

D R A F T
FOR DISCUSSION ONLY

Public Meetings During Emergencies Act

Uniform Law Commission

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April 11, 2022

Public Meetings During Emergencies Act

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Public Meetings During Emergencies Act

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1 **Public Meetings During Emergencies Act**

2 **Section 1. Title**

3 This [act] may be cited as the Public Meetings During Emergencies Act.

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Electronic” means relating to technology having electrical, digital, magnetic,
7 wireless, optical, electromagnetic, or similar capabilities.

8 (2) “Emergency” means a disaster or comparable event or circumstance that
9 would constitute an emergency under other law of this state, law of a political subdivision of the
10 state, or federal law.

11 (3) “Emergency declaration” means a declaration of emergency issued under
12 other law of this state, law of a political subdivision of the state, or federal law.

13 (4) “Meeting” has the meaning of meeting or the equivalent term in the open
14 meetings law governing a public body.

15 (5) “Observe” means listen to or watch without being permitted to speak or
16 submit comments in a record.

17 (6) “Open meetings law” means a law of this state or a political subdivision of the
18 state that governs when and how a meeting of a public body must be open to the public.

19 (7) “Participate” means speak or submit comments in a record.

20 (8) “Person” means an individual, estate, business or nonprofit entity, public
21 corporation or government or governmental subdivision, agency or instrumentality, or other legal
22 entity.

23 (9) “Political subdivision of the state” includes any local or regional government.

(10) “Public body” means an entity subject to an open meetings law. [The term does not include the [Legislature and agencies of the Legislature] or a state [or local] court.]

(11) “Record” used as a noun means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(12) “Virtual meeting” means a meeting of a public body, at least part of which one or more members of the public body attend by electronic means.

Legislative Note: *In paragraph (2), a state should insert the words used to describe an “emergency” in state law authorizing the declaration of an emergency.*

In paragraph (9), a state should insert the term used in the state for local government organized at the county level in states that have county governments.

In paragraph (10), a state that does not choose to extend the scope of the act to the state legislature and its agencies or its state and local courts should include the bracketed sentence, unless the state’s open meetings law does not include those entities in which case the sentence should be omitted. If the bracketed sentence is to be included, the state should insert the language used in the state to describe its state legislature and legislative agencies. In a state that does not have local courts, the bracketed text “or local” should be omitted.

Comment

The Public Meetings During Emergencies Act builds on and fits into existing state laws authorizing the declaration of emergencies and subjecting public meetings to various procedural and public access requirements, particularly open meetings laws and laws providing for public comment on and participation in the deliberations of public bodies. During the COVID-19 pandemic, most governors included within their declarations of emergency provisions suspending many state laws concerning the meetings of public bodies, such as those governing the location of meetings and public access and participation, and authorized virtual meetings. Some of the executive orders included provisions intended to create public access and participation rights in virtual meetings comparable to those applicable to traditional in-person meetings. Since the onset of the pandemic a number of states have adopted laws – some temporary, intended to expire after the pandemic, and others permanent – authorizing public bodies to hold virtual meetings during emergencies, subject to various requirements for the conduct of those meetings, including public access. States that adopted such laws or amended pre-existing laws that provided some authorization for remote or virtual meetings in 2020-2022 include Arkansas, California (teleconference meetings for local agencies; emergency provisions

1 expire December 31, 2023, other provisions take effect January 1, 2024); Connecticut (expires
2 April 30, 2022; as of this writing a bill is pending before the state senate to extend authorization
3 through December 31, 2022), Delaware, Hawaii, Maine, Massachusetts (expires July 15, 2022),
4 Minnesota, Nevada, New York (expires, unless renewed, upon the expiration of Governor
5 Hochul’s executive order #11; that executive order was mostly recently extended on March 16,
6 2022 for thirty days), North Carolina, Oklahoma (expires February 15, 2022, or thirty days after
7 the expiration of the COVID state of emergency; as of this writing, the Oklahoma legislature is
8 considering a bill to permit remote meetings by “a public body in any county in which the
9 Governor has declared a state of emergency until the emergency declaration expires or is
10 terminated’), Vermont (expires January 15, 2023), and Virginia. This Act would provide a
11 statutory basis for the authorization of virtual meetings during an emergency conditioned on
12 compliance with requirements intended to assure comparable public access and participation.
13

