

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 does not change or curtail what has always been required of public bodies complying with the Open Meetings Law. Public bodies should 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, we understand that this law expands, 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 there any required steps that a public body or local public body must complete before it can permit its members to participate in an open meeting from a private location, citing “extraordinary circumstances” as described in the new § 103-a of the OML?

A. Yes. The new Law requires that every public body must conduct a hearing before taking advantage of the “extraordinary circumstances” described therein. The Law provides, among the other listed prerequisites, that a “public body may, in its discretion, use videoconferencing to conduct its meetings pursuant to the requirements of this article . . . where . . . the governing board of a county, city, town or



village has adopted a local law, or a public body has adopted a resolution, or the senate and assembly have adopted a joint resolution, *following a public hearing*, authorizing the use of videoconferencing.” While the required hearing is most likely also a meeting subject to the other requirements of the OML, it is possible that additional legal requirements imposed by different statutes will also apply to any such hearing.

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 amendments to the OML *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 is our opinion that the new § 103-a does not 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 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 count 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 requires 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 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, subject to rules adopted by a public body following a hearing.



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 conducts a meeting leveraging § 103-a allowing a member to participate from a private location by videoconference based upon a determination of “extraordinary circumstances,” the public notice for the meeting must inform the public that such videoconferencing will be used and must include directions for how the public can view and/or participate (if participation is permitted) in such meeting.

Q. If using § 103-a “extraordinary circumstances” videoconferencing to conduct its meeting, must a public body that allows for public comment or public participation by members of the public who attend its meetings in-person allow the same for members who attend remotely?

A. Yes. If using § 103-a to conduct its meeting, a public body that permits public comment or participation must provide the same opportunity for members of the public to view the meeting and participate, both by remote technology or in person, in real time. It is our opinion that, if a public body is using § 103-a to conduct its meeting, it shall ensure that its videoconferencing technology permits the same public participation or testimony as in person participation or testimony by members of the public.

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. Section 103-a now requires that “each meeting conducted using [extraordinary circumstances] 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.” This provision does not apply to meetings of public bodies that are not taking advantage of “extraordinary circumstances” videoconferencing such that a member is participating from a non-public location pursuant to the new § 103-a.

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. The law defines “local public body” as any public body limited in its function to an area of less than the entire state, as well as certain entities that are or political subdivisions, public corporations, or municipal corporations.

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.

