



STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

To: Douglas Boyle, Director of the Indiana Fire Prevention and Building Safety Commission
Justin Guedel, Deputy General Counsel, Indiana Department of Homeland Security
From: Philip A. Gordon, Deputy Attorney General, Advisory Division
Date: May 20, 2021
Re: Electronic Meeting Policy and Legislative Updates

QUESTION PRESENTED: What provisions must the Indiana Fire Prevention and Building Safety Commission (the “Commission”) follow for electronic meetings?

BRIEF ANSWER: The Commission must follow and adhere to the provisions of Ind. Code § 5-14-1.5-3.6 when having members of the Commission participate in meetings via electronic means.

BACKGROUND: With the winding down of the COVID-19 pandemic, and its resulting executive orders, imminent, the Commission would like to begin planning for future public meetings. The Commission appears ready to resume full-scale physical meetings, but a few concerns remain, including any health concerns of commission members, video and streaming capabilities of meetings, and whether a hybrid system may be adopted to facilitate and continue some form of virtual meetings.

ANALYSIS:

The Commission and the Open Door Law

The Commission is subject to Indiana’s Open Door Law codified at Ind. Code § 5-14-1.5 *et seq.* Specifically, Ind. Code § 5-14-1.5-3.6, as amended by HEA 1437 (2021), provides in relevant part:

...

(b) A member of a governing body who is not physically present at a meeting of the governing body may participate in a meeting of the governing body by electronic communication only if the member uses a means of communication that permits:

- (1) the member;

(2) all other members participating in the meeting;
(3) all members of the public physically present at the place where the meeting is conducted; and
(4) if the meeting is conducted under a policy adopted under subsection (g)(7), all members of the public physically present at a public location at which a member participates by means of electronic communication; to simultaneously communicate with each other during the meeting.

(c) The governing body must fulfill both of the following requirements for a member of the governing body to participate in a meeting by electronic communication:

(1) ... This subdivision does not apply to a governing body if at least fifty-one percent (51%) of the governing body membership consists of individuals with a disability (as described in IC 12-12-8-3.4) or individuals with a significant disability (as described in IC 12-12-8-3.6), or both. The minimum number of members who must be physically present at the place where the meeting is conducted must be the greater of:

(A) two (2) of the members; or

(B) one-third ($\frac{1}{3}$) of the members.

(2) All votes of the governing body during the electronic meeting must be taken by roll call vote.

Nothing in this section affects the public's right under this chapter to attend a meeting of the governing body at the place where the meeting is conducted and the minimum number of members is physically present as provided for in subdivision (1).

(d) Each member of the governing body is required to physically attend at least one (1) meeting of the governing body annually. This subsection does not apply to a governing body if at least fifty-one percent (51%) of the governing body membership consists of individuals with a disability (as described in IC 12-12-8-3.4) or individuals with a significant disability (as described in IC 12-12-8-3.6), or both.

(e) Unless a policy adopted by a governing body under subsection (g) provides otherwise, a member who participates in a meeting by electronic communication:

(1) is considered to be present at the meeting;

(2) shall be counted for purposes of establishing a quorum; and

(3) may vote at the meeting.

(f) A governing body may not conduct meetings using a means of electronic communication until the governing body:

(1) meets all requirements of this chapter; and

(2) by a favorable vote of a majority of the members of the governing body, adopts a policy under subsection (g) governing participation in meetings of the governing body by electronic communication.

(g) A policy adopted by a governing body to govern participation in the governing body's meetings by electronic communication may do any of the following:

(1) Require a member to request authorization to participate in a meeting of the governing body by electronic communication within a certain number of days before the meeting to allow for arrangements to be made for the member's participation by electronic communication.

(2) Subject to subsection (e), limit the number of members who may participate in any one (1) meeting by electronic communication.

(3) Limit the total number of meetings that the governing body may conduct in a calendar year by electronic communication.

(4) Limit the number of meetings in a calendar year in which any one (1) member of the governing body may participate by electronic communication.

(5) Provide that a member who participates in a meeting by electronic communication may not cast the deciding vote on any official action. For purposes of this subdivision, a member casts the deciding vote on an official action if, regardless of the order in which the votes are cast:

(A) the member votes with the majority; and

(B) the official action is adopted or defeated by one (1) vote.

(6) Require a member participating in a meeting by electronic communication to confirm in writing the votes cast by the member during the meeting within a certain number of days after the date of the meeting.

(7) Provide that in addition to the location where a meeting is conducted, the public may also attend some or all meetings of the governing body, excluding executive sessions, at a public place or public places at which a member is physically present and participates by electronic communication. If the governing body's policy includes this provision, a meeting notice must provide the following information:

(A) The identity of each member who will be physically present at a public place and participate in the meeting by electronic communication.

(B) The address and telephone number of each public place where a member will be physically present and participate by electronic communication.

(C) Unless the meeting is an executive session, a statement that a location described in clause (B) will be open and accessible to the public.

(8) Require at least a quorum of members to be physically present at the location where the meeting is conducted.

(9) Provide that a member participating by electronic communication may vote on official action only if, subject to subsection (e), a specified number of members:

(A) are physically present at the location where the meeting is conducted; and

(B) concur in the official action.

(10) Establish any other procedures, limitations, or conditions that govern participation in meetings of the governing body by electronic communication and are not in conflict with this chapter.

(h) The policy adopted by the governing body must be posted on the Internet web site of the governing body, the charter school, the airport, or the public agency.

(i) Nothing in this section affects a public agency's or charter school's right to exclude the public from an executive session in which a member participates by electronic communication.

