



STATE PUBLIC BODIES, ELECTRONIC MEETINGS, AND THE VIRGINIA FREEDOM OF INFORMATION ACT

IN GENERAL

State public bodies may hold meetings by electronic communication means (teleconference or combined audio and video) as long as the meetings comply with the heightened procedural requirements set out in § 2.2-3708 of FOIA. Please see Appendix A for the rules state public bodies must follow to hold an electronic communication meeting.

Effective July 1, 2013, public bodies holding electronic meetings must:

- Include a copy of any agenda(s) for any electronic meeting(s) held with the annual report sent to the FOIA Council and Joint Commission on Technology and Science.
- Make available at the meeting a public comment form that has been prepared by the Virginia FOIA Council. See Appendix D for the public comment form.

Both the annual reporting and public comment forms are also available on the FOIA Council website.

In addition, *individual members* of state public bodies may participate in any meeting subject to FOIA by electronic communication means when an emergency, personal matter, or medical condition on the day of the meeting



prevents them from physically attending the meeting. Participation by individual members, however, is subject to the procedural requirements set out in § 2.2-3708.1 of FOIA. See Appendix C for the rules of participation.

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

ELECTRONIC MEETINGS BY STATE PUBLIC BODIES UNDER § 2.2-3708

FOIA allows state public bodies to hold electronic meetings using audio or audio/visual means. Section 2.2-3708 of the Code of Virginia sets forth the special procedures and requirements that a state public body must follow in order to hold an electronic meeting. Section 2.2-3708 was amended by the 2007 Session of the General Assembly to make it easier for state public bodies to conduct electronic meetings under FOIA.

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.

This Appendix A sets forth the heightened procedural requirements for state public bodies to hold electronic meetings under § 2.2-3708. Members of state public bodies may participate in meetings by electronic means as allowed under both § 2.2-3708 and § 2.2-3708.1.

MUST A QUORUM BE PHYSICALLY ASSEMBLED AT ONE LOCATION?

Generally, 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. The only time a physically assembled quorum is not required is for electronic meetings held when the Governor has declared a state of emergency, the meeting addresses that emergency, and the meeting otherwise complies with the heightened procedural requirements for electronic meetings, as described in detail in Appendix B.

WHAT KIND OF ELECTRONIC MEETINGS ARE ALLOWED UNDER § 2.2-3708?

For purposes of this section, an electronic meeting is a gathering where members of a public body discuss or transact public business through any **audio OR combined audio and visual communication** means.¹

¹ FOIA Council Opinion AO-01-01.



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

Generally, yes. Any site from which a member of the public body participates must be open to the public. If public comment is received during the meeting, members of the public attending the meeting at the remote sites must be given the same opportunity to address the public body as members of the public at the primary site of the meeting.

However, individual members may participate from remote locations that are *not* open to the public under the limited circumstances permitted under § 2.2-3708.1 (described in detail in Appendix C).

WHEN MUST NOTICE BE POSTED?

Notice must be given at least **three (3) working days** in advance of the electronic meeting.

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 at § 2.2-3707. Notice must also be posted on the state public body's website and on the Commonwealth Calendar.² 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 Commonwealth Calendar, on the agency's website.

WHAT INFORMATION MUST BE IN THE NOTICE?

The notice must include the **date, time, purpose, and ALL locations** of the meeting and shall include a telephone number that may be used at remote locations to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting to the remote locations. If a public body includes a member appointed by the Governor, the notice must also state whether or not public comment will be received at the meeting, and if so, the approximate point during the meeting when public comment will be received.

² The Commonwealth Calendar is a website maintained by the Virginia Information Technologies Agency. Its web address as of June 30, 2014 is <http://www.virginia.gov/connect/commonwealth-calendar>.



WHEN IS THREE (3) WORKING DAYS' NOTICE NOT REQUIRED?

For emergency and continued meetings.

If an electronic meeting is being held to address an emergency and the public body is not able to meet at a regular session where all of the members are physically assembled, three days' notice is not required. The nature of the emergency causing the electronic meeting to be held with less than three days' notice must be stated in the minutes. Notice must be given to the public contemporaneously with the notice given to the public body.

If proper notice has been provided for an electronic meeting, but the meeting must be continued to conclude the agenda, three days' notice is not required for the continued portion of the meeting so long as the date, time, place and purpose of the continued meeting are set during the meeting prior to adjournment.

MUST AN AGENDA AND MATERIALS BE MADE AVAILABLE AT EACH MEETING SITE?

Yes. An agenda and any materials that will be distributed to members of a public body must be forwarded to all locations of the meeting and made available to the public, provided that the materials were made available to staff of the public body in sufficient time for duplication and forwarding to the meeting locations. Again, as noted above, all locations for the meeting shall be made accessible to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location.

ARE MINUTES REQUIRED TO BE TAKEN?

Yes. Minutes must be kept in the same manner as required for regular meetings. In addition, for electronic communication meetings, minutes must include (i) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (ii) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (iii) the identity of the members of the public body who were not present at the locations identified in clauses (i) and (ii), but who monitored such meeting through electronic communications means.

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. Section 2.2-3708 allows public bodies to hold closed meetings in this manner provided the 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 where no members participate by electronic communication means.

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 to all of the meeting sites.

ARE THERE ANY OTHER SPECIAL REQUIREMENTS FOR ELECTRONIC MEETINGS?

Public bodies authorized to hold closed meetings must submit a report by **December 15** of each year to the Virginia FOIA Council and the Joint Commission on Technology and Science. The report must include:

- The total number of electronic communication meetings held during the preceding year;
- The dates and purposes of the meetings;
- A copy of the meeting agenda(s);
- The number of sites for each meeting;
- The types of electronic communication means by which the meetings were held;
- The number of participants, including members of the public, at each meeting location;
- The identity of the members of the public body recorded as absent and those recorded as present at each meeting location;
- A summary of any public comment received about the electronic communication meetings; and



- A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.

Public bodies authorized to hold closed meetings must also make available to the public at any meeting conducted in accordance with this section a public comment form prepared by the FOIA Council. Copies of both the annual reporting and public comment forms are available on the FOIA Council website.

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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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APPENDIX C

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.

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 approved by majority vote at a meeting of those physically assembled at the meeting location; **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 193³ and Senate Bill 161⁴, 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, 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

³ 2014 Acts of Assembly, c. 492.

⁴ 2014 Acts of Assembly, c. 524.



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. The reason that the member is unable to attend the meeting and the remote location from which the member participates must be recorded in the meeting minutes.

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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10. If there were any presentations (PowerPoint, etc.), were you able to hear and see them?

Poorly
1 2 3 4 5 Clearly

COMMENT _____

11. Were the members as attentive and did they participate as much as you would have expected?

Less
1 2 3 4 5 More

COMMENT _____

12. Were there differences you noticed in how the members interacted?

With the other members present:

Very Different
1 2 3 4 5 No Difference

With members participating from other locations:

Very Different
1 2 3 4 5 No Difference

With the public:

Very Different
1 2 3 4 5 No Difference

COMMENT _____

13. Did you feel the technology was a help or a hindrance?

Hindered
1 2 3 4 5 Helped

COMMENT _____

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

Poor
1 2 3 4 5 Excellent

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
General Assembly Building, Second Floor
201 North 9th Street, Richmond, Virginia 23219
foiacouncil@dls.virginia.gov/Fax: 804-371-8705/Tele: 866-448-4100

