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TO: The Honorable Internal Operations Standing Committee

FROM: David Whitaker, Director 
Legislative Policy Division Staff

DATE: November 16, 2020

RE: **ISSUES/PROCEDURES FOR CONDUCTING CLOSED CITY COUNCIL MEETINGS IN A VIRTUAL SESSION**

Council Member Roy McCalister, Jr., asked the Legislative Policy Division (LPD), as well as the Law Department, to review relevant policy issues and propose a protocol “to conduct closed sessions in a safe and secure virtual format.”

Background

As a result of the ongoing Covid-19 pandemic, public bodies throughout the state and particularly in the City of Detroit have been meeting remotely through electronic means. On October 16, 2020, Governor Whitmer signed Public Act 228 of 2020 (Senate Bill 1108) into law, amending Michigan’s Open Meetings Act (OMA), MCL 15.261 *et seq.*, and codifying authority and required protocol for public bodies to hold virtual meetings under specific circumstances.

The newly adopted amendment to the OMA officially extends the former accommodation for remote participation due to military service to also address a medical condition of a member, or “a statewide or local state of emergency declared pursuant to law or charter by the governor or a local official or local governing body that would risk the personal health or safety of members of the public or the public body if the meeting were held in person.” MCL 15.263(2). The amendment also specifically contemplates closed sessions held in a virtual setting, as follows:

Members of the general public otherwise participating in a meeting of a public body held electronically under this section are to be excluded from participation

in a closed session of the public body held electronically during that meeting if the closed session is convened and held in compliance with the requirements of this act applicable to a closed session. MCL 15.263a.(7).

Significantly, the amendment permits a public body to hold a virtual meeting **for any reason** prior to January 1, 2021, **retroactive to March 18, 2020**. MCL 15.263a.(1)(a). On or after January 1, 2021 through December 31, 2021, however, a member or members may participate remotely or virtually only due to absence for military duty, a medical condition, or "a statewide or local state of emergency or state of disaster as described" in the act. MCL 15.263a.(b). The amended act also requires that the reasons for conducting the meeting virtually and specific instructions as to how members of the public can attend and participate (of an open session) must be posted and made known. In compliance with this requirement, on October 20, 2020, City Council adopted *Resolution Establishing Procedures for City of Detroit Public Bodies to Meet Remotely*, establishing procedures consistent with Senate Bill 1108 for conducting remote/virtual meetings through December 31, 2020.¹ (Attached) The Resolution adopted by City Council includes the above language with respect to closed sessions. Therefore, the foundation has been laid for conducting virtual closed sessions in compliance with the OMA, through the expiration of the currently adopted procedures at the end of 2020.

Policy and Practical Considerations/Recommendations Relative to Virtual Closed Sessions

In the past, City Council has considered options for allowing members unable to attend a closed session for health, or other, reasons. Concerns for the ability to secure communications with off-site participants have weighed heavily against the adoption of rules to facilitate such participation. Council's current *Rules of Order*, at *section 12.4*, provide as follows: "Attendance: Council Members are expected to be present at all Closed Sessions." The rules also permit each Council Member to designate a staff person to attend, provided that individual sign a confidentiality agreement in advance of attending a closed session. See, *Rules of Order*, *section 12.5*.

The onset of the Covid-19 pandemic in 2020 has obviously increased the urgency to reconsider past preference for in-person meetings. As discussed by Corporation Counsel at the October 28, 2020, meeting of the Internal Operations Standing Committee, permitting remote/virtual closed sessions will by necessity require a level of trust among participants. Everyone – Council Members, staff, and other necessary participants alike – must commit to maintaining complete confidentiality with respect to the content of the discussion, as well as to securing their individual locations to the extent possible. To that end, Council may wish to extend the requirement of signed confidentiality agreements to **all** participants. Past practice has been to only require Council staff to do so, but not witnesses, staff from other City departments, outside counsel, or Council Members.

