageser, *KPBS Joining Voice of San Diego in Suit Against County for COVID Outbreak Information*, KPBS (Aug. 26, 2020, 5:38 AM PDT), <https://www.kpbs.org/news/2020/aug/26/kpbs-joining-voice-san-diego-suit-against-county-c/> [https://perma.cc/BP7B-VD73]; San Diego Union-Tribune Ed. Bd., *Editorial: San Diego County Should Disclose Outbreak Specifics*, SAN DIEGO UNION-TRIB. (Aug. 20, 2020, 4:55 PM PT), <https://www.sandiegouniontribune.com/opinion/editorials/story/2020-08-20/san-diego-county-should-disclose-coronavirus-outbreak-specifics> [https://perma.cc/XNG9-3U7P] (arguing that San Diego County should release more specific information regarding outbreaks, because withholding it “denies residents basic health-risk information that can shape their decision-making”).

<sup>177</sup> Trageser, *supra* note 176; see also San Diego Union-Tribune Ed. Bd., *supra* note 176 (comparing San Diego County's unwillingness to release specific information on COVID-19 outbreaks to Los Angeles County's practice of specific disclosure, which allows residents to see patterns in virus exposure).

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provided “vital public safety information.”<sup>178</sup> The San Diego Superior Court sided with the news organizations in their request for county records of COVID-19 deaths and ordered the county to comply; the San Diego County Board of Supervisors voted to appeal the ruling.<sup>179</sup>

The complex nature of Texas’ response to public records requests in the COVID-19 era has perpetually lengthened response times, even though Texas enacted laws to respond to emergencies. The catastrophe provision of the Texas Public Meetings Act is intended to allow for flexibility during catastrophes — like Hurricane Harvey — when it is impracticable or impossible for agencies to comply with the normal provisions that govern when requests require a response.<sup>180</sup> The

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<sup>178</sup> Trageser, *supra* note 176 (reporting a San Diego County spokesperson’s comment on the lawsuit stating “the county doesn’t think outbreak locations should be public information because that could make businesses fearful about reporting outbreaks to health officials”).

<sup>179</sup> Sara Libby & Jared Whitlock, *County Officials Dig in to Keep COVID-19 Info Private*, VOICE OF SAN DIEGO (Nov. 18, 2020), <https://www.voiceofsandiego.org/topics/government/county-officials-dig-in-to-keep-covid-19-info-private/> [https://perma.cc/Z856-TT6Z]. The lawsuit hinged on a records request from the Voice of San Diego for death certificates with coronavirus as the cause or contributing cause of death for patients in long-term care facilities. Jared Whitlock, *Judge Orders County to Disclose COVID-Related Death Data*, VOICE OF SAN DIEGO (Nov. 12, 2020), <https://www.voiceofsandiego.org/topics/government/judge-orders-county-to-disclose-covid-related-death-data/> [https://perma.cc/6SMG-HTJ3]. The public records attorney for the news organizations argued that the county denied the request because the requester must provide the specified death dates and names of the deceased they wanted to view. Libby & Whitlock, *supra*. In other words, it “turns the [Public Records Act] on its head, requiring the public to know what records its government has in order to access the information in them.” *Id.* Superior Court Judge Ronald Styn stated that nothing stands in the way of the county searching through its extensive death index to properly respond to the records request. Whitlock, *supra*. He further said that the county did not establish that “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record” so as to justify withholding the records . . . .” Libby & Whitlock, *supra* (internal quotation marks omitted). When voting to appeal the Superior Court’s decision, the San Diego County Board of Supervisors had varying reasons for their decision. Two of the supervisors voted in favor of the appeal for fears of “financial scammers” having more access to death certificates, as well as “over-sharing” concerns among the senior community. *Id.* The other lawsuit focusing on COVID-19 outbreak data was less successful for the news organizations, as they lost at both the trial and appellate levels; the California Supreme Court, however, directed the appellate court to re-examine the case. *Voice of San Diego v. Superior Ct.*, No. D078415 (Cal. Ct. App. dismissed Jan. 14, 2021) (denying a petition for writ of mandamus against the Superior Court judge), *vacated*, No. S266836 (Cal. Mar. 24, 2021) (ordering the Superior Court to show cause why relief should not be granted).

<sup>180</sup> TEX. GOV’T CODE ANN. § 552.233(c) (2021). During Hurricane Harvey, government buildings holding public records were flooded in cities hit hard by the storm. Government employees rushed to move paper records to safer ground and wrapped books in plastic. Jorjanna Price, *Clerks Rushed to Reopen After Hurricane*

provision allows agencies to suspend their responses to records requests for up to fourteen business days after notifying the attorney general.<sup>181</sup> However, the Attorney General clarified that, in addition to public holidays and weekends, days of COVID-19 closure — closure due to the very catastrophe that necessitated delays — do not count as business days.<sup>182</sup> The catastrophe provision, therefore, is not implicated for the entirety of the COVID-19 pandemic and delays in fulfilling records requests can perpetually continue, leaving the public completely in the dark.<sup>183</sup>

### C. Shielding Information About Emergencies

Several government bodies cited broad exemptions and loopholes in public records laws to deny requests for COVID-19 related information.<sup>184</sup> North Dakota, for example, completely precludes

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*Harvey*, TEX. ASS'N OF CNTYS., <https://www.county.org/County-Magazine/May-June-2018/Clerks-Rushed-to-Reopen-After-Hurricane-Harvey> (last visited Sept. 22, 2022) [<https://perma.cc/7AJ7-SAG7>]. It would take weeks until clerks could return to their posts and examine the damage from the hurricane. *Id.* The documents that had been soaked were sent across state lines to a company that specializes in restoring records. *Id.*

<sup>181</sup> TEX. GOV'T CODE ANN. § 552.233(d)-(e) (2021); *see also* *Catastrophe Notices*, ATT'Y GEN. OF TEX., <https://www.texasattorneygeneral.gov/open-government/governmental-bodies/catastrophe-notice/catastrophe-notices> (last visited Sept. 22, 2022) [<https://perma.cc/Y8PY-SX5W>] (compiling catastrophe notices in Texas properly submitted to the Attorney General, including dates of applicability and reason for suspension).

<sup>182</sup> *Update: Calculation of Business Days and COVID-19*, ATT'Y GEN. OF TEX., <https://www.texasattorneygeneral.gov/open-government/governmental-bodies/catastrophe-notice/update-calculation-business-days-and-covid-19> (last visited Sept. 22, 2022) [<https://perma.cc/YDQ3-RR32>] (clarifying that COVID-19 closure includes days when the staff consist of only skeleton crews or when office personnel are working remotely).

<sup>183</sup> *See* Asher Price, *Amid Pandemic, Texas Public Records Requests Languish*, AUSTIN AM.-STATESMAN, <https://www.statesman.com/news/20200417/amid-pandemic-texas-public-records-requests-languish> (last updated Apr. 23, 2020, 1:08 PM CT) [<https://perma.cc/72QF-KGKA>] (quoting Kelly Shannon, Director of the Freedom of Information Foundation of Texas: “People have a right to know even during this crisis, and especially during this crisis . . . . [I]t’s in the public interest that as much information as possible be shared, because it helps the public understand the emergency better, understand the severity of virus, know how to protect themselves, and how to take it seriously.”).

