



ELECTRONIC MEETINGS UNDER THE VIRGINIA FREEDOM OF INFORMATION ACT

As of July 1, 2018, public bodies may hold meetings by electronic communication means as long as the meetings comply with the heightened procedural requirements set out in § 2.2-3708.2 of the Code of Virginia in the Virginia Freedom of Information Act (FOIA). Previously, the law on conducting meetings by electronic communications means was set forth in former §§ 2.2-3708 and 2.2-3708.1 of the Code of Virginia. Former § 2.2-3708 addressed meetings held by state public bodies and meetings held to address states of emergency as declared by the Governor. Former § 2.2-3708.1 addressed individual participation by electronic communication means when a personal matter or medical condition prevented physical attendance or when a member of a regional body lived 60 miles or more from the central meeting location. All of these provisions remain in the law, but they have been amended and consolidated into § 2.2-3708.2. Additionally, House Bills 29 and 30 (Torian, 2020) were enacted in 2020 to amend the current budget (HB 29) and the next biennial budget (July 1, 2020 through June 30, 2022).¹ Both bills add an electronic meetings option that may be used when the Governor has declared a state of emergency in Budget Item 4-0.01 (g). This guidance document is organized to correspond to the provisions of § 2.2-3708.2 and Budget Item 4-0.01 (g), as follows:

- Appendix A addresses individual participation using electronic communication due to a medical condition or personal matter that prevents physical attendance at the meeting (available to all public bodies) (corresponds to subdivisions A 1 and A 2 of § 2.2-3708.2);
- Appendix B address the rules for electronic meetings held to address a state of emergency declared by the Governor (available to all public bodies) (corresponds to subdivision A 3 of § 2.2-3708.2 and Budget Item 4-0.01 (g));
- Appendix C addresses individual participation using electronic communication for regional public bodies due to distance from the central meeting location (local and state bodies may not use this procedure) (corresponds to subsection B of § 2.2-3708.2);
- Appendix D addresses the policy requirement applicable to the above types of electronic meetings (medical condition, personal matter, and distance for regional bodies) (corresponds to subsection C of § 2.2-3708.2);²
- Appendix E addresses the rules that apply only to state public bodies when conducting electronic meetings (local and regional bodies may not use this procedure) (corresponds to subsection D of § 2.2-3708.2);

¹ 2020 Acts of Assembly, cc. 1283 and 1289.

² Note that this subsection C was amended in 2019 to make clear that it does not apply to meetings held to address a state of emergency declared by the Governor (2019 Acts of Assembly, c. 359).



- Appendices F and G set out the annual reporting forms AND public comment forms, respectively, for state public bodies that hold electronic meetings.

Note that nothing in FOIA should be construed as to prohibit the use of audio or audiovisual means to increase public participation at meetings. If members of a public body are physically assembled at one location but wish to allow members of the public to listen or provide comment electronically, these heightened procedural requirements would not prevent such public access. Public bodies are always welcome to use electronic means to increase public access even if no members are participating electronically (such as by broadcasting a meeting via radio, television, or online). The specific requirements and limitations on electronic participation described herein apply only to the members of the public body holding a public meeting.

Note also that the definition of "electronic communication" was amended in 2018 to mean "the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information." This definition is applicable to all of the types of electronic participation allowed under § 2.2-3708.2.

Please contact the FOIA Council with any questions you may have concerning the requirements for conducting meetings using electronic communications.

Toll-Free 1-866-448-4100
Email: foiacouncil@dls.virginia.gov



Disability or Medical Condition or Personal Matter Prevents Physical Attendance*(Applies to all public bodies)*

Individual members of public bodies may participate in a meeting through electronic communication means from a remote location that is not open to the public if a temporary or permanent disability or other medical condition or a personal matter prevents them from physically attending the meeting, following the procedures and limitations described hereafter. In order for a member to participate through electronic means under these provisions, a quorum of the public body must be physically assembled at the primary or central meeting location and the voice of the remote participant must be able to be heard by all persons at the primary or central meeting location. Public bodies must also adopt a policy on such participation before any member may participate from a remote location. The requirements for such participation are examined in further detail below. Please note that, so long as all of the requirements are met, a member participating through electronic communications means under this section may make motions, vote, join in closed meetings, and otherwise participate fully as if he or she was physically present. If the procedural requirements are not met, however, then the member may only monitor the meeting (i.e., listen or watch, depending on the technology used) and cannot otherwise participate. The remote location where the member using electronic communications is does not have to be open to the public under these provisions.