14 The Act uses a state’s open meetings law to provide definitions of “public body” and
15 “meeting.” Different states use different terms – including but not limited to “open meetings,”
16 “sunshine” or “government in the sunshine,” “open doors,” “freedom of information” – for the
17 law that sets the requirements for public observation of meetings of public bodies, The Act’s use
18 of the term “open meetings law” is intended to reach all such laws regardless of how they are
19 referred to in a specific state. The Act uses the open meetings law to define “public body” and
20 “meeting” for several reasons. Most of the executive orders or laws addressing virtual meetings
21 during emergencies have, to date, been operated as exceptions to or amendments of an open
22 meetings law as that is necessary to allow a public body to meet in a physical location that is not
23 publicly accessible. So, too, an important purpose of these orders or laws has been to provide
24 alternative means of public access via electronic technology comparable to the access required
25 by open meetings laws. Moreover, a state’s open meetings law typically includes a
26 comprehensive definition of what the state considers to be its public bodies. Rather than provide
27 a new definition of “public body” consisting of a lengthy list of agencies, authorities, boards,
28 bureaus, commissions, committees, councils, etc. that would surely vary from state to state, the
29 Act incorporates by reference the state’s open meetings law definition.
30

31 The Act also assumes the broad definition of “meeting” – a convening or gathering of a
32 public body to discuss or transact the public’s business – typically found in state open meetings
33 laws.
34

35 The Act uses the term “virtual” to refer to a meeting of a public body conducted by
36 electronic means. The executive orders and state laws that have authorized such meetings more
37 commonly use the term “remote.” However, “remote” may imply that there is an in-person
38 meeting of the public body with only some members participating remotely by electronic means.
39 Indeed, a number of states before the pandemic had adopted laws permitting some members of
40 public bodies to participate remotely in a public meeting that occurred at the public body’s usual
41 physical location. “Virtual” makes it clearer that this Act applies to meetings where there need
42 not be a central gathering. The “one or more” phrase permits the Act to apply in hybrid settings
43 in which some members of the body are at a central location but the meeting involves the use of
44 electronic means to connect them to other members of the body who are participating virtually.
45

46 Section 3. Scope

1 (a) This [act] applies to the conduct of a virtual meeting only while an emergency
2 declaration is in effect.

3 (b) This [act] does not limit or supersede other law authorizing a public body to permit a
4 member of the public body or the public to observe or participate in a meeting of the public body
5 remotely by electronic means, whether or not an emergency declaration is in effect.

6 **Comment**

7
8 A number of states have laws authorizing remote participation in public meetings by
9 individual members of a public body and some forms of remote observation or participation by
10 members of the public. These laws assume that the meeting of the public body will be in a
11 physical location, and may specify that members of the public body also be at a publicly
12 accessible physical location, such as at a state office building. The Act does not supersede those
13 laws but supplements them with an authorization for an entirely or primarily virtual meeting
14 during an emergency.

15 16 **Section 4. Authorization for Virtual Meeting**

17 (a) A public body may conduct a virtual meeting while an emergency declaration is in
18 effect that applies to all or part of the jurisdiction of the public body if:

19 (1) the declaration prohibits, limits, or has the effect of prohibiting or limiting an
20 in-person meeting of the public body; or

21 (2) the presiding officer of the public body or other individual authorized by law
22 or rule of the public body to act for the public body:

23 (A) determines it would not be practical or prudent for the public body to
24 conduct an in-person meeting because of the emergency; and

25 (B) informs the members of the public body and the public of the basis for
26 the determination.

27 (b) An action taken at a virtual meeting that complies with this [act] has the same effect
28 as an action taken at an in-person meeting of the public body.

(c) Other law that applies to an in-person meeting of a public body applies, to the extent practicable, to a virtual meeting.

Comment

Subsection (a) creates a two-part test for authorizing public bodies to meet virtually. First, the individual authorized by state law to declare an emergency has done so with respect to a geographic area that is part of the public body's jurisdiction. That individual is likely to be the governor, but for local emergencies it could be a county executive, mayor or other local official. Minnesota's law, for example, requires that "the presiding officer, chief legal counsel, or chief administrative officer for the affected governing body" make the determination that an in-person meeting is "not practical or prudent." Minn. Stat. Ann. § 13D.021.1 (1). Second, either the emergency declaration itself must have the effect of preventing an in-person meeting – such as by a direct prohibition, a stay-at-home order, or an order limiting the number of people at a gathering – or the presiding officer of the public body or another individual authorized to act for the public body determines that due to the emergency it would be impractical or imprudent for the body to meet. The reason for the second requirement is that sometimes emergency declarations remain in effect long past the most acute phase of an emergency. This may be necessary for the area to continue to receive special emergency assistance or because some emergency measures may still be needed. However, it might be possible for the public body to meet. The second requirement addresses that concern. If the emergency declaration in effect continues to have the effect of prohibiting an in-person meeting, the public body may continue to meet virtually. Alternatively, if the emergency declaration by its terms does not have the effect of prohibiting an in-person meeting, a virtual meeting will be authorized only if the public body's presiding officer or someone else – such as its executive director – determines that it would be impractical or imprudent due to the emergency for the public body to meet and advises the members of the public body and the public of that determination.

