

COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK DEPARTMENT OF STATE

ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
TELEPHONE: (518) 474-2518
FAX: (518) 474-1927
WWW.OPENGOVERNMENT.NY.GOV

COMMITTEE MEMBERS

ANTONIO DELGADO
PETER D. GRIMM
HADLEY HARRIGAN
ROBERT MEGNA
JEANETTE M. MOY
ROBERT J. RODRIGUEZ
DAVID A. SCHULZ
FRANKLIN H. STONE
STEPHEN B. WATERS

EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

MEMORANDUM

TO: Whom it May Concern

FROM: Shoshanah Bewlay
Executive Director, Committee on Open Government

RE: *Chapter 58 of the Laws of 2023 Amending § 103-a(2)(c) of the Open Meetings Law*

DATE: May 5, 2023

On May 3, 2023, Governor Kathy Hochul signed into Law Chapter 58 of the Laws of 2023, which, in part, provides for the exemption from certain in person meeting participation requirements of individuals with disabilities who are members of public bodies as defined in the Open Meetings Law (Pub. Off. L. § 100 et seq.). Specifically, Chapter 58 amended Public Officers Law § 103-a(2)(c) to allow public bodies, notwithstanding the quorum requirements otherwise applicable in this section, through written procedures:

to allow for any member who has a disability as defined in section two hundred ninety-two of the executive law, where such disability renders such member unable to participate in-person at any such meeting location where the public can attend, to be considered present for purposes of fulfilling the quorum requirements for such public body at any meetings conducted through videoconferencing pursuant to this section, provided, however, that the remaining criteria set forth in this subdivision are otherwise met; and provided, further, that the public body maintains at least one physical location where the public can attend such meeting;

This amendment takes effect immediately and will be deemed repealed on the same date (July 1, 2024) as the remainder of § 103-a. The full text of the Open Meetings Law may be found [here](#).

NEW YORK STATE COMMITTEE ON OPEN GOVERNMENT

QUESTIONS AND ANSWERS CHAPTER 56 OF THE LAWS OF 2022

On April 9, 2022, Governor Hochul signed Chapter 56 of the Laws of 2022 relating to the New York State budget for the 2022-2023 state fiscal year. Included in the bill is an amendment to the Open Meetings Law (OML) to make permanent (until July 1, 2024) the expanded use of videoconferencing by public bodies to conduct open meetings, *under extraordinary circumstances*, regardless of a declaration of emergency.

As a threshold matter, it is our understanding that the new law is not meant to change or curtail what has always been required of public bodies complying with the Open Meetings Law. Public bodies may continue to operate now as they did *before* the onset of the pandemic in early 2020 when the “in person” aspects of the Open Meetings Law were first suspended. In other words, we believe that if a public body was permitted to do it before the pandemic, this law does not change that. As noted above, this law is intended to expand, in extraordinary circumstances only, the ability of public bodies to meet using remote access technology.

Below we have identified areas of the law that may require clarification.

Q. Are public bodies required to comply with the new videoconferencing requirements right away?

A. No. For sixty days after the effective date of Chapter 56 (April 9, 2022; accordingly through June 8, 2022), public bodies are authorized to meet and take such action authorized by law without permitting in public-in-person access to meetings and authorize such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed. This language closely models the language of Chapter 417 of the Laws of 2021 and [Chapter 1 of the Laws of 2022](#), the requirements of which have been in effect since September 2021.

Q. What is considered an “extraordinary circumstance” under which a public body may permit a member to participate remotely by videoconference from a location not open to the public?

A. Each public body that wishes to allow for remote attendance by its members at locations that do not allow for in-person physical attendance by the public is required to adopt a local law (governing bodies of counties, cities, towns and villages), adopt a joint resolution (New York State Senate and Assembly), or adopt a resolution (any other public body) authorizing such remote attendance, and must establish written procedures that set forth what they determine to be “extraordinary circumstances.” The Law includes a non-exhaustive list of examples of such circumstances, “including disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member’s physical attendance at such meeting.”