Means of Communication Used by Commission Members

Any Commission member participating electronically must ensure the means of doing so meets several baseline criteria. Any electronic communication tool must ensure simultaneous communication of any members physically present at a meeting place, the member(s) participating electronically, and members of the public who are both at the meeting place and those attending electronically. Ind. Code § 5-14-1.5-3.6(b). While the assistance of an IT professional may be necessary, several other boards and/or commissions have utilized such services as Zoom, WebEx, and Microsoft Teams, to facilitate these requirements. WebEx appears to be the continued method of participation for Commission meetings. There are also several conference call services, some of which are free, and provided through the services previously mentioned, that may be utilized to allow the simultaneous communication between Commission members and members of the public.

Quorum, Procedure, and Attendance Considerations

Commission members who participate in meetings electronically are considered present at the meeting, counted for purposes of establishing a quorum, and permitted to vote on agenda items. Ind. Code § 5-14-1.5-3.6(e). However, in instances where an electronic participation policy is in effect, at least four (4) Commission members must be physically present at the meeting location. Ind. Code § 5-14-1.5-3.6(c)(1). Importantly, all Commission members would need to still physically attend at least one meeting annually even where the Commission has an electronic meeting participation policy in place, unless the disability exemptions provided in statute apply to the Commission as discussed below. Ind. Code § 5-14-1.5-3.6(c)(1) and (d). Where a Commission member(s) participates in a meeting electronically, all votes must be taken via roll call vote. Ind. Code § 5-14-1.5-3.6(c)(2).

Electronic Meeting Policy Considerations

Generally, before any board or commission can hold electronic meetings, it must first adopt an electronic meeting policy by a majority vote. Ind. Code § 5-14-1.5-3.6(f). As recommended guidelines, the statutes also provide some additional considerations for the content of an electronic meeting policy. Importantly, these are mere recommendations and do not in any way need to be included in an electronic meeting policy though it may be advisable to do so. The Commission may want to reexamine its current policy for purposes of discussing any relevant updates due to statutory changes.

As an initial recommendation, the Commission may require members to request authorization to participate electronically a number of days before the scheduled meeting to facilitate the order of the meeting and may limit the number of members who will participate electronically at a given meeting. Ind. Code § 5-14-1.5-3.6(g)(1)-(2). The Commission may limit the number of meetings per year that are held electronically or limit the number of meetings per year any one member may participate electronically. Ind. Code § 5-14-1.5-3.6(g)(3)-(4). Further, an electronic meeting policy may provide that a member participating may not cast a deciding vote on any official action taken by the Commission. Ind. Code § 5-14-1.5-3.6(g)(5). Additionally, an electronic meeting policy may require a member to confirm their votes on actions in writing within a certain amount of time after the public meeting. Ind. Code § 5-14-1.5-3.6(g)(6). An electronic meeting policy may also provide the public access to a public location where at least one member will be physically present.¹ Ind. Code § 5-14-1.5-3.6(g)(7). An electronic meeting policy may provide that at least a quorum of members must be physically present at the public meeting location and provide that a member participating electronically may only vote on official action where a specified number, at least a quorum, of members is physically present at the meeting site and concur in the official action. Ind. Code § 5-14-1.5-3.6(g)(8)-(9). The Commission is free to adopt any other procedures, limitations, or conditions as long as they do not conflict with Ind. Code ch. 5-14-1.5. Ind. Code § 5-14-1.5-3.6(g)(10). Finally, the electronic meeting policy, if adopted, must be posted on the Commission's website. Ind. Code § 5-14-1.5-3.6(i).

Consideration of the Disability Exemptions Under Statute

The Commission may potentially be exempt from certain limitations on how its members may participate electronically. Ind. Code § 5-14-1.5-3.6(c)(1) provides that members of governing bodies for whom at least fifty-one percent (51%) of the membership has a disability as defined in Ind. Code § 12-12-8-3.4 or a significant disability as defined in Ind. Code § 12-12-8-3.6, may electronically participate in meetings without the physical presence of the greater of two (2) members or one-third (1/3) of members. Subsection (d) also provides that if a majority of the Commission members have a disability or significant disability, the requirement for members to attend at least one meeting in-person per year would not apply.

Ind. Code § 12-12-8-3.4 defines a disability as follows:

As used in this chapter, "individual with a disability" means an individual who:

- (1) has a physical or mental impairment that substantially limits a major life activity;
- (2) has a record of an impairment described in subdivision (1); or
- (3) is regarded as having an impairment described in subdivision (1).

¹ If the Commission includes this provision in its electronic meeting policy, it must also include the following information on its public meeting notices: (1) The identity of each member who will be physically present at a public place and participate in the meeting by electronic communication; (2) The address and telephone number of each public place where a member will be physically present and participate by electronic communication; and (3) Unless the meeting is an executive session, a statement that a location described in clause (B) will be open and accessible to the public. Ind. Code § 5-14-1.5-3.6(g)(7).

While further research would need completed as to whether the conditions of different members of the Commission may qualify, such exemptions are important to note as the Commission reviews its electronic meeting policy. The exemption's main practical effect, if it applies, is that any particular Commission members would not need to be physically present at one meeting annually.

CONCLUSION: It is recommended that the Commission revisit its electronic meeting policy to ensure compliance with Ind. Code § 5-14-1.5-3.6. Furthermore, should revisions be necessary, the Commission should be mindful of the new conditions imposed as well as the recommendations provided for in statute. The Commission should also consider whether some of its members may have disabilities, documented disabilities, or otherwise be regarded as having disabilities that may justify waiving the statutory requirements for their electronic meetings under Ind. Code § 5-14-1.5-36(c)(1) and (d). Any electronic policy adopted by the Commission should fulfill the overall purpose of Indiana's Open Door Law to ensure "... that the official action of public agencies be conducted and taken openly ... in order that the people may be fully informed...." Ind. Code § 5-14-1.5-1.