Section 5. Conduct of Virtual Meeting

(a) A public body shall to the extent practicable select technology to conduct a virtual meeting that reasonably accommodates the needs of an individual with a disability in accessing the meeting.

(b) Except as provided in subsections (c) and (d), the technology used to conduct a virtual meeting must permit each member of the public body who attends the meeting contemporaneously throughout the meeting to see and hear, and to be seen and heard by, the other members of the public body who attend.

(c) If a member of a public body is unable to obtain visual access to the virtual meeting

1 but is able to obtain audio access that permits the member contemporaneously throughout the
2 meeting to hear and be heard by the other members of the public body who attend, the member
3 must be permitted to attend by audio access.

4 (d) If a public body lacks the capacity to provide contemporaneous visual access to a
5 virtual meeting for members of the public body, the public body may conduct the meeting by
6 audio-only access that permits each member of the public body who attends the meeting
7 contemporaneously throughout the meeting to hear and be heard by the other members of the
8 public body who attend.

9 (e) A member of a public body who attends a virtual meeting shall be present for all
10 purposes, including for determination of a quorum and voting, if the member can
11 contemporaneously throughout the meeting:

12 (1) under subsection (b), see and hear and be seen and heard by the other
13 members of the public body who attend; or

14 (2) under subsection (c) or (d), hear and be heard by the other members of the
15 public body who attend.

16 (f) A member of a public body who attends a virtual meeting through electronic means
17 that provide audio-only access to the meeting shall state the member's name each time the
18 member speaks or votes.

19 (g) The minutes of a virtual meeting must record any vote taken, that the meeting was
20 conducted by electronic means, the technology used, and which members attended by electronic
21 means.

22 **Comment**

23 The provisions of this Section derive from some of the gubernatorial executive orders or
24 state laws authorizing remote public meetings, adopted between 2020 and 2022. These include:

1 Cal Gov't Code § 54953, as amended; 5 Ill. C.S. 120/7(e), Ind. Code 5-14-1.5-3.7, Ky SB 150,
2 ch. 73, Ls of 2020; Me. Rev. Stat. tit. 1, § 403-A; Michigan Gov. E.O. 2020-154 (July 17, 2020);
3 Mich. Comp. L .Ann. § 15.263a; N.J.S.A. § 52:27D-18.11; N.C. Gen. Stat. § 166A-19.24; 25
4 Okla Stat. § 307.1, as amended; Va Code Ann. § 2.2-3708.2; Vt, Laws 2022, No. 78.

5
6 Consistent with Title II of the Americans with Disabilities Act and other applicable law,
7 subsection (a) directs the public body conducting a virtual meeting to select, to the extent
8 practicable, technology that reasonably accommodates the needs of individuals with a disability
9 in accessing the meeting. This applies to access by both members of the public body and
10 members of the public when authorized to observe the meeting under section 6 or to participate
11 under sections 7 or 8, *infra*. The public body shall furnish appropriate auxiliary aids and services,
12 as defined in 28 C.F.R. § 35.105, to enable individuals with disabilities to effectively participate
13 in or observe a virtual meeting of the public body.

14
15 As subsection (b) indicates, the intent of this section is to require technology that permits
16 the members of the public body attending the meeting to see and hear each other throughout the
17 meeting. However, this may not always be possible. Subsection (c) addresses the situation of a
18 meeting conducted by technology that provides both visual and audio access but where a
19 particular member may not be able to obtain video access. Subsection (d) addresses the situation
20 where the public body as a whole lacks the technical capacity to provide video access. That
21 could be due, for example, to Internet bandwidth limitations in the public body's area. In that
22 case, the virtual meeting may still be conducted using technology that provides only audio
23 access. In any of those events, the member will still be treated as attending for purposes of a
24 quorum and voting. Subsection (g) provides that the type of technology used, e.g., audio-visual
25 or just audio, shall be reflected in the minutes of the virtual meeting.

26 27 **Section 6. Public Observation**

28 (a) If the open meetings law requires that the public be able to contemporaneously
29 observe all or part of a meeting of a public body, the public body shall permit the public to
30 contemporaneously observe a virtual meeting or the part of the virtual meeting that would be
31 required to be open to the public if it were part of an in-person meeting.