The *2012 Charter of the City of Detroit* defines *Confidential Information* at section 2-105(A)(8) as ". . . information obtained by a Public Servant by reason of his or her official position concerning the property, government or affairs of the City or any office, department or agency

¹ In the event a local or statewide state of emergency is declared in late December or early January 2021, a similar resolution establishing procedures for virtual meetings will be considered and likely adopted by City Council contemporaneous with the resumption of meetings in January 2021.

thereof, not available to members of the public pursuant to the Michigan Freedom of Information Act or other applicable laws, regulations or procedures.” Section 2-106.1 of the Charter, *Ethical Standards of Conduct* provides:

1. These standards of conduct apply to Public Servants including the Mayor, City Council members, City Clerk, appointive officers, appointees, employees and contractors as defined in this Charter. * * *
2. Except as otherwise provided by applicable law, a Public Servant shall not knowingly:
* * *
 - b. Use or disclose Confidential Information concerning the property, government or affairs of the City or any office, department or agency thereof, not available to members of the public and gained by reason of his or her official position. . . .²

Sec. 2.106.11, *Violations and Penalties*, sets out potential penalties for those who intentionally or through willful or gross negligence violate the above provisions. They include disciplinary action for employees, a “recommendation to the City Council for removal or forfeiture proceedings” for elective or appointive officers, administrative sanction by the Board of Ethics, or criminal prosecution. Section 2-107 details the forfeiture and removal processes.

In furtherance of maintaining confidentiality, clearly the fewer ears hearing the discussion, the easier to avoid security breaches. Therefore, it is recommended that staff attendance be limited to as few individuals as possible. Council may wish to consider only permitting a staffer to attend as a silent representative when the Council Member who is their principal is unable to be present. In that regard, where the information to be elicited at a closed session can be obtained in another manner, limiting the number of closed sessions to only the most essential might be a safer, preferred course of action.

Finally, and of utmost significance, working with DoIT to identify a secure platform to host virtual closed sessions is required. In addition, Council will need assistance with a DocuSign or similar process to facilitate the execution of confidentiality agreements.

Ideally, City Council’s *Rules of Order* should be amended expeditiously to provide ongoing guidance for the Council and those interacting with the Body with respect to virtual meetings, both public and closed. Council protocol requires that an amendment be considered by Council’s Rules Committee, per Council Rule 9.2.6.2, *Committee Jurisdiction*. Additionally, adoption of an amendment must comply with Charter section 2-111, *Promulgation of*

² The Detroit City Code, in the City’s ethics ordinance, also provides:

Sec. 2-5-62. - Improper use or disclosure of confidential information prohibited.

Except as otherwise provided for by applicable law, a public servant shall not knowingly use or disclose to third parties confidential information, which is gained by reason of the public servant's official duties, concerns the property, government or affairs of the City, or any office, department or agency thereof, and is not available to members of the public.

Administrative Rules, which requires an investment of time, including publication of any proposed rule changes at least four weeks in advance of a scheduled public hearing. See, Charter sec. 2-111(2).

Interim Closed Session Procedures

In the interim, prior to adoption of permanent remote/virtual meeting rules, an electronic “invitation” to attend a closed session issued to individual participants can include language explaining appropriate security protocol (*e.g.*, attending from a private room with no one else in proximity, using a headset, etc.), and an acknowledgement that by accepting the invitation, the participant agrees to abide by the security protocol and be bound by appropriate confidentiality.

The City’s Department of Innovation and Technology (DoIT) has prepared a memo explaining procedure for conducting secure virtual closed sessions using the Zoom platform. (See, attached memo from Michael Homant, DoIT Deputy Chief Information Officer, entitled “City Council Closed Session Guidelines”, dated November 12, 2020) Additionally, the Law Department has drafted and submitted to Council an “acknowledgment of confidentiality form” for use when holding virtual closed sessions. (Attached)

Should City Council have further questions or concerns, LPD will respond.

Attachment