<sup>184</sup> Despite having leeway to respond to public records requests during an emergency, some reporting suggests that the real reason for withholding this information was to avoid causing panic. *See* Emily Wagster Pettus, *Mississippi Withholds Some Health Prep Info About Virus*, AP NEWS (Apr. 2, 2020), <https://apnews.com/article/b9f61801792c0c42852cc674eb15f15f> [<https://perma.cc/2JNW-C697>]. Following a records request, state agencies in Mississippi were not providing information related to the availability of coronavirus testing kits, medical

disclosure of information pertaining to “disease control,”<sup>185</sup> Nebraska refuses publication of “information obtained by emergency management agencies,”<sup>186</sup> and New Jersey exempts disclosure of “[a]ny correspondence, records, reports and medical information” pursuant to its Emergency Health Powers Act.<sup>187</sup> These workarounds, while originally intended to protect state interests, such as privacy and national security, enable government entities to shield from the public critical emergency-related information.<sup>188</sup>

### 1. In the Name of Privacy

Some states claimed that they were not required to disclose particular records due to rules that protect confidential patient information; yet the states denied access to these records even when the data was aggregated and did not appear to violate patient privacy.<sup>189</sup> Consider the

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supplies, personal protection equipment ordered by the state, and the number of ventilators in the state. *Id.* The state health officer, Dr. Thomas Dobbs, said that “[p]eople would freak out” if they saw the number of available ventilators go up or down. *Id.*; see also Mark Kenny, *Trump Reportedly Played Down the Risk of COVID-19 to Avoid ‘Panic’. How Much Should Leaders Say, and When?*, CONVERSATION (Sept. 10, 2020, 1:26 AM EDT), <https://theconversation.com/trump-reportedly-played-down-the-risk-of-covid-19-to-avoid-panic-how-much-should-leaders-say-and-when-145919> [<https://perma.cc/K5B4-VPTV>] (discussing President Trump’s early pandemic strategy as “playing it down” to avoid “creat[ing] a panic”).

<sup>185</sup> Opinion Letter on Open Records and Meetings No. 2020-O-08 from Wayne Stenehem, Att’y Gen., Off. of N.D. Att’y Gen. to Dep’t of Health 1 (July 16, 2020), <https://attorneygeneral.nd.gov/sites/ag/files/documents/Opinions/2020/OR-OM/2020-O-08.pdf> [<https://perma.cc/W42Z-7VQD>] (stating that the Department of Health did not violate the public records law when it denied the request for COVID-19 data because the data is protected as disease control records under N.D. CENT. CODE § 23-07-20.1 (2021)).

<sup>186</sup> NEB. REV. STAT. § 81-829.41 (2022).

<sup>187</sup> See N.J. STAT. ANN. § 26:13-26 (2022); Brent Johnson, *Requests for N.J. Public Records Rejected During Coronavirus Crisis as Murphy Administration Uses Little-Known Law*, NJ ADVANCE MEDIA, <https://www.nj.com/coronavirus/2020/05/requests-for-nj-public-records-rejected-during-coronavirus-crisis-as-murphy-uses-little-known-law.html> (last updated May 18, 2020, 5:52 PM) [<https://perma.cc/AMF9-7GND>] (explaining how Governor Phil Murphy and state agencies have used the Emergency Health Powers Act to deny media requests for information about COVID-19).

<sup>188</sup> See Johnson, *supra* note 187 (“If the wording [in New Jersey’s open records law] was inappropriate, we should be changing it. People in our government should be more anxious to share information than keep it.”).

<sup>189</sup> See, e.g., Craig Harris, *Judge Rules Ducey Administration Does Not Have to Release COVID-19 Nursing Home Records*, AZCENTRAL.COM, <https://www.azcentral.com/story/news/local/arizona-health/2020/05/29/judge-rules-arizona-nursing-home-covid-19-records-private/5283835002/> (last updated May 29, 2020, 8:44 PM MT) [<https://perma.cc/PY37-J4W7>] (reporting on case holding that records showing how



situation in Utah. Pursuant to its state code, information about communicable diseases, including COVID-19, is not considered public for purposes of Utah's public records act.<sup>190</sup> In May 2020, two local Utah businesses refused to abide by CDC guidelines and even required employees who tested positive for COVID-19 to come to work.<sup>191</sup> This disregard of basic health protocols led to an outbreak that eventually resulted in sixty-eight infections.<sup>192</sup> When a local news station requested records that simply identified the names of the businesses, the Utah County Health Department denied the request, claiming that the records were exempt because they had been "obtained during an epidemiological investigation," and thus they were "strictly confidential."<sup>193</sup> These types of records are not usually excluded; the Health Department regularly names businesses when they violate health or labor laws.<sup>194</sup> The Health Department's decision to deny access to this information, in the midst of a public health emergency, caused many to worry about the underlying motives of the decision and what else the Department may have hidden.<sup>195</sup>

Utah also came under criticism in April 2020 when it failed to disclose information about an outbreak in a nursing home.<sup>196</sup> The Salt Lake

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many positive tests occurred at particular nursing homes in Arizona were confidential medical records and could not be released through open records laws, despite that the records contained aggregate data without residents' names).

<sup>190</sup> UTAH CODE ANN. § 26-6-27(1) (2022).

<sup>191</sup> Sydney Glenn, *Utah County Health Dept. Denies Public Records Request to Name Businesses Involved in COVID-19 Outbreaks*, FOX 13 SALT LAKE CITY, <https://www.fox13now.com/news/local-news/utah-county-health-dept-denies-public-records-request-to-name-businesses-involved-in-outbreaks> (last updated May 12, 2020, 5:44 PM) [<https://perma.cc/6FL9-5RWV>].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*; see UTAH CODE ANN. § 26-6-27(1) (2022).

<sup>194</sup> Glenn, *supra* note 191.

<sup>195</sup> *Id.*

<sup>196</sup> Nate Carlisle, *Half of Utah's Nursing Homes in Contact with State Have Had a COVID-19 Case and Families Don't Have to Be Notified*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/04/09/half-utahs-nursing-homes/> (last updated Apr. 9, 2020, 10:30 AM) [<https://perma.cc/TK2S-C75R>] (reporting on the lack of transparency in the early months of the pandemic, especially in the Utah nursing homes); see also Nate Carlisle, *Utah Discloses Which Long-Term Care Facilities Have Coronavirus Cases*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/05/14/utah-discloses-which-long/> (last updated May 14, 2020, 6:35 PM) [<https://perma.cc/F54N-5ZWK>] (quoting Danny Harris, the Advocacy Director of AARP Utah, as saying: "By making this information publicly available . . . the residents, staff and families of these facilities can make better, informed decisions about their health and the care of their loved ones."). Utah eventually succumbed to public pressure and disclosed the names

County Health Department refused to release the name of the first nursing home in the state with a COVID-19 outbreak, citing privacy concerns and the absence of a threat to the public: “since we have not identified a health threat to the wider public in this situation, there’s no need to compromise privacy in the interest of public health.”<sup>197</sup> The Department claimed that “there was no threat to the public” caused by the lack of disclosure, citing a balancing test that weighed public and private interests.<sup>198</sup> By this point, however, the Governor had already declared a state of emergency, indicating a heightened concern for public health.<sup>199</sup> This declaration — in addition to the fact that the outbreak had the potential for far-reaching and deadly consequences<sup>200</sup>

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of nursing homes that had active cases; it stopped short of total transparency, however, and did not disclose the actual number of cases.

<sup>197</sup> Glenn, *supra* note 191. *But see* UTAH CODE ANN. § 26-6-27(2)(g) (2022) (“[S]pecific medical or epidemiological information may be released in such a way that no individual is identifiable . . .”). Naming two businesses and a nursing home does not specifically identify any individuals with a communicable disease, and disclosing this information could have had a profound impact on preventing further infection.

<sup>198</sup> Glenn, *supra* note 191; *see* UTAH CODE ANN. § 26-6-27(2)(b) (2022); *see also* OR. REV. STAT. §§ 433.443(4)(c), 433.008(1)(a), 433.137(2) (2022) (using a balancing test for “[i]ndividually identifiable health information obtained during a public health emergency, [i]nformation obtained in the course of investigating a reportable disease or disease outbreak, [p]rivileged information presented at a quarantine hearing, [and] [r]ecord of the proceedings of a quarantine hearing”). Utah claims to undergo a balancing test when deciding whether to disclose information, weighing privacy interests of the individual against the public interests of the disclosure. In this situation, where a nursing home facility was dealing with an outbreak of a highly contagious and deadly disease, arguably the balance should have tilted in favor of disclosure — the small privacy interest of the name of the facility versus the paramount need for the public to know so they could decide how to care for their loved ones.

<sup>199</sup> Utah Exec. Order No. 2020-63 (Sept. 19, 2020), <https://rules.utah.gov/wp-content/uploads/Utah-Executive-Order-No.-2020-63.pdf> [<https://perma.cc/7BM7-XZRD>].