A. Participation by member with **disability or other medical condition**; procedural requirements:

1. Physically assembled quorum is required;
2. Remote member's voice must be heard by all;
3. Member must notify chair on or before the day of the meeting of inability to attend due to temporary or permanent disability or other medical condition that prevents physical attendance;
4. Fact of disability or medical condition must be recorded in the minutes;
5. Remote location must be recorded in the minutes; and
6. Member's remote participation must be in accord with the policy on electronic participation adopted by the public body (see Appendix D below).

NOTE: While the fact that a disability or medical condition prevents the members' physical attendance must be recorded in the minutes, it is not required to identify the specific disability or medical condition.

Examples:

- Temporary hospitalization or confined to home;
- Contagious illness; or
- Any permanent physical disability that prevents travel to the meeting location.

B. Participation if a **personal matter** prevents attendance; procedural requirements:



1. Physically assembled quorum is required;
2. Remote member's voice must be heard by all;
3. Remote member must notify chair of the public body on or before the day of the meeting;
4. Nature of the emergency or personal matter must be identified;
5. Nature of the personal matter must be recorded in the minutes;
6. Remote location must be recorded in the minutes; and
7. Member's remote participation must be in accord with the policy on electronic participation adopted by the public body (see Appendix D below).

NOTE: Participation because of a personal matter that prevents attendance is limited to two (2) meetings per calendar year.

If a member's participation is disapproved because it would violate the public body's policy on participation, that fact must be recorded in the minutes with specificity. However, the member may continue to monitor the meeting from the remote location but may not participate in the proceeding and may not be counted as present at the meeting.

Examples:

- Flat tire on the way to the meeting, call in from cell phone at side of the road;
- Traffic congestion or stoppage;
- Personal, family, or business emergency;
- Blizzard, flood, or other sudden severe weather conditions that prevent travel to the meeting location;
- Business trip;
- Family trip; or
- Scheduling conflicts.

NOTE: Monitoring a meeting –As stated above, if a member of a public body cannot meet the procedural requirements to participate in a meeting by electronic communication means, the member may still monitor the meeting by listening or watching by electronic communication means. However, the member cannot be counted as present and cannot participate. In such a situation, as a matter of best practices, it is suggested that the chair of the public body make a statement to inform the public and the other members, such as: "Please observe that [member name] could not attend today's meeting, but is [listening/watching] the meeting [by speakerphone, videoconference, or whatever electronic communication means is being utilized]. However, [member name] is only monitoring the meeting. [He/she] is not counted as present, and cannot make motions, vote, or otherwise participate."



State of Emergency Declared by the Governor
(Applies to all public bodies)

I. Subdivision A 3 of § 2.2-3708.2

Pursuant to subdivision A 3 of § 2.2-3708.2 of the Code of Virginia, any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17 of the Code of Virginia, subject to the following procedures and conditions:

- i. The catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location; and
- ii. The purpose of the meeting is to address the emergency.

In addition, the public body must:

- a. Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting;
- b. Make arrangements for public access to such meeting;
- c. Otherwise comply with the provisions of § 2.2-3708.2; and
- d. State in the minutes the nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held.

NOTE: Subsection C of § 2.2-3708.2 was amended in 2019 to make clear that its requirements (participation policy, quorum, and voice be heard at a central meeting location) do not apply to meetings held by electronic communication means to address a state of emergency declared by the Governor.

II. Budget Item 4-0.01 (g)

Pursuant to Budget Item 4-0.01 (g), any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, subject to the following procedures and conditions:

- i. The nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location;
- ii. The purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body and the discharge of its lawful purposes, duties, and responsibilities; and



iii. A public body shall make available a recording or transcript of the meeting on its website in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the Code of Virginia.