Q. Are public bodies permitted to conduct its meetings at multiple physical locations from which members of the body may participate if those locations are open to in-person public attendance, regardless of extraordinary circumstances?

A. Yes. We understand that the intent of the amendments to the OML was to *expand* the authority of a public body to allow its members to participate in a meeting using videoconferencing under limited circumstances when the member’s location is not open to in-person public attendance. Before the onset of the pandemic in 2020, public bodies routinely held proper open meetings by videoconference from

multiple physical locations identified in the meeting notice that were open to the public, connected virtually together by videoconference. This remains proper. It was not the intent to limit the existing authority to virtually connect multiple public locations from which members and the public may attend through the use of videoconferencing technology.

Q. Which members of the public body may count toward a quorum?

A. Any member who participates at a physical location that is open to in-person physical attendance by the public (and which location has been included in the meeting notice) may count toward a quorum and may fully participate and vote in the meeting. If there is a quorum of members at a physical location open to the public, the public body may properly convene a meeting; a member who is participating from a remote location that is *not* open to in-person physical attendance by the public may not be counted toward a quorum of the public body (but may participate and vote if there is a quorum of members at a physical location open to the public).

Q. Can members of a public body participate remotely in a meeting, for any reason, without convening at least a quorum of members at a physical location (or locations) open to the public?

A. No. Chapter 56 states that members of the public body “shall be physically present at any such meeting unless such member is unable to be physically present at any such meeting location due to extraordinary circumstances.”

Q. Are public bodies *required* to allow their members to participate remotely, under extraordinary circumstances, at locations that do not allow for in-person physical attendance by the public?

A. No. Chapter 56 states that a public body “may, in its discretion” allow its members to participate remotely, under extraordinary circumstances and so long as there is a quorum of members gathered at a physical location or locations open to the public, at locations that do not allow for in-person physical attendance by the public.

Q. If a public body allows its members to participate remotely, under extraordinary circumstances, at locations that do not allow for in-person physical attendance by the public, must it afford members of the public the opportunity to view the meeting by videoconference as well?

A. Yes. If a public body uses videoconferencing to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used and must include directions for how the public can view and/or participate (if participation is permitted) in such meeting. The public body must provide the opportunity for members of the public to view the meeting, using remote technology or in person, in real time.

Q. If a public body allows for public comment or public participation by members of the public who attend its meetings in-person, must it allow the same for members who attend remotely?

A. Yes. The law requires public bodies to allow members of the public to participate in proceedings by videoconference in real time where public comment or participation is authorized and shall ensure that videoconferencing authorizes the same public participation or testimony as in person participation or testimony.

Q. Is participation by a member of a public body by teleconferencing (audio only) authorized by Chapter 56?

A. No. The Law requires that except in the case of executive sessions, a “public body shall ensure that members of the public body can be heard, seen and identified, while the meeting is being conducted, including but not limited to any motions, proposals, resolutions, and any other matter formally discussed or voted upon.” (Note that an executive session may only be properly convened after a successful motion made during an open session, and that but for the requirement to permit the public to attend and view the session, all other requirements of the Law continue to apply to executive sessions.)

Q. Must the meeting minutes reflect which members of the public body participated remotely?

A. Yes. The Law requires that “minutes of the meetings involving videoconferencing shall include which, if any, members participated remotely.”

Q. Are public bodies required to record and/or transcribe open meetings conducted using videoconferencing?

A. Yes. The Law requires that “each meeting conducted using videoconferencing shall be recorded and such recordings posted or linked on the public website of the public body within five business days following the meeting and shall remain so available for a minimum of five years thereafter. Such recordings shall be transcribed upon request.”

Q. Are public bodies required to record and/or transcribe the executive session portions of meetings conducted using videoconferencing?

A. No. In our view the obligation to record and transcribe upon request only applies to the open portions of the meeting that the public is entitled to attend.