32 (b) A document, exhibit, or other record presented to a public body at a virtual meeting
33 that, under the open meetings law, would have been available to the public at an in-person
34 meeting must be made available to the public contemporaneously with the virtual meeting, to the
35 extent practicable.

36 (c) If under Section 5(d), a virtual meeting is conducted by electronic means that provide

1 only audio access, public observation may be limited to audio access.

2 **Comment**

3 This Section confirms that the state's open meetings law applies to a virtual meeting to
4 the same extent as it would to a comparable in-person meeting. If a meeting, or a portion of
5 meeting, would not be open to the public under the state's open meetings law, that meeting or
6 portion would not be open when conducted virtually. The form of public observation will
7 inevitably be affected by the nature of the technology used. For a meeting conducted by audio-
8 only technology because, under section 5, the public body lacks the capacity for an audio-visual
9 meeting, public observation may be limited to listening to the meeting. Public observation of the
10 meeting requires that the members of the public body, depending on the technology used, be
11 visible and audible, or audible, to the members of the public observing the meeting. As noted in
12 the comment to section 5, appropriate auxiliary aids and services shall be made available to
13 afford individuals with disabilities an equal opportunity to observe the virtual meeting. Any
14 documents or exhibits considered by members of the public body may be provided by making
15 those documents or exhibits available for inspection separately from the meeting, such as by
16 posting them to the public body's website. Any such document shall be provided in a format
17 accessible to individuals with disabilities.

18
19 **Section 7. Public Participation**

20 (a) If a public body, under law of this state or a political subdivision of the state or a rule,
21 practice, or procedure adopted by the public body, must permit members of the public to
22 participate in a meeting of the public body, the public body to the extent practicable shall permit
23 members of the public to participate in a virtual meeting, subject to the conditions that apply at
24 an in-person meeting of the public body.

25 (b) If members of the public are permitted to speak at a virtual meeting, the technology
26 used to conduct the meeting must permit the members of the public body attending the meeting
27 to hear the members of the public who speak in the meeting.

28 (c) Members of the public who, under section 6, observe the virtual meeting must be able
29 to see and hear, or hear, depending on the technology used, any members of the public
30 authorized by the public body to speak during the meeting.

31 **Comment**

1 This section addresses the situation in which members of the public have a right to
2 provide comments at the meeting of a public body, either orally or in writing. This right to
3 participate typically derives not from an open meetings law but from some other law, such as an
4 administrative procedure act, another law dealing with the operations of state and local public
5 bodies, or the organic law governing the specific public body. Compliance with public comment
6 requirements may require flexible arrangements. For example, the public body could provide for
7 the submission of written comments by e-mail or text message in advance of, or within a limited
8 time after, the virtual meeting. As noted in the comment to section 5, appropriate auxiliary aids
9 and services shall be made available to afford individuals with disabilities an equal opportunity
10 to observe the virtual meeting. Subsection (c) is intended to confirm that members of the public
11 who, pursuant to section 6, have a right to observe the virtual meeting also have a right to
12 observe members of the public – such as government officials, staff of the public body, experts,
13 witnesses, or parties to a proceeding before the public body – that the public body has invited or
14 authorized to address the public body.

15 16 **Section 8. Quasi-Adjudicative Proceeding**

17 (a) If a public body considers at a virtual meeting a matter affecting the right or interest
18 of a person entitled to participate in or present evidence and, if otherwise permitted, examine or
19 cross-examine witnesses during the meeting, the public body shall permit the person to use the
20 same technology that the public body uses to conduct the meeting to participate in or present
21 evidence and examine or cross-examine witnesses during the meeting.

22 (b) If a person under subsection (a) objects that a virtual meeting will deny the person due
23 process of law, the public body may proceed with the matter at the virtual meeting only if the
24 public body considers the objection and determines that the virtual meeting provides the person
25 due process. The determination and the reason for the determination must be stated in a record.

26 **Comment**

27
28 This Section addresses the situation in which the action of the public body will so affect
29 the rights or interests of a specific member of the public that they have a due process right to be
30 heard at the meeting. These are commonly referred to as quasi-adjudicative proceedings, and
31 typically involve land use matters such as variances, special use permits, and site-specific
32 rezonings, but may also include the grant (or revocation) of licenses, franchises, permits, or
33 benefits. Georgia and North Carolina would bar quasi-adjudicative action at a virtual proceeding
34 unless all persons whose interests are affected agree. The North Carolina law also requires that
35 the right to a hearing occur during the emergency. This Act follows the approach of New
36 Jersey's virtual meeting law, which does not require the consent of the parties or that a decision