<sup>200</sup> Although the location of the original outbreak was not confirmed, Utah’s Department of Health stated that Pine Creek Rehabilitation and Nursing was the site of an outbreak following a positive test from a patient in late March 2020. Julie Jag, *Salt Lake City Nursing Home Will Only Take COVID-19 Patients After Six Residents, Two Staffers Got the Virus and One Died*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/04/04/utah-health-department/> (last updated Apr. 6, 2020, 6:47 PM) [<https://perma.cc/SA9P-RB7J>]. The Health Department took over the location and transitioned it into a dedicated COVID-19 care facility after several residents and two employees tested positive, forcing all uninfected residents to be transferred to other facilities. *Id.* As of May 2020, only nine states were reporting numbers of COVID-19 cases and deaths at the facility level, frustrating families and public health experts who state that “knowing where the virus is spreading is crucial to preventing future outbreaks and allocating testing kits, supplies and protective equipment.” Jo Ciavaglia, Stacey Barchenger & Matthew Leonard, *Lack of Details: States Vary on Reporting Nursing Home COVID-19 Deaths, Frustrating Families*, LOHUD,

— should have been factored into the balancing calculus and shifted the scale toward disclosure.<sup>201</sup> On the international stage, the United States stood in stark contrast to other countries that adopted more lenient disclosure policies.<sup>202</sup>

Similar to Utah, Virginia public health officials did not disclose vital information from nursing home and long-term care facilities, pursuant to a “long-standing policy” that does not require disclosure unless there is a public health reason to do so.<sup>203</sup> Despite the Virginia Governor’s public health emergency declaration on March 12, 2020, public health

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<https://www.lohud.com/story/news/politics/2020/05/05/data-withheld-how-states-vary-reporting-covid-19-nursing-home-deaths/3076352001/> (last updated May 5, 2020, 11:13 AM ET) [<https://perma.cc/4WSQ-NC45>]. Brian Lee, Executive Director of Families for Better Care, a long-term care watchdog organization, suggests that other states not fully disclosing information “are protecting the interests of the providers” and putting families and safety second. *Id.*

<sup>201</sup> Section 26-6-27 of the Utah Annotated Code appears to recognize the importance of essential information about communicable diseases during a medical emergency; nevertheless, information can only be released to “medical personnel or peace officers . . . in accordance with guidelines [the department] has established, only to the extent necessary to protect the health or life of the individual identified in the information, or of the attending medical personnel or law enforcement or public safety officers.” UTAH CODE ANN. § 26-6-27(2)(b) (2022). Redaction of identifying information was not considered or implemented, even though Section 26-6-27 recognizes that “specific medical or epidemiological information may be released in such a way that no individual is identifiable.” *Id.* § 26-6-27(2)(g).

<sup>202</sup> COVID-19 has pitted health and privacy against each other as an abundance of advanced tracking and surveillance technology has given nations’ leaders more tools to control the spread of the coronavirus. Theodore Claypoole, *COVID-19 and Data Privacy: Health vs. Privacy*, BUS. L. TODAY (Mar. 26, 2020), <https://businesslawtoday.org/2020/03/covid-19-data-privacy-health-vs-privacy/> [<https://perma.cc/AS7T-Q2EL>]. In Beijing, one of the largest search engines of the region developed an algorithm for police to identify commuters not wearing masks. *Id.* The South Korean government used a “tracking app to keep digital eyeballs on the roughly 30,000 people officials told to stay home for two weeks.” *Id.* The CDC gave government contracts to data mining companies in an attempt to scrape through social media profiles and diagram the virus spread. *Id.*; see also Peter Loftus & Rolfe Winkler, *Palantir to Help U.S. Track COVID-19 Vaccines*, WALL ST. J. (Oct. 22, 2020, 7:47 AM ET), <https://www.wsj.com/articles/palantir-to-help-u-s-track-covid-19-vaccines-11603367276> [<https://perma.cc/3G3J-KXGG>] (outlining how the same companies employed to track the pandemic at the beginning of the pandemic are being used to distribute the vaccine). The inevitable problem will be curtailing these new programs following the pandemic after Pandora’s box has been opened and its contents have intruded against the public’s privacy.

<sup>203</sup> Facilities may also consent to disclosure of this information. See Bob Lewis, *Timely COVID-19 Information Is Vital, but Va.’s State Government Is Falling Short*, VA. MERCURY (Apr. 20, 2020, 12:01 AM), <https://www.virginiamercury.com/2020/04/20/timely-covid-19-information-has-never-been-more-vital-to-the-public-yet-state-government-stymies-foia-requests/> [<https://perma.cc/LQ3R-2TW8>].

officials continued to refuse disclosure.<sup>204</sup> The Health Commissioner cited a seldom-used law that left disclosure of the names of “patients and practitioners” up to the Commissioner’s discretion. He exercised his discretion — and even took it further than excluding the names of individuals by also excluding the names of nursing facilities.<sup>205</sup> Recognizing the problems associated with this policy, the Virginia General Assembly quickly enacted a law removing the Commissioner’s ability to decide unilaterally whether to withhold information.<sup>206</sup> This law speaks directly to the need for transparency during a public health emergency, as it requires the Virginia Department of Health to make publicly available information on outbreaks during any state of emergency declared in response to a contagious disease.<sup>207</sup> The Department must include in its disclosure the name of the facility, the number of cases, and the number of deaths. The law also applies to medical care centers, residential programs, schools, summer camps, campgrounds, hotels, and restaurants, but — notably — the law does not apply to poultry plants and certain other workplaces.<sup>208</sup>

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<sup>204</sup> Va. Exec. Order No. 51 (Mar. 12, 2020), <https://www.iftach.org/bulletins/VA%20-%20EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus.pdf> [<https://perma.cc/24CC-G842>]. Virginia law compels certain facilities to report disease outbreak information “by rapid means to the local health director or [State Health] Commissioner.” VA. CODE ANN. § 32.1-37(B) (2008). Virginia public health officials refused to release that outbreak information to the public, though, citing an anonymity provision they believe applies to facilities as well as individuals. Lewis, *supra* note 203. *But see* VA. CODE ANN. § 32.1-41 (1979) (“The Commissioner . . . shall preserve the anonymity of each *patient* and *practitioner* . . . [but] may divulge the identity of such patients and practitioners if pertinent to an investigation, research or study.” (emphasis added)).

<sup>205</sup> Lewis, *supra* note 203.

<sup>206</sup> 2020 Va. Acts 1st Spec. Sess. ch. 12 (codified at VA. CODE ANN. § 32.1-37.01 (2022)); Kate Masters, *Disclosure of COVID-19 Outbreaks at Nursing Homes, Elsewhere Moves Toward Approval by Virginia Legislature*, INSIDENOVA, [https://www.insidenova.com/headlines/disclosure-of-covid-19-outbreaks-at-nursing-homes-elsewhere-moves-toward-approval-by-virginia-legislature/article\\_05cb1e16-ea3d-11ea-96bf-93b271b755d6.html](https://www.insidenova.com/headlines/disclosure-of-covid-19-outbreaks-at-nursing-homes-elsewhere-moves-toward-approval-by-virginia-legislature/article_05cb1e16-ea3d-11ea-96bf-93b271b755d6.html) (last updated Aug. 31, 2020) [<https://perma.cc/QUP9-QVKW>].

<sup>207</sup> VA. CODE ANN. § 32.1-37.01 (2020).

