

CHAPTER 265
FORMERLY
SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 243

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE RELATING TO THE FREEDOM OF INFORMATION ACT.

WHEREAS, since 2009, when video-conferencing was first permitted under the Freedom of Information Act (“FOIA”) by Senate Bill No. 104 (145th General Assembly), technology has continued to evolve and the need to provide more mechanisms for participation by members of public bodies and the public has grown; and

WHEREAS, technology can increase the ability of individuals with disabilities to serve as members of advisory bodies and participate in public meetings; and

WHEREAS, under the Governor's March 12, 2020, Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat and House Concurrent Resolution No. 85 (“HCR 85”), public bodies in Delaware have been successfully holding virtual public meetings; and

WHEREAS, technology is available to hold a virtual public meeting in compliance with the FOIA requirements for a meeting in a physical location; and

WHEREAS, virtual meetings allow greater public attendance and participation in public meetings, especially by individuals with disabilities; and

WHEREAS, however, not everyone has access to technology that allows both audio and visual participation in a virtual meeting; and

WHEREAS, it is the intent of the General Assembly, that whenever practicable, virtual meetings include the ability for participants to simultaneously hear the comments of and view a member or participant recognized by a chair or presiding officer of a public body; and

WHEREAS, the General Assembly encourages advisory bodies to use technology to hold virtual meetings, in conjunction with a meeting at a physical location, to increase opportunities for public participation in civic affairs.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. The General Assembly finds and declares all of the following:

(1) Technology can increase the ability of individuals with disabilities to serve as members of public bodies and participate in public meetings.

(2) There is well-established law regarding when a place of public accommodation must provide a reasonable accommodation to an individual with a disability, if providing the accommodation is not an undue burden.

(3) Technology that allows for virtual meetings provides a new manner to provide a reasonable accommodation to a member of a public body with a disability.

(4) The requirements under the Freedom of Information Act, Chapter 100 of Title 29, could be interpreted to limit the use of technology to provide a reasonable accommodation to an individual with a disability, as required by state and federal law.

(5) Virtual meetings allow greater public attendance and participation in public meetings, especially by individuals with disabilities.

(6) However, not everyone has access to technology that allows both audio and visual participation in a virtual meeting.

(7) It is the intent of the General Assembly, that whenever practicable, virtual meetings include the ability for participants to simultaneously hear the comments of and view a member or participant recognized by a chair or presiding officer of a public body.

Section 2. Amend § 10002, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 10002. Definitions.

(c) “FOIA” means the Freedom of Information Act ~~-(this chapter)-~~ under this chapter.

(n) “Video-conferencing” means any system permitting interaction among all participants in 2 or more noticed public locations ~~in compliance with~~ that meets the requirements under § 10006 of this title.

Section 3. Amend § 10004, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 10004. Open meetings.

(e)(1) This subsection concerning notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly.

(2) All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings, including whether such meeting will be conducted ~~by video-conferencing; under § 10006 or § 10006A of this title;~~ however, the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting.

Section 4. Amend Chapter 100, Title 29 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 10006A. Open meetings; virtual meetings; reasonable accommodations for members with a disability.

(a) For purposes of this section:

(1) “Advisory body” means an entity that is impliedly or specifically charged by a public body or public official to provide advice to a public body or public official or make reports or recommendations to a public body or public official. “Advisory body” does not mean an entity that has authority to make a legally binding decision regarding a specific person’s right, privilege, or remedy, including a case decision under § 10102 of this title.

(2) “Anchor location” means the physical location within the geographic jurisdiction of the public body that is open to the public and at which 1 or more members of a public body attend a virtual meeting.

(3) “Disability” means as defined in § 4502 of Title 6.

(4) “Electronic” means as defined in § 12A-102 of Title 6.

(5) “Public meeting” means the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.

(6) “State of emergency” means as defined in § 3102 of Title 20.

(7) “Virtual meeting” means a public meeting of a public body that 1 or more members attend through the use of an electronic means of communication and that meets the requirements under this section.

(b)(1) A public body shall allow a member with a disability to attend a public meeting of the public body through the use of an electronic means of communication, instead of being required to attend in-person at a physical location, as a reasonable accommodation under § 4504 of Title 6.

(2) Paragraph (b)(1) of this section applies to a public body whose members are all elected by the public to serve on the public body, unless to do so imposes an undue burden under Chapter 45 of Title 6.

(c) At the discretion of the chair or presiding officer, a public body may allow the public to monitor or provide public comment at a public meeting through the use of an electronic means of communication.

(d) An advisory body may hold a virtual meeting with 1 or more members participating through the use of an electronic means of communication if, in addition to the requirements under subsection (h) of this section, the virtual meeting includes an anchor location.

(e) During a state of emergency, a public body may hold a virtual meeting at which members participate through the use of an electronic means of communication if, in addition to the requirements under subsection (h) of this section, all of the following occur:

(1) The virtual meeting is preceded by the same public notice as would be required if the public meeting were to be held only at a physical location, except that notice of the public meeting does not need to be conspicuously posted at the principal office of the public body holding the public meeting or where public meetings of the public body are regularly held.

(2) If required by law, the public body must maintain a verbatim transcript of the public meeting.

(3) If all of the members of the public body are elected by the public to serve on the public body, all of the following must occur:

a. A document that is used during the public meeting by a member or witness, and that is accepted by the presiding officer or chair, is immediately transmitted to each member or witness participating in the public meeting.

b. The public is able to review a recording of the public meeting within a reasonable time after the public meeting concludes.

(f) If necessary to prevent a public health emergency, as defined in § 3132 of Title 20, the Governor may issue an executive order allowing public bodies to hold virtual meetings at which any or all members may participate

through the use of an electronic means of communication. A virtual meeting held under this subsection must comply with the requirements under subsection (h) and paragraphs (e)(1) through (e)(3) of this section.

(g)(1) All actions taken during a virtual meeting conducted under this section have the same legal effect as if the members were physically present at the same location.

(2) For the purposes of determining quorum for a virtual meeting, a member participating in a virtual meeting is considered present as if the member were physically present at the public meeting.

(3) For the purposes of voting during a virtual meeting, a member participating in a virtual meeting is able to vote as if the member were physically present at the public meeting.

(4) A technological failure that prevents, or a technological limitation that limits, public access otherwise required under this chapter does not invalidate a virtual meeting or an action taken at a virtual meeting.

(h) If a public body is permitted to hold a virtual meeting under this section, all of the following must occur for any virtual meeting the public body holds:

(1) The identity of a member or witness is verified, and the actions of a member are authenticated, in a manner satisfactory to the presiding officer or chair.

(2) All participating members and witnesses can simultaneously do 1 of the following regarding each member or witness who is recognized by the presiding officer or chair:

a. Hear the comments of each member or witness.

b. Hear the comments of and view each member or witness.

(3) A document used during the public meeting by a member or witness, and that is accepted by the presiding officer or chair, is provided to each member participating in the public meeting and made available to the public under § 10003 of this title.

(4) Except during an executive session under § 10004 of this title, the public is able to do all of the following through an electronic means of communication:

a. Monitor the public meeting.

b. Provide public comment, if the public body is required to accept, or provides an opportunity for, public comment.

(5) The public meeting notice under § 10004 of this title includes information regarding how the public can monitor or participate in the public meeting under paragraph (h)(4) of this section.

(6) Minutes of the virtual meeting are maintained under § 10004 of this title.

Section 5. This Act expires on June 30, 2021, unless terminated or extended by subsequent action of the General Assembly.

Approved July 23, 2020