In addition, the public body must:

- a. Give notice to the public using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body or governing board conducting the meeting;
- b. Make arrangements for public access to such meeting through electronic means including, to the extent practicable, videoconferencing technology. If the means of communication allows, provide the public with an opportunity to comment;
- c. Otherwise comply with the provisions of § 2.2-3708.2; and
- d. State in the minutes the nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held.

Note: This budget item also provides for electronic meetings to be held by governing boards of common interest communities such as condominium unit and property owners' associations. Such governing boards are not public bodies subject to FOIA but are subject to their own laws concerning access to records and meetings. Because this office is limited to providing guidance regarding FOIA, provisions in Budget Item 4-0.01 (g) that are specific to common interest communities have been omitted from this guide. Please direct any inquiries regarding records and meetings of common interest communities to the Office of the Common Interest Community Ombudsman within the Department of Professional and Occupational Regulation:

PHONE (804) 367-2941
FAX (866) 490-2723
EMAIL CICOmbudsman@dpor.virginia.gov



Regional Public Bodies

A member of a regional public body who lives 60 miles or more from the meeting location may participate electronically, subject to the following procedural requirements:

1. Physically assembled quorum is required;
2. Remote member's voice must be heard by all;
3. Remote member must notify chair of the public body on the day of the meeting;
4. Remote location must be recorded in the minutes (but need not be open to the public); and
5. The public body must adopt a policy on remote participation, and the member's remote participation must be in accord with that policy (see Appendix D below).

If a member's participation is disapproved because it would violate the public body's policy on participation, that fact must be recorded in the minutes with specificity. However, the member may continue to monitor the meeting from the remote location but may not participate in the proceeding and may not be counted as present at the meeting.

NOTE: "Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, which unit includes two or more localities.

This provision does NOT apply to state or local public bodies.



Electronic Participation Policy Requirement

The 2014 Session of the General Assembly enacted two identical bills, House Bill 193 (Minchew) and Senate Bill 161 (Favola), which require public bodies to adopt a policy regarding individual participation by electronic means before members are allowed to use the provisions described in Appendices A (electronic participation due to disability, medical condition, or personal matter) and C (electronic participation due to distance in the case of regional public bodies). With the 2019 amendments, this requirement does not apply to meetings held to address a state of emergency declared by the Governor, as described in Appendix B. The requirement specifies that the policy must include "an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting." Note that these provisions and this policy requirement apply to all public bodies subject to FOIA and that, until such a policy is adopted, members cannot use the provisions to participate from remote locations. In other words, members cannot call in under the circumstances described in Appendices A and C until the public body adopts a policy on such participation.

Sample Policy Language

In order to facilitate compliance with this requirement, the FOIA Council has prepared sample language that public bodies may use in crafting their own policies. This sample language is based on the language of the statute itself and includes both the basic policy statement and the limitations set forth in the law, as follows:

It is the policy of [the public body] that individual [public body] members may participate in meetings of [the public body] by electronic means as permitted by § 2.2-3708.2 of the Code of Virginia. This policy shall apply to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting.

Whenever an individual member wishes to participate from a remote location, the law requires a quorum of [the public body] to be physically assembled at the primary or central meeting location, and there must be arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

When such individual participation is due to an emergency or personal matter, such participation is limited by law to two meetings of the public body per member each calendar year, whichever is fewer.

An Approval Process Must Be Chosen



As part of the policy requirement, each public body must adopt an approval process. There are several possible mechanisms a public body might use; so long as the process adopted does not violate the express provisions of § 2.2-3708.2, each public body may choose whichever approval process it prefers. As an example, the FOIA Council has adopted a policy of automatic approval unless a member's participation would violate FOIA, and, if such participation is challenged, then the matter would be put to a vote. Sample language follows:

Automatic Approval With Vote If Challenged

Individual participation from a remote location shall be approved unless such participation would violate this policy or the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia. If a member's participation from a remote location is challenged, then [the public body] shall vote whether to allow such participation. If [the public body] votes to disapprove of the member's participation because such participation would violate this policy, such disapproval shall be recorded in the minutes with specificity.