<sup>208</sup> Masters, *supra* note 206; Sarah Vogelsong, *Virginia Won’t Release Data on COVID-19 Outbreaks at Chicken Plants, Despite Nursing Home Reversal*, VA. MERCURY (July 9, 2020, 12:01 AM), <https://www.virginiamercury.com/2020/07/09/virginia-wont-release-data-on-covid-19-outbreaks-at-chicken-plants-despite-nursing-home-reversal/> [<https://perma.cc/96BE-G8GR>] (reporting that the compelled disclosure of information on outbreaks during a state of emergency did not extend to information provided by poultry plants, even though, by the summer of 2020, outbreaks in meat and poultry facilities in Virginia had resulted in more than 1,000 COVID-19 cases); *see also* VA. CODE ANN. § 35.1-1 (2019) (“‘Restaurant’ does not include any place

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In a similar vein, the Florida Department of Health sought to restrict the Florida Medical Examiners Commission from releasing death reports, even though they are traditionally considered public records.<sup>209</sup> The public first raised concerns when the *Tampa Bay Times* reported that there was a discrepancy in the number of deaths indicated, with the Florida Department of Health releasing figures that were ten percent lower than those released by the Medical Examiners Commission.<sup>210</sup> This led members of the community to question which information was accurate and why the Department of Health was trying to obstruct public access to the Medical Examiners information.<sup>211</sup> County medical examiners have been responsible for tracking disaster-related deaths since Hurricane Andrew in 1992 and have regularly made such information available to the public.<sup>212</sup> As COVID-19 spread through the state, however, the Florida Health Department broke with tradition and favored its own reports, shielding the Medical Examiners Commission's data.<sup>213</sup> While ensuring the accuracy of death reports and maintaining the privacy of the deceased are undoubtedly important goals, Florida's suppressive efforts undermine public trust in government.<sup>214</sup> Privacy is certainly an important factor to consider when releasing medical information — specific details about the individuals who lost their lives rarely need to be disclosed — but given how deadly the pandemic was in the United States, information such as where an outbreak occurred or number of deaths in a county is not only relevant to the public, but

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manufacturing packaged or canned foods that are distributed to grocery stores or other similar retailers for sale to the public.”).

<sup>209</sup> Kathleen McGrory & Rebecca Woolington, *Florida Medical Examiners Were Releasing Coronavirus Death Data. The State Made Them Stop.*, TAMPA BAY TIMES, <https://www.tampabay.com/news/health/2020/04/29/florida-medical-examiners-were-releasing-coronavirus-death-data-the-state-made-them-stop/> (last updated Apr. 29, 2020) [<https://perma.cc/7KLR-LTM5>].

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See* Kathleen McGrory & Rebecca Woolington, *Florida's Count of Coronavirus Deaths Is Missing Some Cases*, TAMPA BAY TIMES, <https://www.tampabay.com/news/health/2020/04/11/floridas-count-of-coronavirus-deaths-is-missing-some-cases/> (last updated Apr. 11, 2020) [<https://perma.cc/6AV3-Y64R>] (“The discrepancy underscores the difficulty in building a system to track the fast-moving disease in real time. But it also reflects choices by state health officials that could have the effect of understating the virus’ toll . . .”). The Commission’s COVID-19 death count includes any person who dies of the disease, while the Health Department includes only deaths of Florida residents. *Id.* Double-counting might be a problem, but its remedy should not come at the cost of accurately conveying the presence of a deadly disease in one’s community, whether contracted by residents or by visitors.

also imperative for combatting contagious diseases. In those situations, the scales should tip strongly in favor of prioritizing the public's need for information.<sup>215</sup>

## 2. In the Name of National Security

Another way in which states circumvented public records requests for COVID-19 information was by claiming that the requests fall under national security and infrastructure exemptions.<sup>216</sup> Infectious diseases were not originally classified as national security interests; in the late 1980s, however, the definition expanded to include public health crises.<sup>217</sup> This expansion of the scope of national security allows for greater “federal aid through military health-related operations and funding for public health research, supplies, and biosurveillance.”<sup>218</sup> At the same time, this designation can then be used to block a wider range of information — all in the name of national security.<sup>219</sup>

Iowa is one example of a state that has used a national security exemption to deny records concerning the COVID-19 pandemic. Both Iowa's Department of Public Health and its Department of Homeland Security and Management denied records requests for pandemic response plans in April 2020 by citing a broad exemption in Iowa's public records law that says that information about “physical infrastructure, cyber security, critical infrastructure, security procedures or emergency preparedness” can be denied if “disclosure could reasonably be expected to jeopardize such life or property.”<sup>220</sup> In

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<sup>215</sup> See *Iowa Is Denying the Public Access to Some Records of Its COVID-19 Response*, NAT'L FREEDOM OF INFO. COAL. (Apr. 22, 2020), <https://www.nfoic.org/blogs/iowa-denying-public-access-some-records-its-covid-19-response> [https://perma.cc/MLJ6-R8Z5] (quoting Daniel Bevarly, Executive Director of the National Freedom of Information Coalition, as saying, “[w]hen you lose transparency, you lose trust”).

<sup>216</sup> See, e.g., Bourne, *supra* note 58 (reporting on the Florida Department of Education's refusal to disclose its pandemic plan for schools because the information falls under a “security and fire safety” exemption in Florida law).

<sup>217</sup> James G. Hodge, Jr. & Kim Weidenaar, *Public Health Emergencies as Threats to National Security*, 9 J. NAT'L SEC. L. & POL'Y 81, 85 (2017).

<sup>218</sup> *Id.* at 89.

<sup>219</sup> *Id.*

<sup>220</sup> Barbara Rodriguez, *Iowa Is Denying the Public Access to Some Records of Its COVID-19 Response; ‘When you Lose Transparency, You Lose Trust,’ One Advocate Said*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/health/2020/04/20/iowa-public-health-homeland-security-agencies-deny-public-documents/5151202002/> (last updated Apr. 21, 2020, 2:07 PM CT) [https://perma.cc/L2CU-ZVR9]; see IOWA CODE § 22.7(50) (2020) (enumerating what information is considered confidential and thus exempt from disclosure); see also Nev. Exec. Order No. 2020-01 (Feb. 4, 2020), [https://gov.nv.gov/News/Executive\\_Orders/2020/Executive\\_Order\\_2020-01\\_Order\\_](https://gov.nv.gov/News/Executive_Orders/2020/Executive_Order_2020-01_Order_)

its denial, however, the two agencies failed to explain how releasing the State's response plan would jeopardize the life or property of its citizens. Several months later, a local Iowa newspaper requested information concerning COVID-19 infections in Iowa nursing homes and assisted-living centers.<sup>221</sup> In response to a public records request for 1,400 documents, the Department of Public Health did not deny the request outright, but dramatically limited the records given, releasing only three documents — one of them being a heavily redacted two-page document.<sup>222</sup> The Department gave “no legal justification” for the thirty-two redactions in the document, even though justifications are required and the news outlet bore the cost of the legal reviews.<sup>223</sup> The reason for redaction remains unclear, but the Department denied previous records requests due to infrastructure concerns.<sup>224</sup>

States' startling use of national security and terrorism concerns to justify withholding information from the public was commonplace

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Declaring\_Certain\_Public\_Safety\_Documents\_Confidential\_and\_not\_Subject\_to\_Subpoena\_Discovery\_or\_Inspection\_by\_the\_General\_Public/ [https://perma.cc/4S32-HJ5X] (deeming records related to the “specific emergency response plan” confidential and “not subject to inspection by the general public”).

<sup>221</sup> Clark Kauffman, *State Releases Heavily Redacted COVID-19 Document in Response to Record Request*, TIMES-REPUBLICAN (Sept. 12, 2020), <https://www.timesrepublican.com/news/todays-news/2020/09/state-releases-heavily-redacted-covid-19-document-in-response-to-record-request/> [https://perma.cc/54GR-KJYV].

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* The Department of Public Health charged the news outlets a fee of \$65 per hour for what they called “legal reviews” of the documents. *Id.* The legal reviews were how the Department determined which documents could be released, which needed redaction, and which to protect. *Id.* Ultimately the news outlet agreed to pay for the review of documents that the Department would release to them, but would not pay for the review of documents the Department decided to withhold. *Id.* The fee was between \$1000 and almost \$10,000, depending on the amount of documents requested. *Id.* A well-funded news agency may be able to cover this cost, but it would certainly be cost-prohibitive to many individuals and smaller, underfunded news outlets, thus further limiting transparency and unfairly restricting who has access to information.

