



SPONSOR: Sen. Hansen & Sen. Poore & Sen. Delcollo & Rep. Brady
& Rep. Baumbach & Rep. Griffith
Sens. Cloutier, Lockman, Sokola, Townsend

DELAWARE STATE SENATE
150th GENERAL ASSEMBLY

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.

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

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

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

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

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

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

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

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

20 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 ~~under 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~~ 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.

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

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

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

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

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

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

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

99 (f) If necessary to prevent a public health emergency, as defined in § 3132 of Title 20, the Governor may issue an
100 executive order allowing public bodies to hold virtual meetings at which any or all members may participate through the
101 use of an electronic means of communication. A virtual meeting held under this subsection must comply with the
102 requirements under subsection (h) and paragraphs (e)(1) through (e)(3) of this section.

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

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

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

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

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

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

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

117 a. Hear the comments of each member or witness.

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

119 (3) A document used during the public meeting by a member or witness, and that is accepted by the presiding
120 officer or chair, is provided to each member participating in the public meeting and made available to the public under
121 § 10003 of this title.

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

124 a. Monitor the public meeting.

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

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

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

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

SYNOPSIS

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

This Act amends FOIA to allow a public body to hold a meeting electronically if specific notice and public access requirements are met. The notice and access requirements follow the guidelines established under HCR 85.

This Act gives “advisory bodies” the broadest ability to hold virtual meetings because the vast majority of citizen boards, commissions, task forces, and councils currently in place in Delaware are comprised of volunteer citizens, who serve without pay, and who are charged with providing advice to administrative agencies, the legislature, and others in government. Advisory bodies meet to review data and discuss the programs or operations of particular governmental bodies, to provide advice and recommendations to governmental bodies and members of the public on particular issues, to

confer and issue opinions regarding legislation on particular public policy issues, and to provide support and direction for particular public policy goals.

There are other boards, commissions, and councils that meet to decide whether to grant or deny certain rights, remedies, or privileges to specific individuals or legal entities, such as a permit, a license, an appeal, or other decision by the board that has legal significance in a subsequent hearing. Boards that have the authority to decide rights, remedies, or privileges in specific situations are not considered advisory bodies under this Act.

Frequently, advisory bodies have a difficult time conducting business because business can only be conducted when a quorum of the advisory body is present at the physical meeting location. As a result, some advisory bodies go months without being able to make quorum, members become discouraged, the advisory body stops holding regular meetings, and eventually becomes ineffectual.

Delaware agencies and citizens have made great strides in utilizing the technology to conduct virtual meetings since the State of Emergency was ordered as a result of the COVID-19 pandemic. However, shortfalls with this technology have been experienced, including the knowledge that significant portions of our State are not yet served with the quality of internet service necessary to support virtual participation in which the participant can be both heard and seen. For this reason, this Act encourages virtual participation encompassing both the ability to hear and see all participants, but also allows technology that only provides the ability to hear all participants.

Under this Act, if an advisory body holds a virtual meeting when there is no state of emergency or threat of a public health emergency, members of public must be able to monitor the meeting virtually or in-person at a physical location. If the advisory body is required to accept public comment or provides the opportunity for public comment, the public must be able to participate virtually or at the physical location.

Specifically, this Act does all of the following:

1. Allows an advisory body to hold a virtual meeting at any time, if there is an anchor location that is open to the public and 1 or more members of the advisory body attend the meeting at the anchor location.
2. During a state of emergency, allows any public body to hold a virtual meeting. If all members of a public body are elected by the public to serve on the public body, there are requirements to ensure that members have contemporaneous access to documents and the public has the ability to monitor the proceeding and provide public comment, if public comment is otherwise allowed by statute.
3. Permits the Governor, by executive order, to allow all public bodies to hold virtual meetings if necessary to prevent a public health emergency.
4. Clarifies that if its members are not all elected by the public to serve on the public body, a public body must allow a member with a disability to attend a meeting electronically as a reasonable accommodation under § 4504 of Title. If all of the members of the public body are elected by the public, then a public body must allow a member with a disability to attend a meeting electronically unless doing so would present an undue burden.

This Act does not revise § 10006 of Title 29, the existing video-conferencing section, because § 10006 permits more types of public bodies to conduct a meeting through video-conferencing than are permitted to conduct a virtual meeting under this Act in the absence of a state of emergency or executive order by the Governor.

Senate Substitute No. 1 for Senate Bill No. 243 differs from Senate Bill No. 243 as follows:

Section 1 sets forth the findings and intent of the General Assembly regarding the use of technology to improve access to public meetings for all Delawareans and in particular, individuals with disabilities. Section 1 also clarifies that it is the intent of the General Assembly to incorporate the well-established body of law that requires places of public accommodation to provide reasonable accommodations to individuals with disabilities if the accommodation can be provided without imposing an undue burden on the place of public accommodation.

Section 2 makes technical corrections to conform existing law to the standards of the Delaware Legislative Drafting Manual.

Section 4 revises the new virtual meeting section, as follows:

1. Reorganizes the new § 10006A for clarity.
2. Revises language to improve clarity and incorporate concerns from stakeholders.
3. Clarifies that a public body that is composed entirely of members elected by the public to the public body may allow a member with a disability to attend a public meeting through a means of electronic communication as a reasonable accommodation.
4. Allows any public body, at the discretion of the chair or presiding officer, to allow the public to monitor or provide public comment through the use of an electronic means of communication.

5. Requires that if a public body holds a virtual meeting, the public must be able to monitor the virtual meeting electronically, and, if applicable, provide public comment through the use of a means of electronic communication.

Section 5 sunsets § 10006A, the new virtual meeting provisions, in its entirety, on June 30, 2021. This sunset provision anticipates continued work by agencies and public stakeholders to learn from experience using technology to hold virtual public meetings and to revise this section during the next legislative session to reflect lessons learned through experience.

Finally, Senate Substitute No. 1 for Senate Bill No. 243 states that passage of this Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend a charter issued to a municipal corporation.

Author: Senator Hansen