

DRAFT
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Model Public Meetings During Emergencies Act

Uniform Law Commission

June 7, 2022 Informal Session



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National Conference of Commissioners on Uniform State Laws

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May 26, 2022

Public Meetings During Emergencies Act

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Public Meetings During Emergencies Act

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Public Meetings During Emergencies Act

Section 1. Title

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

Section 2. Definitions

In this [act]:

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

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

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

(4) “Meeting” has the meaning of [meeting] in the open meetings law governing a public body.

(5) “Observe” means listen to or watch, whether or not permitted to participate.

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

(7) “Participate” means speak or submit a comment.

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

(9) “Political subdivision of the state” includes a city, [county], district, and any other local or regional governmental authority.

(10) “Public body” means an entity subject to an open meetings law. [The term

1 does not include the [Legislature and agencies of the Legislature] or a state [or local] court.]

2 (11) “Record” means information:

3 (A) inscribed on a tangible medium; or

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

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

8 **Legislative Note:** *If a state or political subdivision uses a term other than “meeting” in its open*
9 *meetings law, insert that term in the brackets in paragraph (4).*

10
11 *In paragraph (10), a state that includes the state legislature and its agencies and its state and*
12 *local courts in the state’s open meetings law and does not choose to extend the scope of the act*
13 *to those branches of government should include the bracketed sentence. If the bracketed*
14 *sentence is included, the state should insert the language used in the state to describe its state*
15 *legislature and legislative agencies. In a state that does not have local courts, the bracketed text*
16 *“or local” should be omitted.*

17 18 **Comment** 19

20 The Public Meetings During Emergencies Act builds on and fits into existing state laws
21 authorizing the declaration of emergencies and subjecting public meetings to various procedural
22 and public access requirements, particularly open meetings laws and laws providing for public
23 comment on and participation in the deliberations of public bodies. During the COVID-19
24 pandemic, most governors included within their declarations of emergency provisions
25 suspending many state laws concerning the meetings of public bodies, such as those governing
26 the location of meetings and public access and participation, and authorized virtual meetings.
27 Some of the executive orders included provisions intended to create public access and
28 participation rights in virtual meetings comparable to those applicable to traditional in-person
29 meetings. Since the onset of the pandemic a number of states have adopted laws – some
30 temporary, intended to expire after the pandemic, and others permanent – authorizing public
31 bodies to hold virtual meetings during emergencies, subject to various requirements for the
32 conduct of those meetings, including public access. States that adopted such laws or amended
33 pre-existing laws that provided some authorization for remote or virtual meetings in 2020-2022
34 include Arkansas, California (teleconference meetings for local agencies; emergency provisions
35 expire December 31, 2023, other provisions take effect January 1, 2024); Connecticut (expires
36 April 30, 2022; as of this writing a bill is pending before the state senate to extend authorization
37 through December 31, 2022), Delaware, Hawaii, Maine, Massachusetts (expires July 15, 2022),
38 Minnesota, Nevada, New York (expires, unless renewed, upon the expiration of Governor
39 Hochul’s executive order #11; that executive order was most recently extended on March 16,

2022 for thirty days), North Carolina, Oklahoma (expires February 15, 2022, or thirty days after the expiration of the COVID state of emergency; as of this writing, the Oklahoma legislature is considering a bill to permit remote meetings by “a public body in any county in which the Governor has declared a state of emergency until the emergency declaration expires or is terminated”), Vermont (expires January 15, 2023), and Virginia. This Act would provide a statutory basis for the authorization of virtual meetings during an emergency conditioned on compliance with requirements intended to assure comparable public access and participation.

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

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

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

Section 3. Scope

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

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

5 **Comment**

6
7 A number of states have laws authorizing remote participation in public meetings by
8 individual members of a public body and some forms of remote observation or participation by
9 members of the public. These laws assume that the meeting of the public body will be in a
10 physical location, and may specify that members of the public body also be at a publicly
11 accessible physical location, such as at a state office building. The Act does not supersede those
12 laws but supplements them with an authorization for an entirely or primarily virtual meeting
13 during an emergency.
14

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

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

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

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

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

24 (B) before the meeting, informs the members of the public body and the
25 public of the basis for the determination.