<sup>224</sup> See Michaela Ramm, *Former Iowa Public Health Official Alleges Governor's Office Restricted Public Information on COVID-19*, GAZETTE, <https://www.thegazette.com/subject/news/health/iowa-coronavirus-data-public-health-governor-restricted-info-20200903> (last updated Sept. 3, 2020, 9:11 PM) [https://perma.cc/K9FW-NMSX] (reporting that Iowa used an Emergency Command Center (“ECC”), which classifies all emails related to COVID-19 as ECC emails, and therefore not subject to open-records requests). Interestingly, the former spokesperson for the Iowa Department of Public Health was fired in 2020 and sued her former employer, claiming that “the Governor's Office violated the state's whistle blower laws and made an effort to strictly control the flow of information regarding COVID-19 and the state's response to the pandemic.” *Id.*

during the pandemic.<sup>225</sup> While lawmakers' aims were certainly not malicious and some may even have been well-intentioned attempts to prevent disclosure of a state's potential weaknesses, the lack of transparency still adversely affected the lives of American people.<sup>226</sup> In the United States alone, the COVID-19 death toll approached 500,000 in less than a year — more than the number of Americans who died in World War I, World War II, and the Vietnam War combined.<sup>227</sup> Disseminating information plays an important role in reducing the various impacts of a disease outbreak by providing the public with information regarding rates of exposure and sites of contagion — both of which can help stop the spread and, in turn, save lives. Transparency also enables leadership to coordinate an effective response across a large and diverse population by providing evidence-based plans of action.<sup>228</sup>

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<sup>225</sup> See, e.g., Stacey Barchenger, *Murphy Administration Cites 'Terrorism' Concerns to Keep NJ Coronavirus Weak Points Secret*, NORTHJERSEY.COM, <https://www.northjersey.com/story/news/new-jersey/2020/06/16/murphy-aides-say-nj-wont-release-coronavirus-records-due-to-terrorism/5333233002/> (last updated June 16, 2020, 12:38 PM ET) [<https://perma.cc/S5HC-HEUL>] (describing New Jersey's refusal to release information about personal protective equipment shortages at medical facilities on the ground that the disclosure "could tip off terrorists to vulnerabilities"); Bourne, *supra* note 58 (discussing how a security exemption justified the Florida Department of Education's refusal to release its pandemic plan for schools); cf. Matthew Collette, *The Legally Troubling Treatment of COVID-19 Meetings as Classified*, JUST SEC. (Mar. 17, 2020), <https://www.justsecurity.org/69237/the-legally-troubling-treatment-of-covid-19-meetings-as-classified/> [<https://perma.cc/FRR7-K3ZW>] (noting that the Trump Administration rejected a FOIA request regarding a COVID-19 strategy meeting with the Department of Health and Human Services ("HHS") to protect national security, even though, according to a former HHS official, "it's not normal to classify discussions about a response to a public health crisis").

<sup>226</sup> Professor Lisa Grow Sun argues that allowing the "melding" of natural disasters with war-time emergencies in transparency law is an "abandon[ment of the] democratic obligations of openness . . . [that] robs individuals of potentially crucial information at a time when information may be most necessary and valuable." Sun & Jones, *supra* note 58, at 887.

<sup>227</sup> Julie Bosman, *A Ripple Effect of Loss: U.S. Covid Deaths Approach 500,000*, N.Y. TIMES (Feb. 21, 2021, 3:00 AM EST), <https://www.nytimes.com/2021/02/21/us/coronavirus-deaths-us-half-a-million.html> [<https://perma.cc/BD22-ZBCR>].

<sup>228</sup> See Kuala Lumpur, *WHO Global Conference on Severe Acute Respiratory Syndrome (SARS)*, WHO (June 17-18, 2003), [https://web.archive.org/web/20030820204548/https://www.who.int/csr/sars/conference/june\\_2003/materials/report/en/](https://web.archive.org/web/20030820204548/https://www.who.int/csr/sars/conference/june_2003/materials/report/en/) [<https://perma.cc/W5K6-NDSQ>] ("Communication of information to the general public and the media was singled out as another component of an effective response. Information should be communicated in a transparent, accurate, and timely manner. SARS had demonstrated the need for better risk communication as a component of outbreak control and a strategy for reducing health, economic, and psychosocial impact of major infectious disease events."); see also Hodge Jr. & Weidenaar, *supra* note 217, at 82 (discussing how classification of public health emergencies as national security events in the United



Irrespective of the compelling reasons favoring disclosure, information relating to a disease outbreak should presumptively be made available, as it is directly relevant to individuals' daily health and welfare. A more committed approach to transparency and disclosure during the initial weeks and months of the pandemic could have reduced its grave impact and saved lives.

#### D. Keeping Families in the Dark

The COVID-19 crisis enabled suspensions of normally stringent rules and regulations, including public records laws, resulting in an overall lack of transparency. The public's limited access to records extended beyond state emergency preparedness plans to encompass all agency records. In 2020, in addition to grappling with the pandemic, America faced what many have called a "racial reckoning" during a summer of protests against police violence.<sup>229</sup> Against this backdrop, police departments still chose to delay and deny records requests made in response to instances of police violence, broadly preventing in-person review due to COVID-19 restrictions.<sup>230</sup> Such restrictions have had serious social as well as practical consequences for families of individuals shot by police.<sup>231</sup> The City of Rochester, New York delayed

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States ultimately "alter[s] how federal, state, and local governments respond legally to public health crises").

<sup>229</sup> See John Eligon & Audra D. S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html?auth=login-google> [https://perma.cc/U5LU-YMTD] (describing the cultural and social landscape that the United States was navigating in the summer of 2020 as it considered the effects of deep systemic racism throughout the country).

<sup>230</sup> See Fisher, *supra* note 163 and accompanying text (finding that a Memphis police department restricted review of their records).

<sup>231</sup> Families struck with tragedy brought about by police violence face a harsh reality when attempting to obtain evidence of law enforcement misconduct. See, e.g., Friedmann & Dignan, *supra* note 138 (discussing the difficulties of obtaining records from an underfunded police department). The release of officers' body camera footage comes with exorbitant redaction fees that have made them "completely inaccessible to the public." Maura Dolan, *California's Top Court Limits What Government May Charge for Public Records*, L.A. TIMES, <https://www.latimes.com/california/story/2020-05-28/public-records-redaction-fees-california-supreme-court> (last updated May 28, 2020, 3:43 PM PT) [https://perma.cc/8YHB-WWKW]; see, e.g., Farmer, *supra* note 15 (highlighting the extreme cost of body camera footage). Prohibitive costs for body camera footage are not restricted to California; Nevada's fees cannot exceed the "actual cost" of production and are not supposed to include the employee's salary, even though the fees for police videos have dramatically risen due to a media analyst's rate increasing by \$100 per hour. Ed Komenda, *Las Vegas Police Plan \$280 an Hour Fee for Body Cam Footage. Critics Say that Violates Law*, RENO GAZETTE J., <https://www.rgj.com/>

fulfilling a records request after the death of Daniel Prude, a Black man who was killed while in police custody.<sup>232</sup> In September 2020, the lawyer for Mr. Prude's family filed a petition against the City of Rochester, alleging that the city withheld information about Prude's arrest and death in violation of New York's Freedom of Information Law ("FOIL") requirements.<sup>233</sup> The police department cited "hospital privacy laws [and] . . . an overworked employee's backlog in processing videos" as the reasons for delay.<sup>234</sup> Even though some police incidents, including Daniel Prude's case, may not be directly related to COVID-19, they illustrate the pandemic's impact on government transparency and everyday public records requests. While the police did not cite the pandemic directly, their efforts to suppress this information flourished during the state of emergency as a result of strained resources and strict in-person protocols.<sup>235</sup>

Public access to government records is an integral part of ensuring the transparency and accountability of government actions.<sup>236</sup> Without

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story/news/2020/06/24/las-vegas-police-charge-280-per-hour-body-cam-footage/3250074001/ (last updated June 24, 2020, 1:35 PM PT) [<https://perma.cc/UM2E-U2T7>]. *But see* Nat'l L. Guild v. City of Hayward, 464 P.3d 594, 608 (Cal. 2020) (holding that agencies may not charge requesters for the cost of redacting electronic information from public records).

<sup>232</sup> Jonathan Hunter, *Daniel Prude's Family Lawyer Sues the City of Rochester Over FOIL Requests*, SPECTRUM NEWS (Sept. 21, 2020, 8:45 PM ET), <https://spectrumlocalnews.com/nys/rochester/community/2020/09/22/prude-s-family-lawyer-sues-the-city-over-foil-requests-> [<https://perma.cc/6UKT-PFPM>].