Q. What if a local public body does not maintain an official website for purposes of posting the recording of its meetings?

A. Any local public body electing to utilize the “extraordinary circumstances” videoconferencing described in the Law to conduct its meetings *must* maintain an official website.

Q. Does the Law address the ability of a public body to hold fully remote meetings during a state of emergency?

A. Yes. The Law states that the “in person” participation requirements of the Law shall not apply during a state disaster emergency declared by the governor pursuant to section twenty-eight of the executive law, or a local state of emergency proclaimed by the chief executive of a county, city, village or town pursuant to section twenty-four of the executive law, if the public body determines that the circumstances necessitating the emergency declaration would affect or impair the ability of the public body to hold an in person meeting.

Resolution No. _____

[PUBLIC BODY]

WHEREAS, by passing Chapter 56 of the Laws of 2022 (“Chapter 56”), the New York State Legislature amended Section 103 of the Open Meetings Law; and

WHEREAS, Chapter 56 adds Section 103-a of the Open Meetings Law, permitting the [PUBLIC BODY] to authorize its members to attend meetings by videoconferencing under extraordinary circumstances; and

WHEREAS, Section 103-a(2)(a) requires the [PUBLIC BODY] to adopt a resolution following a public hearing authorizing the limited use of videoconferencing under such circumstances; and

WHEREAS, Section 103-a(2) allows for hybrid meetings by requiring “that a minimum number of members are present to fulfill the public body’s quorum requirement in the same physical location or locations where the public can attend”; and

WHEREAS, Section 103-a(2)(c) requires that members be physically present at any such meeting “unless such member is unable to be physically present at any such meeting location due to extraordinary circumstances . . . including disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member’s physical attendance at such meeting”; and

WHEREAS, in accordance with Section 103-a(2)(d), any members attending by videoconference must, except during executive session, be “heard, seen and identified, while the meeting is being conducted, including but not limited to any motions, proposals, resolutions, and any other matter formally discussed or voted upon”; and

WHEREAS, Section 103-a(2)(g) requires that any meeting where a member attends by videoconference be recorded, posted to the [PUBLIC BODY] webpage within five business days, and transcribed upon request; and

WHEREAS, Section 103-a(2)(h) requires that members of the public be permitted to attend and participate, if authorized, in any meeting by videoconference when a member attends by videoconference.

BE IT RESOLVED, that the [PUBLIC BODY] authorizes its members who experience an extraordinary circumstance, as described above and further defined by any rules or written procedures later adopted, to attend meetings by videoconference: (i) as long as a quorum of the members attend in-person at one or more locations open to the public; (ii) as long as the member can be seen, heard, and identified while the open portion of the meeting is being conducted; and (iii) as otherwise permitted under Chapter 56 of the Laws of 2022; and be it further

RESOLVED, that the [PUBLIC BODY] shall create written procedures further governing its use of videoconferencing by its members in compliance with Chapter 56 of the Laws of 2022.

MODEL Procedures for Member Videoconferencing
Pursuant to Public Officers Law § 103-a

In compliance with Public Officers Law (POL) § 103-a(2)(a), the [PUBLIC BODY], following a public hearing, authorized by resolution on [insert date] the use of videoconferencing as described in POL § 103-a.

The following procedures are hereby established to satisfy the requirement of POL § 103-a(2)(b) that any public body which in its discretion wishes to permit its members to participate in meetings by videoconferencing from private locations – under extraordinary circumstances – must establish written procedures governing member and public attendance.