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

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

1 practicable, to a virtual meeting.

2 **Comment**

3
4 Subsection (a) creates a two-part test for authorizing public bodies to meet virtually.
5 First, the individual authorized by state law to declare an emergency has done so with respect to
6 a geographic area that is part of the public body's jurisdiction. That individual is likely to be the
7 governor, but for local emergencies it could be a county executive, mayor or other local official.
8 Minnesota's law, for example, requires that "the presiding officer, chief legal counsel, or chief
9 administrative officer for the affected governing body" make the determination that an in-person
10 meeting is "not practical or prudent." Minn. Stat. Ann. § 13D.021.1 (1). Second, either the
11 emergency declaration itself must have the effect of preventing an in-person meeting – such as
12 by a direct prohibition, a stay-at-home order, or an order limiting the number of people at a
13 gathering – or the presiding officer of the public body or another individual authorized to act for
14 the public body determines that due to the emergency it would be impractical or imprudent for
15 the body to meet.

16
17 The reason for the second requirement is that sometimes emergency declarations remain
18 in effect long past the most acute phase of an emergency. This may be necessary for the area to
19 continue to receive special emergency assistance or because some emergency measures may still
20 be needed. However, it might be possible for the public body to meet. The second requirement
21 addresses that concern. If the emergency declaration in effect continues to have the effect of
22 prohibiting an in-person meeting, the public body may continue to meet virtually. Alternatively,
23 if the emergency declaration by its terms does not have the effect of prohibiting an in-person
24 meeting, a virtual meeting will be authorized only if the public body's presiding officer or
25 someone else – such as its executive director – determines that it would be impractical or
26 imprudent due to the emergency for the public body to meet and advises the members of the
27 public body and the public of that determination prior to the meeting. As the need for a virtual
28 meeting is triggered by an emergency declaration, it may not always be possible for the presiding
29 officer of the public body or other authorized individual to provide the other members of the
30 public body and members of the public notification about the change to a virtual format in the
31 manner ordinarily required of notices of meetings of public bodies. The presiding officer or other
32 authorized individual should use the best means available under the circumstances to inform
33 other members of the public body and members of the public that a meeting will be held
34 virtually. Thereafter, if the conditions for a virtual meeting set by this section are met, the public
35 body will need to comply with the notice provisions of Section 8 in addition to any other
36 applicable notice requirements.

37
38 Subsection (b) creates a safe harbor for actions taken at a virtual meeting conducted in
39 accordance with the requirements of the act. The converse will also be true. That is, if the
40 meeting is not conducted in accordance with the requirements of the act, the action taken may
41 not be valid if, under the open meetings law, it would not be valid if taken at an in-person
42 meeting that is not conducted in accordance with the rules for the meeting required by the law.

43 **Section 5. Conduct of Virtual Meeting**

1 (a) A public body shall to the extent practicable select technology to conduct a virtual
2 meeting that is compatible with assistive technology commonly used by people with disabilities
3 and that facilitates the accommodation needs of people with disabilities to access the meeting.

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

8 (c) If a member of a public body is unable to obtain visual access to the virtual meeting
9 but is able to obtain audio access that permits the member contemporaneously throughout the
10 meeting to hear and be heard by the other members of the public body who attend the meeting,
11 the member may attend by audio access.

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

17 (e) A member of a public body who attends a virtual meeting is considered present for all
18 purposes, including for determination of a quorum and voting, if contemporaneously and
19 throughout the meeting the member can:

20 (1) for a meeting conducted in compliance with subsection (b), see and hear and
21 be seen and heard by the other members of the public body who attend; or

22 (2) for a meeting conducted in compliance with subsection (c) or (d), can hear and
23 be heard by the other members of the public body who attend.

