



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL COMMONWEALTH OF VIRGINIA

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March 19, 2020

The Honorable Governor Ralph S. Northam
P.O. Box 1475
Richmond, VA 23218

RE: Electronic Meetings under the Virginia Freedom of Information Act and the Novel Coronavirus (COVID-19) State of Emergency

Dear Governor Northam:

You have declared a state of emergency regarding the novel coronavirus (COVID-19) pursuant to Executive Order 51 (March 12, 2020) and provided a further Declaration regarding this public health emergency in conjunction with the State Health Commissioner (March 17, 2020). The Virginia Freedom of Information Advisory Council (the Council) has received numerous inquiries from state, regional, and local public bodies who are concerned about their ability to conduct meetings without running afoul of the Virginia Freedom of Information Act (FOIA) while also acting in accordance with the public health guidelines not to assembled in groups larger than ten persons.

Currently, subdivision A 3 of § 2.2-3708.2 provides that any public body may "meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency." The limitation that "the purpose of the meeting is to address the emergency" does not appear to allow for the conduct of other business necessary to ensure the continuity of government and essential government services, such as consideration of the annual budget for a locality. During emergencies that are short in duration, such as most weather-related events, this limitation has not posed a problem in the past. However, the novel coronavirus pandemic appears to present unprecedented difficulties in that its duration is unknown and physically-assembled gatherings, including public meetings that require a quorum to be present in a single location, present a heightened public health risk. For those reason, I ask that you consider taking further action to temporarily alleviate the requirement that

public bodies have a physically-assembled quorum in a single location in order to conduct public meetings as currently required under FOIA.

There may be multiple ways to achieve this goal. The Office of the Attorney General has previously opined regarding a Governor's emergency powers under § 44-146.17 that " the Governor has the authority to declare an emergency and waive state law when, in the Governor's opinion, the safety and welfare of the people of Virginia require the exercise of emergency measures."¹ Following this interpretation and the plain language of subdivision 1 of § 44-146.17 that executive orders "shall have the force and effect of law," I believe it is within the authority of your office to issue a further executive order waiving the physically-assembled quorum requirement for electronic meetings.

Alternatively, you may seek an amendment to existing legislation that has passed the House and Senate during the 2020 Session of the General Assembly but that you have not yet signed, including an emergency enactment clause to ensure the changes take effect in a timely fashion. I am aware of four such FOIA-related bills, SB 138 (Stuart), SB 139 (Stuart), SB 153 (Stuart), and SB 259 (Bell). Unfortunately, none of these bills deal directly with electronic meetings issues, so there could be questions of germaneness were you to add amendments concerning electronic meetings. Another option would be to amend the appropriations act, but as that bill would not go into effect until July 1, 2020, it would not address the immediate needs of public bodies to hold meetings without a quorum in light of this unprecedented health crisis.

Sincerely,

Senator Richard H. Stuart
Senate District 28
Chair, Virginia Freedom of Information
Advisory Council

¹ Op. Atty. Gen. Va. No. 06-044 (June 8, 2006) (citing *Boyd v. Commonwealth*, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975)).