



LOCAL AND REGIONAL PUBLIC BODIES, ELECTRONIC MEETINGS, and the VIRGINIA FREEDOM OF INFORMATION ACT

IN GENERAL

Only **STATE** public bodies are authorized to hold meetings by electronic means (teleconference or combined audio and video) as set out in § 2.2-3708 of FOIA. As a general rule, local or regional public bodies are **NOT** authorized to hold meetings by electronic means. However, there are two exceptions to this general rule (described in more detail below): electronic participation by individual members and states of emergency declared by the Governor. However, these are the **ONLY** exceptions—in all other situations, local and regional public bodies may **NOT** meet by electronic means.

The first exception to the general rule is a provision for *individual members* of public bodies to participate by electronic means under specific conditions. Individual members of all types of public bodies—state, regional, and local—may participate by electronic means when an emergency, personal matter, or medical condition on the day of the meeting prevents them from physically attending the meeting. Individual members of *regional* public bodies may also participate in a meeting of the regional public body if such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting. Participation by individual members, however, is subject to the procedural requirements set out in § 2.2-3708.1 of FOIA. Please see Appendix A for the rules of participation.

The second exception to the general rule is a provision allowing any public body to 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, provided (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. The local public body convening a meeting in accordance with subsection G of § 2.2-3708 shall (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 members of the local public body conducting the meeting; (b) make



arrangements for public access to such meeting; and (c) otherwise comply with the provisions of § 2.2-3708. 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 must be stated in the minutes. Please see Appendix B for the rules of participation.

Finally, keep in mind that nothing in FOIA should be construed as to prohibit the use of audio or audio/visual 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.

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

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APPENDIX A

This Appendix A sets forth the requirements of § 2.2-3708.1, which allows *individual members* of any public body to participate by electronic communication means (teleconference or combined audio and video) under specific, limited circumstances. Members of local and regional public bodies may **only** participate in meetings by electronic means as allowed under § 2.2-3708.1 or in situations where the Governor has declared a state of emergency as allowed under subsection G of § 2.2-3708 (described in Appendix B).

ELECTRONIC PARTICIPATION UNDER § 2.2-3708.1

Section 2.2-3708.1 allows *individual members* of public bodies to participate in a meeting through electronic communication means from a remote location that is not open to the public in the event of an emergency or personal matter, or temporary or permanent disability or other medical condition, or when a member of a regional public body's principal residence is more than 60 miles from the primary meeting location. For a member to participate in the manner described above, FOIA requires that a quorum of the public body be physically assembled at the primary or central meeting location and that the public body make arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location. Effective July 1, 2014, public bodies must adopt a policy on such participation before any member may participate from a remote location under these provisions. 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 and cannot otherwise participate.

A. Participation in an emergency or personal matter; 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. Member's remote participation must be in accord with the policy on electronic participation adopted by the public body (see section D below); **and**



6. Nature of emergency or personal matter, and remote location must be recorded in the minutes.

NOTE:

Participation because of an emergency or personal matter is limited to two (2) meetings/year or 25% of the meetings of the public body, whichever is *less*.

If a member's participation is not approved, the member may continue to monitor the meeting from his remote location, but he may not participate in the proceeding and may not be counted as present at the meeting.

Examples of emergencies include, but are not limited to:

- 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; or
- Blizzard, flood, or other sudden severe weather conditions that prevent travel to the meeting location.

Examples of personal matters include, but are not limited to:

- Business trip;
- Family trip; or
- Scheduling conflicts.

NOTE: Sometimes there may be overlap between emergencies and personal matters. As both are covered by the same procedure, the individual member may choose.

B. Participation by member with physical 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 of inability to attend due to temporary or permanent physical disability or other medical condition that prevents physical attendance; and
4. Fact of disability (or other condition) and remote location must be recorded in the minutes.



Examples:

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

C. Participation by member of regional public body who lives 60 miles or more from meeting location; 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. Member's remote participation must be approved by majority vote of those physically assembled at the meeting location; and
5. Remote location must be recorded in the minutes.

NOTE:

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, whose members are appointed by the participating local governing bodies, and such unit includes two or more counties or cities.

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

D. Policy Requirement

The 2014 Session of the General Assembly enacted two identical bills, House Bill 193¹ and Senate Bill 161², which require public bodies to adopt a policy regarding individual participation by electronic means before members are allowed to use these provisions. The new language 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,

¹ 2014 Acts of Assembly, c. 492.

² 2014 Acts of Assembly, c. 524.



members cannot use these provisions to participate from remote locations. In other words, members cannot call in under the circumstances listed above until the public body adopts a policy on such participation.

Sample Language

In order to facilitate compliance with this requirement, the FOIA Council has prepared sample language 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 § 2.2-3708.1, 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 Virginia Code § 2.2-3708.1. 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 or 25 percent of the meetings of the public body per member each calendar year, whichever is fewer.

An Approval Process Must Be Chosen

In addition, 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 § 2.2-3708.1, each public body may choose whatever 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. 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 Are Optional

Additional policy provisions may be included as each public body sees fit, so long as those limitations do not violate the express provisions of § 2.2-3708.1. It is up to each public body to decide for itself whether to adopt any such additional policy provisions.

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APPENDIX B

This Appendix B sets forth the requirements of subsection G of § 2.2-3708, which authorize public bodies to hold electronic communication meetings (teleconference or combined audio and video) in situations where the Governor has declared a state of emergency in accordance with § 44-146.17.

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,
- Provided:
 - a. The catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location; **and**
 - b. The purpose of the meeting is to address the emergency.
- In addition, the local public body convening an electronic communication meeting 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 members of the local public body conducting the meeting;
 - b. Make arrangements for public access to such meeting; **and**
 - c. Otherwise comply with the provisions of § 2.2-3708.
- 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 must be stated in the minutes.

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