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

4 (g) The minutes of a virtual meeting must include any vote taken, that the meeting was
5 conducted by electronic means, the technology used, and which members of the public body
6 attended by electronic means.

7 **Comment**

8 The provisions of this Section derive from some of the gubernatorial executive orders or
9 state laws authorizing remote public meetings, adopted between 2020 and 2022. These include:
10 Cal Gov't Code § 54953; 5 Ill. C.S. 120/7(e), Ind. Code 5-14-1.5-3.7, Ky SB 150, ch. 73, Ls of
11 2020; Me. Rev. Stat. tit. 1, § 403-A; Michigan Gov. E.O. 2020-154 (July 17, 2020); Mich.
12 Comp. L. Ann. § 15.263a; N.J.S.A. § 52:27D-18.11; N.C. Gen. Stat. § 166A-19.24; 25 Okla Stat.
13 § 307.1; Va Code Ann. § 2.2-3708.2; Vt. Laws 2022, No. 78.

14
15 Consistent with Title II of the Americans with Disabilities Act of 1990, the Rehabilitation
16 Act of 1973, and other applicable law, subsection (a) directs the public body conducting a virtual
17 meeting to select, to the extent practicable, technology that reasonably accommodates the needs
18 of individuals with a disability in accessing the meeting. This applies to access by both members
19 of the public body and members of the public when authorized to observe the meeting under
20 section 6 or to participate under sections 7 or 8. The public body shall furnish appropriate
21 auxiliary aids and services, as defined in 28 C.F.R. § 35.104, to enable individuals with
22 disabilities to effectively participate in or observe a virtual meeting of the public body.

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

35 **Section 6. Public Observation**

36
37 (a) If the open meetings law requires that the public be able contemporaneously to

1 observe all or part of a meeting of a public body:

2 (1) the public body shall permit the public contemporaneously to observe a virtual
3 meeting or the part of the virtual meeting that would be required to be open to the public if it
4 were part of an in-person meeting; and

5 (2) members of the public who observe the virtual meeting must be able to see
6 and hear or, if the public body conducts the meeting by audio-only access under Section 5(d), to
7 hear any members of the public authorized by the public body to speak in the meeting.

8 (b) A document, exhibit, or other record presented to a public body at a virtual meeting
9 that, under the open meetings law, would have been available to the public at an in-person
10 meeting, including members of the public observing a virtual meeting under Section 6, must be
11 made available to the public contemporaneously with the virtual meeting, to the extent
12 practicable.

13 **Comment**

14 This Section confirms that the state's open meetings law applies to a virtual meeting to
15 the same extent as it would to a comparable in-person meeting. If a meeting, or a portion of
16 meeting, would not be open to the public under the state's open meetings law, that meeting or
17 portion would not be open when conducted virtually. The form of public observation will
18 inevitably be affected by the nature of the technology used. For a meeting conducted by audio-
19 only technology because, under section 5, the public body lacks the capacity for an audio-visual
20 meeting, public observation may be limited to listening to the meeting. Public observation of the
21 meeting requires that the members of the public body, depending on the technology used, be
22 visible and audible, or audible, to the members of the public observing the meeting. As noted in
23 the comment to section 5, appropriate auxiliary aids and services shall be made available to
24 afford individuals with disabilities an equal opportunity to observe the virtual meeting.
25 Paragraph (a)(2) is intended to confirm that members of the public who have a right to observe
26 the virtual meeting also have a right to observe members of the public – such as government
27 officials, staff of the public body, experts, witnesses, or parties to a proceeding before the public
28 body – that the public body has invited or authorized to address the public body. Any documents
29 or exhibits considered by members of the public body may be provided by making those
30 documents or exhibits available for inspection separately from the meeting, such as by posting
31 them to the public body's website. Any such document shall be provided in a format accessible
32 to individuals with disabilities.
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(b) If members of the public are permitted to speak at a virtual meeting, the technology used to conduct the meeting must permit the members of the public body attending the meeting to hear the members of the public who speak at the meeting.