<sup>233</sup> *Id.* See generally Brianna Hamblin, *Mayor Warren Releases Preview of Rochester's Police Reform Plan*, SPECTRUM NEWS, <https://spectrumlocalnews.com/nys/rochester/public-safety/2021/02/03/city-of-rochester-presenting-first-draft-of-police-reform-plans-thursday> (last updated Feb. 4, 2021, 2:45 PM ET) [<https://perma.cc/Y6D3-CCCQ>] (highlighting Rochester's Police Reform Plan, which — in addition to new transparency initiatives — includes a reduction in police personnel, and support for "Daniel's Law, which would increase funding towards having social workers and mental health professionals be the first to respond to calls instead of police").

<sup>234</sup> Michael Wilson & Edgar Sandoval, *Documents Reveal How the Police Kept Daniel Prude's Death Quiet*, N.Y. TIMES, <https://www.nytimes.com/2020/09/15/nyregion/rochester-police-daniel-prude.html> (last updated Oct. 8, 2020) [<https://perma.cc/GYS7-KRXQ>].

<sup>235</sup> See *supra* notes 158–64 and accompanying text (describing the difficulty of viewing records in person during the pandemic).

<sup>236</sup> See, e.g., Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020, 9:01 AM EDT), [https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a\\_story.html](https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html) [<https://perma.cc/FW7M-R4F9>] (describing how FOIA requests led to criminal murder charges, showed that government officials believed that the war in Afghanistan was unwinnable, and disclosed that some minority communities' COVID-19 infection rates

this open access to government files, information — such as how the government spends taxpayer dollars,<sup>237</sup> the actions of the police,<sup>238</sup> and the strategies for combating the pandemic<sup>239</sup> — is hidden from the public. Nursing and hospital facilities kept patients, their families, and the public at large in the dark about the gravity of the situation.<sup>240</sup> Especially alarming is how these facilities failed to release their high rates of COVID-19 transmission under the pretense of protecting their residents' privacy and shielding them from any stigma associated with the disease, while the real reasons behind their actions were the preservation of their reputation and economic stability.<sup>241</sup> The stigma

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were nearly three times that of their white neighbors). “[P]ublic-records laws are, in many instances, the only legal mechanism for the public to pry information out from the government.” *Id.*

<sup>237</sup> Jacob Ryan, *Louisville Officials Won't Release Spending Records Amid Pandemic*, WFPL (Apr. 7, 2020), <https://wfpl.org/kycir-louisville-officials-wont-release-spending-records-amid-pandemic/> [<https://perma.cc/C985-W68V>] (“Louisville Metro Government officials are refusing to disclose documentation that would show how public money is being spent during the COVID-19 pandemic.”).

<sup>238</sup> See *supra* notes 231–34 and accompanying text.

<sup>239</sup> See *supra* Section III.C.1.

<sup>240</sup> See, e.g., Bill Hammond, *The Health Department Stalls a FOIL Request for the Full COVID Death Toll in Nursing Homes*, EMPIRE CTR. (Sept. 1, 2020), <https://www.empirecenter.org/publications/the-health-department-stalls-a-foil/> [<https://perma.cc/HR9L-E8SP>] (stating that the New York Health Department had delayed releasing information about COVID-19-related deaths in nursing homes, claiming “diligent search” as the reason for the delay). See generally Dena Bunis, *Nursing Homes Ordered to Disclose COVID-19 Cases, Deaths*, AARP (May 7, 2020), <https://www.aarp.org/caregiving/health/info-2020/nursing-homes-to-publicly-disclose-coronavirus.html> [<https://perma.cc/5ZRX-4T79>] (quoting Bill Sweeney, AARP Senior Vice President for Government Affairs, saying that “[c]are facilities are ground zero in the fight against the coronavirus, representing a shockingly high share of deaths,” and that “the reporting of facility names with confirmed COVID-19 cases needs to be made public and happen daily [because f]amilies have a right to know what is happening to their loved ones”).

<sup>241</sup> See Caitlin McGlade, *Arizona: Revealing Nursing Homes with COVID-19 Outbreaks Would Hurt Businesses*, AZCENTRAL.COM, <https://www.azcentral.com/story/news/local/arizona-health/2020/05/15/arizona-disclosing-nursing-homes-have-covid-19-would-hurt-business/5203600002/> (last updated May 15, 2020, 10:55 PM MT), [<https://perma.cc/T5JB-H4WX>] (justifying its lack of disclosure, the Arizona Department of Health Services claimed that releasing the names of nursing homes would hurt the businesses, as bad publicity could surround the facilities and affect staffing, as facilities have difficulty retaining employees, and stating that disclosure “could also harm ‘possibly even their residents’ because the stigma could interfere with care”); see also Clark Kauffman, *Iowa Agency Keeps Secret the Number of COVID-19 Staff Deaths in Nursing Homes*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/health/2020/10/05/iowa-agency-keeps-secret-number-covid-19-staff-deaths-nursing-homes/3627565001/> (last updated Oct. 5, 2020, 9:37 PM CT), [<https://perma.cc/PBN9-6P62>] (stating that “[t]he nursing home industry may not want

from a disease that infected tens of millions of Americans<sup>242</sup> should never affect the care that patients receive, nor should it justify withholding information that enables prudent decision-making regarding health care.<sup>243</sup> The non-disclosure of important COVID-19 information protects nursing homes from being held accountable and strips residents and families of their ability “to make informed health decisions during an unprecedented time.”<sup>244</sup> Furthermore, state

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the number of positive cases or deaths of nursing home workers to be part of the news because it can make it even more challenging to recruit and retain workers,” but that “knowing how many nursing home workers have become infected, hospitalized, or even died from COVID-19, would help to inform the state’s mitigation efforts”). At the Regency Care of Silver Spring facility, a Maryland nursing home, residents discovered their facility had numerous COVID-19 cases through Channel 7 News and not through the facility’s staff. Kevin Lewis, *Maryland Dept. of Health Pressures Counties to Stop Releasing Nursing Home COVID-19 Data*, ABC 7 NEWS: ON YOUR SIDE (Apr. 25, 2020), <https://wjla.com/news/local/maryland-dept-of-health-pressures-counties-to-stop-releasing-nursing-home-covid-19-data> [https://perma.cc/KB2Y-ZS9J] (reporting nine resident deaths and forty-eight hospitalizations among residents and staff at the Regency Care facility). The Maryland Department of Health “expects all nursing home operators to divulge COVID cases to its residents,” but claims that COVID-19 data from nursing homes “serves no public health purpose.” *Id.* A resident at the Regency Care facility remarked that Regency Care has “been on Facebook talking about their five-star nursing facility[;] however, they never mentioned the COVID-19.” *Id.*

<sup>242</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated July 24, 2022) [https://perma.cc/VSP8-AUDM].

<sup>243</sup> See *Reducing Stigma*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html> (last updated July 22, 2021) [https://perma.cc/KMJ3-MNMT] (“Community leaders and public health officials can help prevent stigma by: . . . [q]uickly communicating the risk, or lack of risk, from contact with products, people, and places.”); WHO, SOCIAL STIGMA ASSOCIATED WITH COVID-19, at 3-4 (2020), <https://www.who.int/docs/default-source/coronaviruse/covid19-stigma-guide.pdf> [https://perma.cc/KR4P-7PXY] (encouraging “[s]preading the facts” about affected communities and areas to counteract stigmatizing attitudes arising out of the concurrent “infodemic” of misinformation and rumors about COVID-19).