Additional Limitations and Other Provisions Are Optional

Additional policy provisions may be included as each public body sees fit, so long as they do not violate the express provisions of § 2.2-3708.2. It is up to each public body to decide for itself whether to adopt any such additional policy provisions. For example, when the FOIA Council adopted its policy on electronic participation, it chose to explicitly state that the policy also applied to the Council's committees and subcommittees.



Electronic Meetings By State Public Bodies

FOIA allows state public bodies to hold electronic meetings using audio or audiovisual means. Former § 2.2-3708 of the Code of Virginia set forth the special procedures and requirements that a state public body must follow in order to hold an electronic meeting. This section is older than the provisions described above, and many of its procedures differ. Note that while the reason for electronic participation is critical to the provisions described above (disability or medical condition, personal matter, state of emergency declared by the Governor, or distance in the case of regional bodies), the following provisions do not require that a member who wishes to participate electronically state a reason for doing so. However, there are additional requirements to provide notice, a substantially equivalent means for the public to witness a meeting, an annual report to the FOIA Council, and a public comment form, as well as other procedural differences from the provisions described above. Please note that these provisions apply only to state public bodies, not local or regional public bodies.

MUST A QUORUM BE PHYSICALLY ASSEMBLED AT ONE LOCATION?

Yes. If a quorum of a public body is physically assembled at one location, additional members of the public body may participate through electronic means from remote sites.

DO ALL OF THE SITES FOR THE MEETING NEED TO BE OPEN TO THE PUBLIC?

No. As of July 1, 2018, remote locations no longer have to be open to the public unless three or more members of the public body are gathered at the same remote location. If three or more members are gathered at the same remote location, then such remote location shall be open to the public. If such remote location is required to be open to the public, then all persons attending the meeting at any remote location shall be afforded the same opportunity to address the public body as persons attending at the primary or central location.

WHAT TYPE OF PUBLIC ACCESS MUST BE PROVIDED?

If a member participates electronically, the public body must provide to the public a substantially equivalent electronic communication means to witness the meeting. The term "witness" means to observe or listen. For example, if a member was calling in, the public body could choose to provide to the public a conference call-in line or other means of listening to the meeting. If the member was participating using an audiovisual medium, the public body might choose to stream it online. A public body could also choose to provide an audiovisual medium even if the member was calling in (audio only), as that would only increase the public's ability to witness the meeting. Note that the means used must allow the public to witness the meeting but does not have to allow the public to participate or comment.

WHEN MUST NOTICE BE POSTED?

For regular meetings, notice must be given at least **three (3) working days** in advance of the electronic meeting.

For special, emergency, or continued meetings, public notice must be reasonable under the circumstance and be given contemporaneously with the notice provided to members of the public



body conducting the meeting. For the purposes of providing meeting notice, "continued meeting" means a meeting that is continued to address an emergency or to conclude the agenda of a meeting for which proper notice was given.

WHAT INFORMATION MUST BE IN THE NOTICE?

The notice must include the **date, time, place, and purpose** of the meeting and a **telephone number** that may be used to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting. In accordance with § 2.2-3707 of the Code of Virginia, if a public body includes a member appointed by the Governor, the notice must also state whether public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

WHAT HAPPENS IF THERE IS A TECHNICAL MALFUNCTION DURING THE MEETING?

If there is an interruption in either the audio or visual broadcast of the meeting, the meeting must be suspended until repairs are made and public access is restored.

WHERE MUST NOTICE BE POSTED?

At a minimum, notice must be posted in two physical locations, as well as provided individually to those who have requested to receive notice of all meetings of the public body, in accordance with the requirements for meetings in § 2.2-3707. Notice must also be posted on the state public body's official public government website and on a central, publicly available electronic calendar maintained by the Commonwealth. It is strongly recommended that the public body post a statement of where to find the schedule of its meetings, along with a link to the electronic calendar, on the agency's website.

MUST AN AGENDA AND MATERIALS BE MADE AVAILABLE?