1. [PUBLIC BODY] members shall be physically present at any meeting of the [PUBLIC BODY] unless such member is unable to be physically present at one of the designated public meeting locations due to extraordinary circumstances.
2. For purposes of these procedures, the term “extraordinary circumstances” includes disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member’s physical attendance at such meeting.
3. If a member is unable to be physically present at one of the designated public meeting locations and wishes to participate by videoconferencing from a private location due to extraordinary circumstances, the member must notify [REPRESENTATIVE OR CHAIR OF PUBLIC BODY] no later than four business days prior to the scheduled meeting in order for proper notice to the public to be given. If extraordinary circumstances present themselves on an emergent basis within four days of a meeting, the [PUBLIC BODY] shall update its notice as soon as practicable to include that information. If it is not practicable for the [PUBLIC BODY] to update its notice, the [PUBLIC BODY] may reschedule its meeting.
4. If there is a quorum of members participating at a physical location(s) open to the public, the [PUBLIC BODY] may properly convene a meeting. A member who is participating from a remote location that is not open to in-person physical attendance by the public *shall not* count toward a quorum of the [PUBLIC BODY] but may participate and vote if there is a quorum of members at a physical location(s) open to the public.
5. Except in the case of executive sessions conducted pursuant to POL § 105, the [PUBLIC BODY] shall ensure that its members can be heard, seen, and identified while the meeting is being conducted, including but not limited to any motions, proposals, resolutions, and any other matter formally discussed or voted upon. This shall include the use of first and last name placards physically placed in front of the members or, for members participating by videoconferencing from private locations due to extraordinary circumstances, such members must ensure that their full first and last name appears on their videoconferencing screen.
6. The minutes of the meetings involving videoconferencing based on extraordinary circumstances pursuant to POL § 103-a shall include which, if any, members participated by videoconferencing from a private location due to such extraordinary circumstances.

**MODEL Procedures for Member Videoconferencing
Pursuant to Public Officers Law § 103-a**

7. The public notice for the meeting shall inform the public: (i) that extraordinary circumstances videoconferencing will (or may) be used, (ii) where the public can view and/or participate in such meeting, (iii) where required documents and records will be posted or available, and (iv) the physical location(s) for the meeting where the public can attend.
8. The [PUBLIC BODY] shall provide that each open portion of any meeting conducted using extraordinary circumstances videoconferencing shall be recorded and such recordings posted or linked on the [PUBLIC BODY] website within five business days following the meeting, and shall remain so available for a minimum of five years thereafter. Such recordings shall be transcribed upon request.
9. If members of the [PUBLIC BODY] are authorized to participate by videoconferencing from a private location due to extraordinary circumstances, the [PUBLIC BODY] shall provide the opportunity for members of the public to view such meeting by video, and to participate in proceedings by videoconference in real time where public comment or participation is authorized. The [PUBLIC BODY] shall ensure that where extraordinary circumstances videoconferencing is used, it authorizes the same public participation or testimony as in person participation or testimony.
10. Choice 1:

Open meetings of the [STATE PUBLIC BODY OR AUTHORITY] conducted using extraordinary circumstances videoconferencing pursuant to the provisions of POL § 103-a shall be broadcast pursuant to the requirements of POL § 103(f) and shall utilize technology to permit access by members of the public with disabilities consistent with the 1990 Americans with Disabilities Act (ADA), as amended, and corresponding guidelines. For the purposes of this guideline, “disability” shall have the meaning defined in Executive Law § 292.

Choice 2:

Open meetings of the [ALL OTHER PUBLIC BODIES] conducted using extraordinary circumstances videoconferencing pursuant to the provisions of POL § 103-a shall utilize technology to permit access by members of the public with disabilities consistent with the 1990 Americans with Disabilities Act (ADA), as amended, and corresponding guidelines. For the purposes of this guideline, “disability” shall have the meaning defined in Executive Law § 292.
11. The in-person participation requirements of POL § 103-a(2)(c) shall not apply during a [state disaster emergency declared by the governor pursuant to Executive Law § 28 or a local state of emergency proclaimed by the chief executive of a county, city, village or town pursuant to § 24 of the Executive Law] if the [PUBLIC BODY] determines that the circumstances necessitating the emergency declaration would affect or impair the ability of the [PUBLIC BODY] to hold an in-person meeting.
12. These procedures shall be conspicuously posted on the [PUBLIC BODY] website.