<sup>244</sup> Harris, *supra* note 189. Knowledge of which facilities were hit first and hardest can allow the public to be better informed about which communities were at greatest risk, especially since one-third of all early COVID-19 deaths were nursing home residents and staff. Karen Yourish, K.K. Rebecca Lai, Danielle Ivory & Mitch Smith, *One-Third of All U.S. Coronavirus Deaths are Nursing Home Residents or Workers*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html> (last updated May 11, 2020) [https://perma.cc/8P2Z-2RZ8]. Having increased information about care facilities’ responses to COVID-19 can help families make important decisions about where to place loved ones. A study on West Virginia nursing homes found that facilities “located in counties with high incidences of COVID-19 and those with 1-star ratings have a higher risk of experiencing COVID-19 outbreaks.” David P. Bui, Isaac See, Elisabeth M. Hesse, Kate Varela, R. Reid Harvey,

epidemiologists have shown that releasing the names of care facilities that were hotspots for COVID-19 is “necessary for the protection of the health of the public.”<sup>245</sup>

COVID-19 forced a myriad of changes to public records procedures in order to mitigate the spread of the disease. While these changes are understandable in one sense, their outsized impact on government transparency frustrates the very purpose that public records laws are intended to serve. Government entities restricted or entirely curtailed in-person access to public records. Some enabled or maintained electronic alternatives, but these avenues, which often require purchasing copies, may be cost-prohibitive. Strained resources also led to significant delays, and disclosure exceptions — such as privacy, public health, and national security — justified lack of disclosure entirely. The COVID-19 pandemic illustrates that states should recommit to government transparency during emergencies by enacting laws and promoting policies that will withstand inevitably strained resources and increased demands during a public health crisis.

#### IV. RECOMMENDATIONS

A primary reason that many states fell short in ensuring a transparent government through public meetings and records laws during the COVID-19 pandemic is that relevant statutes and guidelines left officials largely unprepared to face a challenge of this magnitude. The last time an emergency of this scale occurred was in 1918, before many public meetings and public records laws were enacted.<sup>246</sup> In light of a global

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Euna M. August, Andrea Winquist, Samantha Mullins, Shannon McBee, Erica Thomasson & Amy Atkins, *Association Between CMS Quality Ratings and COVID-19 Outbreaks in Nursing Homes — West Virginia, March 17–June 11, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1300, 1301 (2020).

<sup>245</sup> Iowa Dep’t of Just., Off. of the Att’y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic*, [https://www.iowaattorneygeneral.gov/media/cms/covidlegalFAQ\\_6\\_BA489C544A3EE.pdf](https://www.iowaattorneygeneral.gov/media/cms/covidlegalFAQ_6_BA489C544A3EE.pdf) (last updated June 3, 2020) [<https://perma.cc/9Z3G-SB98>]; see also Caroline Linton, *Cuomo Admits “Mistake” in Withholding Nursing Home Deaths*, CBS NEWS (Feb. 16, 2021, 7:22 AM), <https://www.cbsnews.com/news/cuomo-nursing-home-deaths-withholding-data-new-york/> [<https://perma.cc/75XT-6J35>] (explaining New York Governor Andrew Cuomo’s regret in not providing accurate nursing home death totals because, as top aides admitted, they were concerned that the numbers were “going to be used against us”).

<sup>246</sup> See Douglas E. Lee, *Open Meetings*, FREEDOM F. INST. (Sept. 13, 2002), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/freedom-of-information-overview/open-meetings/#:~:text=Although%20a%20few%20states%20began,open%20until%20the%20mid%2D1970s> [<https://perma.cc/NQ6K-JZ8Q>] (“Although a few states began enacting open-meetings laws as early as 1898, most states did not guarantee access to public meetings until the mid-20th century.”);

pandemic that has affected millions of Americans, outdated statutes that did not contemplate a more-than-year-long state of emergency need to be updated.<sup>247</sup>

The country has experienced what happens when states do not have a clear plan and leave the pandemic strategy to the mercy of governors' broad discretion.<sup>248</sup> To avoid another improvised response to a global catastrophe, there needs to be a blueprint in place — a law that reflects the commitment to government transparency in a pandemic.<sup>249</sup> The following Model Statute provides a good starting point.

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*Years that State FOIA Laws Were Enacted*, BALLOTPEDIA, [https://ballotpedia.org/Years\\_that\\_state\\_FOIA\\_laws\\_were\\_enacted](https://ballotpedia.org/Years_that_state_FOIA_laws_were_enacted) (last visited Sept. 22, 2022) [<https://perma.cc/BPU5-YASP>] (noting that only four states had enacted open records laws before 1918). The 1918 influenza pandemic had many similarities to the 2020 pandemic — including disagreement as to precisely where the virus originated — but was far deadlier, with 500 million infections resulting in 50 million deaths worldwide. *1918 Pandemic*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last updated Mar. 20, 2019) [<https://perma.cc/KJ7Y-7736>].

<sup>247</sup> Although the longest ongoing national emergency was issued by President Jimmy Carter in 1979 in response to the Iran hostage crisis, the longest public health national emergency before COVID-19 was in response to the 2009 H1N1 swine flu pandemic and lasted one year. See Gregory Korte, *Special Report: America's Perpetual State of Emergency*, USA TODAY, <https://www.usatoday.com/story/news/politics/2014/10/22/president-obama-states-of-emergency/16851775/> (last updated Oct. 23, 2014, 9:11 AM ET) [<https://perma.cc/QC2M-BA3L>].

<sup>248</sup> Governors have used their discretion to delegate authority to agencies to essentially govern themselves during times of emergency. See *supra* note 39 and accompanying text.

<sup>249</sup> Some states were better equipped to transition to virtual meetings and hands-off viewing of records to supplement existing laws that do not fully address the problem. See, e.g., Bennett Leckrone, *Bill Would Require State Agencies, Local Boards of Elections to Live-Stream Meetings*, MD. MATTERS (Feb. 3, 2021), <https://www.marylandmatters.org/2021/02/03/bill-would-require-state-agencies-local-boards-of-elections-to-live-stream-meetings/> [<https://perma.cc/Z9CV-2P67>] (outlining Maryland State Senator Cheryl Kagan's proposed bill that would require executive branch agencies and local boards of elections to live stream meetings, "post all of their meeting materials and agendas online at least 48 hours before each open meeting, and allow public access to archived meeting recordings and minutes"); John Whittaker, *State Senator Wants Meetings Live Streamed*, POST-J. (Aug. 10, 2020), <https://www.post-journal.com/news/page-one/2020/08/state-senator-wants-meetings-live-streamed/> [<https://perma.cc/W65K-M3BZ>] (describing a proposed public meetings bill by New York State Senator Anna Kaplan that would require every local government to stream all open meetings on its website in real time, upload those streams permanently on its site within five days, and keep them available for at least five years).

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A. *Model Statute*

- (1) PURPOSE. The purpose of this law is to ensure that modifications to public records and public meetings laws pursuant to a declared state of emergency do not unduly restrict public access to information.
- (2) APPLICABILITY. The Sections of this law apply for the duration of a declared state of emergency that is actively affecting public access. The law applies to all levels of state and local government agencies, as defined in Section (3).
- (3) DEFINITIONS.
  - (a) “Emergency” and its proper classification shall be determined by the applicable state’s definition.
  - (b) “Meeting” means any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business. Executive sessions as defined in applicable provisions shall not be subject to the requirements of this Act.
  - (c) “Public Body” and its proper classification shall be determined by the applicable state’s definition.
  - (d) “Public record” or “public records” shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any public body.
  - (e) “Teleconference” or “telemeeting” means information exchanged by any audio, video, or electronic medium, including the Internet. This Section does not prohibit a state body from providing members of the public with additional locations in which the public may observe or address the state body by electronic means, through either audio or both audio and video.
- (4) PUBLIC MEETINGS.

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- (a) Upon declaration of a state of emergency, whose character limits agencies' ability to host public meetings in person to the satisfaction of its public meetings provisions, all public bodies subject to these provisions shall:
- (i) Allow quorum requirements to be satisfied by members participating via audio or video teleconference.
  - (ii) Enable any interested member of the public to hear all discussions and participate therein. This provision may be satisfied by televising meetings on a local news channel or streaming meetings live via the Internet, subject to the requirements of Subsection (iv). Public agencies should not utilize meeting software that imposes a cap on the number of participants.
  - (iii) Post adequate notice of meetings, including the means for accessing a meeting, on a website that is regularly updated at least seven days in advance of the meeting.
  - (iv) Enable members of the public to submit comments before meetings convene, during meetings, and after adjournment of meetings. Comments submitted prior to a meeting must be read into the record. Comments received during meetings shall be received either in-person or via telecommunication software, allowing the individuals sufficient time to voice their comments in the chosen platform. Neither the allowance of comments to be submitted prior to or after meetings shall be a substitute for the requirement that members of the public be able to submit and make comments while the meeting is convened.
  - (v) Temporarily adjourn or postpone any meeting that becomes inaccessible through technical difficulties or other extenuating circumstances until access is restored. Any action taken by a public body without public access shall be void, notwithstanding members' lack of knowledge of inaccessibility.
  - (vi) Post comprehensive meeting notes and an audio or video recording of the meeting within forty-eight hours of the meeting on an accessible website that is regularly updated.