1 must be made during the emergency. The Act anticipates, however, that the public body will
2 undertake a “totality of the circumstances” examination to determine whether a virtual meeting
3 could provide due process as required by an administrative rule adopted by New Jersey’s
4 Division of Local Government concerning whether a land use board can conduct a public hearing
5 on a development application virtually: “Before holding a public hearing on an application for
6 development during a remote public meeting, a land use board shall determine whether
7 electronic communication technology can sufficiently facilitate due process of the applicant and
8 any interested party, including the ability to examine exhibits, transcribe testimony and cross-
9 examine witnesses, as well as the ability of the public to comment upon the application. Factors
10 in making this determination shall include, at minimum, the scale of the project, the number of
11 approvals requested, the degree of public interest, and the number of potential objectors.”
12 N.J.A.C. 5:39-1.7(a). The public body should also consider the consequences of delay until an
13 in-person meeting can be held. Consistent with the comment to section 5, appropriate auxiliary
14 aids and services shall be made available to afford individuals with disabilities entitled to present
15 evidence and examine or cross-examine witnesses during the meeting an equal opportunity to do
16 so.

17 **Section 9. Notice**

19 (a) In addition to any other requirement concerning the notice a public body must give for
20 a meeting of the public body, notice of a virtual meeting must specify that the meeting will be a
21 virtual meeting, the reason the meeting will be a virtual meeting, and the technology that will be
22 used for the virtual meeting.

23 (b) Notice of a virtual meeting under Section 6 must specify how members of the public
24 may contemporaneously observe the meeting.

25 (c) Notice of a virtual meeting under Section 7 or 8 must specify how members of the
26 public may participate in or present evidence or examine or cross-examine witnesses during the
27 meeting.

28 (d) Notice under subsections (b) and (c) must specify how a member of the public may:

29 (1) request auxiliary equipment or services necessary to permit the member to
30 access the meeting in the manner required; or

31 (2) alert the public body of a technical problem that prevents the member from
32 accessing the meeting in the manner required.

1 **Section 10. Rulemaking Authority**

2 A public body may adopt rules for the conduct of a virtual meeting in a manner as
3 comparable as practicable to the conduct of an in-person meeting of the public body. The rules
4 may include:

5 (1) the effect of a technical problem that interferes with the meeting or the access
6 to the meeting by a member of the public body or the public;

7 (2) the means by which a record considered at the meeting is made available to
8 the public body or, if required by the open meetings law, the public;

9 (3) the means for access to the meeting by an individual with a disability; and

10 (4) the process by which a person under Section 8 may object to the conduct of
11 the meeting on the ground that the procedure denies the person due process of law.

12 **Section 11. Uniformity of Application and Construction**

13 In applying and construing this uniform act, a court shall consider the promotion of
14 uniformity of the law among jurisdictions that enact it.

15 **Section 12. Relation to Electronic Signatures in Global and National Commerce Act**

16 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
17 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
18 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
19 described in 15 U.S.C. Section 7003(b).

20 ***Legislative Note:** It is the intent of this act to incorporate future amendments to the cited federal*
21 *law. A state in which the constitution or other law does not permit incorporation of future*
22 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
23 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
24 *incorporated into state law also should omit the phrase.*

25
26 **Comment**
27

1 The federal Electronic Signatures in Global and National Commerce Act, popularly
2 known as “E-Sign”, was adopted in 2000 to facilitate the use of electronic records and signatures
3 in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the
4 acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It
5 largely tracks the Uniform Electronic Transactions Act, adopted by the ULC in 1999, but
6 includes consumer consent provisions and prohibits state law from giving greater legal effect to
7 any specific technology or technical specification. Under Section 102 of E-Sign, state legislation
8 attempting to regulate electronic records and signatures can opt out of federal preemption,
9 allowing some modification to the federal law, so long as the State treats the records or
10 signatures consistent with E-Sign. In order to take advantage of the exception to preemption, the
11 state law must make specific reference to E-Sign as provided in this Section. See 15 U.S.C.
12 Section 7002(a)(2)(B).

13 14 **[Section 13. Severability]**

15 If a provision of this [act] or its application to a person or circumstance is held invalid,
16 the invalidity does not affect another provision or application that can be given effect without the
17 invalid provision.]

18 ***Legislative Note:** Include this section only if the state lacks a general severability statute or a*
19 *decision by the highest court of the state stating a general rule of severability.*

20 21 **[Section 14. Repeals; Conforming Amendments]**

22 (a) . . .

23 (b) . . .]

24 ***Legislative Note:** The state should examine its statutes to determine whether conforming*
25 *revisions are required by provisions of this act relating to meetings of a public body and open*
26 *meetings requirements.*

27 28 **Section 15. Effective Date**

29 This [act] takes effect