(d) If a person to which subsection (c) applies objects that a virtual meeting will deny the person due process of law, the public body may proceed with the matter in the virtual meeting only if the public body considers the objection and determines that the virtual meeting provides the person due process. The determination and the reason for the determination must be stated in a record.

Comment

Subsections (a) and (b) address the situation in which members of the public have a right to provide comments at the meeting of a public body, either orally or in writing. This right to participate may derive not from an open meetings law but from some other law, such as an administrative procedure act, another law dealing with the operations of state and local public

bodies, or the organic law governing the specific public body. Compliance with public comment requirements may require flexible arrangements. For example, the public body could provide for the submission of written comments by e-mail or text message in advance of, or within a limited time after, the virtual meeting. As noted in the comment to section 5, appropriate auxiliary aids and services shall be made available to afford individuals with disabilities an equal opportunity to observe the virtual meeting.

Subsections (c) and (d) address the situation in which the action of the public body will so affect the rights or interests of a specific member of the public that they have a due process right to be heard at the meeting. These are commonly referred to as quasi-adjudicative proceedings, and typically involve land use matters such as variances, special use permits, and site-specific rezonings, but may also include the grant (or revocation) of licenses, franchises, permits, or benefits. Georgia and North Carolina would bar quasi-adjudicative action at a virtual proceeding unless all persons whose interests are affected agree. The North Carolina law also requires that the right to a hearing occur during the emergency. This Act follows the approach of New Jersey's virtual meeting law, which does not require the consent of the parties or that a decision must be made during the emergency. The Act anticipates, however, that the public body will undertake a "totality of the circumstances" examination to determine whether a virtual meeting could provide due process as required by an administrative rule adopted by New Jersey's Division of Local Government concerning whether a land use board can conduct a public hearing on a development application virtually: "Before holding a public hearing on an application for development during a remote public meeting, a land use board shall determine whether electronic communication technology can sufficiently facilitate due process of the applicant and any interested party, including the ability to examine exhibits, transcribe testimony and cross-examine witnesses, as well as the ability of the public to comment upon the application. Factors in making this determination shall include, at minimum, the scale of the project, the number of approvals requested, the degree of public interest, and the number of potential objectors." N.J.A.C. 5:39-1.7(a). The public body should also consider the consequences of delay until an in-person meeting can be held. Consistent with the comment to section 5, appropriate auxiliary aids and services shall be made available to afford individuals with disabilities entitled to present evidence and examine or cross-examine witnesses during the meeting an equal opportunity to do so.

The requirements of this section apply not only when the member of the public affected by the public body is participating virtually but also when the member of the public and some members of the public body are present at an in-person meeting of the public body but one or more members of the public body are participating virtually under this act.

Section 8. Notice

(a) In addition to any other requirement concerning notice a public body must give for a meeting of the public body, notice of a virtual meeting must specify that the meeting will be a virtual meeting, the reason provided pursuant to section 4(a)(2)(B) that the meeting will be a

virtual meeting, and the technology that will be used for the virtual meeting.

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

(c) Notice of a virtual meeting under Section 7 must specify how a member of the public may participate, present evidence, or examine or cross-examine witnesses at the meeting.

(d) Notice under subsections (b) and (c) must specify how:

(1) a member of the public may alert the public body of a technical problem that prevents the member from accessing the meeting; and

(2) a member of the public with a disability may request auxiliary equipment or services necessary to permit the member to access the meeting.

Section 9. Rulemaking Authority

A public body may adopt rules for conducting a virtual meeting comparable to rules for conducting an in-person meeting of the public body. The rules may include:

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

(2) the means by which a record considered at a meeting is made available to the public body and, if required by other law, the public;

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

(4) the process by which a person may object under Section 7 to the conduct of a meeting on the ground that the procedure denies the person due process of law.

Section 10. Uniformity of Application and Construction

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

1 (b) . . .]

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

5
6 **Section 14. Effective Date**

7 This [act] takes effect . . .