- (vii) Ensure that all meetings discussing emergency preparedness plans and the states' responses to the present emergency are open to the public, subject to the above provisions.

(5) PUBLIC RECORDS.

- (a) When a public emergency restricts access to public records in agency buildings and/or resources are diverted from agencies to mitigate the emergency such that government offices are unable to respond to public records requests in the required time frame, agencies shall:
  - (i) Provide as many updates as possible to the public on the status of fulfilling records requests, including posting the following on an accessible webpage:
    - 1) The estimated delay in records processing, subject to Subsection (iii).
    - 2) The date on which records requested will be considered submitted, i.e., the date of request or the date of receipt.
    - 3) The stated reason for delays in processing with reference to the present emergency and the relevant statutory provisions allowing for such delays.
  - (ii) Charge fees for electronic copies that shall be no greater than fees for viewing records in person, including records that the public ordinarily can view at an agency's office. This provision is applicable only when there is no in-person availability.
  - (iii) Extend any delays in fulfilling public records requests only as reasonably necessary to accommodate restricted resources stemming from the ongoing emergency. Any delay shall be determined on a case-by-case basis, and in no event shall be extended past the end of the present state of emergency.
  - (iv) Allow individuals to access documents in physical offices, as practicable, so long as the offices are open and proper health and safety requirements are met.
- (b) Upon declaration of an emergency by the Governor pursuant to relevant public health and emergency provisions in response to

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a communicable disease that threatens the public health, public agencies shall:

- (i) Make information regarding outbreaks of such communicable disease available to the public on a website maintained by the state, provided that the release of such information does not violate the provisions of the privacy requirements of the communicable disease reporting provisions. Such information shall include:
    - 1) The name of the reporting entity at which an outbreak of such communicable disease that threatens the public health has been reported;
    - 2) The number of confirmed cases of such communicable disease that threatens the public health reported by such reporting entity; and
    - 3) The number of deaths resulting from such communicable disease that threatens the public health by such reporting entity.
  - (c) During a declared state of emergency, the state should provide mechanisms for agencies to deliver documents online.
- (6) GUBERNATORIAL POWERS.
- (a) The Governor's powers pursuant to applicable state of emergency statutes cannot suspend or amend these provisions.
  - (b) Any amendments or revisions to open meetings and public records laws by the Governor should be approved by the state legislature after an initial thirty-day period.

### *B. Commentary*

1. Definitions — The definitions in Section (3) are adapted from various state statutes. These definitions are intended to provide minimum requirements and should supplant existing state provisions when a state's definition is more narrowly defined. In particular, the definition of "meetings" under Subsection (b) is derived from the Illinois statute defining meetings.<sup>250</sup> The definition of "public records" is derived from North Carolina's definition of meetings.<sup>251</sup> The

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<sup>250</sup> See 5 ILL. COMP. STAT. ANN. 120/1.02 (2022).

<sup>251</sup> See N.C. GEN. STAT. ANN. § 132-1 (2022).

definition of “teleconference” is derived from California and South Dakota law.<sup>252</sup>

The definitions of several relevant terms are not included in Section (3) because they are better left to state discretion and such terms have been previously defined without significant issue. For example, the term “state of emergency” has historically been defined by individual states to be as broad or narrow as they see fit; thus, this Model Statute will work in tandem with states’ current policies and understanding of what warrants a “state of emergency” declaration. Also excluded is the term “public body.” This term is regularly defined in state current public records and public meetings statutes. States’ definitions of these terms have not directly affected the public’s access to information; most are straightforward and similar in construction, and do not need to change in times of emergency.

2. Public Meetings — Requirements for public meetings held remotely are derived from state legislative and executive action taken in the emergent months of the COVID-19 pandemic. Section 4(a)(i) is developed from an Illinois provision passed in mid-2020.<sup>253</sup> Subsection 4(a)(iv) is derived from a New Mexico Attorney General advisory opinion providing guidance on how to proceed in the event that a time-sensitive matter must be addressed, but an in-person meeting would be imprudent.<sup>254</sup> Section 4(v), derived from the same advisory opinion, requires the temporary adjournment or postponement of meetings that become inaccessible due to technical difficulties. This provision encompasses both unintended and malicious technical idiosyncrasies, such as when a meeting passcode is not properly circulated prior to a meeting, when any number of participants are unable to comment via the designated methods of communication, and when participants are unable to reconvene in the public forum after a private deliberation is held.

3. Public Records — The obligations outlined in Section (5) reflect the need to reduce public agencies’ discretion in fulfilling public records requests. The language from Section 5(a)(i) comes directly from a press release by Missouri’s attorney general.<sup>255</sup> Section 5(a)(ii) requires fees for electronic records to be no greater than any in-person fees, because printing costs are unjustified in the delivery of electronic records. Section 5(b) adopts the provision of a Virginia law requiring the

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<sup>252</sup> See CAL. GOV’T CODE § 11123(b)(2) (2022); S.D. CODIFIED LAWS § 1-25-12 (2022).

<sup>253</sup> See 5 ILL. COMP. STAT. ANN. 120/7(e) (2022).

<sup>254</sup> See Balderas, *supra* note 88.

<sup>255</sup> See OFF. MO. ATT’Y GEN., *supra* note 155.

Department of Health to make information concerning outbreaks of a contagious disease during a declared state of emergency publicly available.<sup>256</sup>

#### CONCLUSION

The COVID-19 pandemic exposed weaknesses in government openness, as many states' emergency preparedness plans made open meetings and records an afterthought and, even worse, a tool to manipulate the narrative of the response to the pandemic. Ensuring transparency in the future will require a push to keep technology updated to view records and meetings from home, enforce increased openness for the emergency information that directly affects people's health and safety, and promote a more democratic process overall.<sup>257</sup>

Consistent and open access to public records is a backbone of democratic governance. The ability to discover the inner workings of government conduct and properly inform the voting public are, according to the United States Supreme Court, essential in promoting "the free discussion of governmental affairs."<sup>258</sup> In times of crisis, transparency becomes even more important; the public relies on government for prompt and accurate information that can have profound impact on individuals' and communities' health and well-being. "The fact that a government decision involves public health and safety is a reason for more, not less, transparency."<sup>259</sup>

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<sup>256</sup> See VA. CODE ANN. § 32.1-37.01 (2022).

<sup>257</sup> Indeed, when the Montgomery County, Maryland County Council returned to in-person meetings after two years of remote meetings, Council President Gabe Albornoz said, "One of the things we have learned during the pandemic is that giving our residents the opportunity [to] participate in the legislative process remotely has expanded the diversity of views expressed on essential public policy issues and has greatly increased participation." Colleen Martin, *MOCO's Council Returning to In-Person Meetings Next Week*, PATCH (Mar. 9, 2022, 12:50 PM ET), <https://patch.com/maryland/rockville/mocos-council-returning-person-meetings-next-week> [<https://perma.cc/296Z-2XEU>]. Albornoz added, "Maintaining the option to testify remotely at Council public hearings allows us to hear from residents who may otherwise not be able to join an in-person meeting because of job responsibilities, childcare concerns or mobility issues." *Id.*

<sup>258</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>259</sup> AFP, *AFPF Joins More than 100 Other Public Interest, Civil Liberty, and Open Government Organizations to Encourage Transparency*, AMS. FOR PROSPERITY (Mar. 20, 2020), <https://americansforprosperity.org/afpf-coa-joins-penamerican-reporterscommittee-union-ofconcernedscientists-transparency-accountabilty-covid19/> [<https://perma.cc/DLP9-ZB6J>] (calling for a recommitment to government transparency during the COVID-19 pandemic and arguing that "[i]t should not be necessary to reconstruct critical decisions about public health and safety by piecing together email trails").