Just as with regular meetings, an agenda and materials must be made available for public inspection at the same time they are provided to the members of the public body (unless the materials are exempt from mandatory disclosure). If three or more members are attending from the same remote location, then agenda materials must also be available for public inspection at that remote location at the time of the meeting.

ARE MINUTES REQUIRED TO BE TAKEN?

Yes. Minutes must be kept in the same manner as required for regular meetings. For emergency meetings held by electronic communication means, the nature of the emergency shall be stated in the minutes.

CAN VOTES BE TAKEN DURING AN ELECTRONIC MEETING?

Yes. Votes must be recorded by name in a roll-call fashion and must be included in the minutes of the meeting.

CAN A PUBLIC BODY HOLD A CLOSED ELECTRONIC MEETING?

Yes. Public bodies may convene closed electronic meetings, provided that the usual requirements for closing a meeting are followed.



HOW OFTEN CAN A PUBLIC BODY MEET ELECTRONICALLY?

There is no limitation on the number of meetings that may be conducted in this manner; except that if a public body holds an electronic meeting, the public body shall also hold **at least** one meeting annually where members in attendance at the meeting are physically assembled at one location and in which no members participate by electronic communication means.

ANNUAL REPORTING REQUIREMENTS

Public bodies authorized to hold closed meetings must submit a report by **December 15** of each year to the FOIA Council. The report must include:

- a. The total number of meetings held that year in which there was participation through electronic communication means;
- b. The dates and purposes of each such meeting;
- c. A copy of the agenda for each such meeting;
- d. The primary or central meeting location of each such meeting;
- e. The types of electronic communication means by which each meeting was held;
- f. If possible, the number of members of the public who witnessed each meeting through electronic communication means;
- g. The identity of the members of the public body recorded as present at each meeting, and whether each member was present at the primary or central meeting location or participated through electronic communication means;
- h. The identity of any members of the public body who were recorded as absent at each meeting and any members who were recorded as absent at a meeting but who monitored the meeting through electronic communication means;
- i. If members of the public were granted access to a remote location from which a member participated in a meeting through electronic communication means, the number of members of the public at each such remote location;
- j. A summary of any public comment received about the process of conducting a meeting through electronic communication means; and
- k. A written summary of the public body's experience conducting meetings through electronic communication means, including its logistical and technical experience.

PUBLIC COMMENT FORM

State public bodies that hold electronic meetings under these provisions must also make available to the public at the meeting a public comment form prepared by the FOIA Council.



Copies of both the annual reporting and public comment forms are set out below in Appendices E and F and are also available on the FOIA Council website.

Last updated July 2020



ELECTRONIC MEETINGS ANNUAL REPORT

Name of the public body: _____

Total number of electronic meetings held during the preceding year: _____

Please attach a copy of the meeting agenda and provide the following information for each electronic meeting held during the reporting period (copy items 1-9 for each such meeting as necessary):

(1) Date of the meeting: _____

(2) Purpose of the meeting: _____

(3) Primary or central location for the meeting: _____

(4) Type(s) of electronic communication means used: _____

(5) Number of members of the public who witnessed the meeting through electronic means (if known):

(6) Identity of members of the public body present at the primary or central location:

(7) Identity of members of the public body participating electronically:



(8) Identity of members of the public body who were absent but monitored the meeting by electronic means:

(9) Identity of members of the public body who were absent:

(10) If any remote locations were open to the public, the number of members of the public at each such remote location:

(11) Summary of public comment received concerning the electronic communication meeting, if any (i.e., public comments about the use of teleconferencing or videoconferencing technology):

(12) Summary of your experience using electronic communication meetings, including logistical and technical experience (i.e., was it easier or more difficult to arrange the meeting, were there any frustrations with the technology, etc.):





COMMENT _____

14. How would you rate the overall quality of this meeting?

Poor				Excellent
1	2	3	4	5

COMMENT _____

THANK YOU. Please send your completed form by mail, facsimile, or electronic mail to the FOIA Council using the following contact information:

Virginia Freedom of Information Advisory Council
Pocahontas Building, Tenth Floor
900 East Main Street, Richmond, Virginia 23219
foiacouncil@dls.virginia.gov/Fax: 804-698-1899/Tele: 866-448-4100

