



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL COMMONWEALTH OF VIRGINIA

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Electronic Meetings under the Virginia Freedom of Information Act and Coronavirus State of Emergency

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UPDATE

The Office of the Attorney General (OAG) issued an opinion to Delegate Sullivan dated March 20, 2020 regarding the conduct of electronic meetings in light of the Coronavirus/COVID-19 state of emergency. The opinion concludes that "Code § 2.2-3708.2 (A)(3) permits public bodies that are unable to assemble in person because of the unique characteristics of the COVID-19 virus to meet electronically to make decisions that must be made immediately and where failure to do so could result in irrevocable public harm. Whether any particular action by a public body fits within that description requires a fact-specific determination that should be made in consultation with that public body's counsel." Please see the full opinion, available on the OAG website at <https://www.oag.state.va.us/files/Opinions/2020/Sullivan-Opinion-Request.pdf>.

Additionally, please note that staff of the FOIA Council has received numerous additional inquiries regarding response timing and making provisions for the public to witness meetings without having to physically attend. Regarding FOIA response times, there is no specific tolling provision for states of emergency, but it is a valid reason to invoke the seven working day extension under § 2.2-3704 (B)(4). If that is not enough time, you would first attempt to negotiate with the requester for a longer time period, and if no agreement could be reached, you could petition a court for additional time under § 2.2-3704 (C). I would hope that under these circumstances requesters will be understanding in reaching such agreements. Regarding public accessibility without physical attendance, please keep in mind that § 2.2-3708.2 (E) provides that "Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation." Therefore, all public bodies are encouraged to use live streaming, television or radio broadcasts, call-in telephone lines, and whatever other technological means are available to allow the public to witness meetings without physical attendance.

(Below is the original memo issued March 13, 2020.)

The FOIA Council has received numerous inquiries regarding whether public bodies may hold meetings by electronic means without a quorum present due to concerns over spread of the coronavirus. Currently, the Virginia Freedom of Information Act (FOIA) only has one provision that allows for such electronic means without assembling a quorum of the members in a single location, subdivision A 3 of § 2.2-3708.2. That provisions allows such meetings in response to a state of emergency declared by the Governor with certain limitations, including 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." We have been asked what topics may be discussed in such a situation, particularly as there may be a need to conduct regular business if the state of emergency lasts for any significant period of time. Our advice is that due to the statutory limitation that "the purpose of the meeting is to address the emergency," the topics that may be discussed will depend on the language of the emergency declaration, and will likely vary depending on the nature of the emergency.

In this instance, Governor Ralph S. Northam declared a state of emergency in Virginia in regard to the coronavirus on March 12, 2020, by Executive Order 51 (2020), available online at [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf). In this order the Governor directs "state and local governments to render appropriate assistance to prepare for this event, to alleviate any conditions resulting from the situation, and to implement recovery and mitigation operations and activities so as to return impacted areas to pre-event conditions as much as possible," in addition to directing certain other emergency actions. Please see the full text of the emergency order.

Finally, while the other provisions for electronic meetings do require that a quorum be physically assembled, please keep in mind that they are also available to use and are not limited based on the purpose of the meeting. For general guidance on electronic meetings procedures and requirements, please see our Electronic Meetings Guide, available at <http://foiacouncil.dls.virginia.gov/ref/EMeetGuide2019.pdf>.

Statutory Reference:

§ 2.2-3708.2. Meetings held through electronic communication means.

A. The following provisions apply to all public bodies:

3. 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 public body convening a meeting in accordance with this subdivision shall:

- a. Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting;
- b. Make arrangements for public access to such meeting; and
- c. Otherwise comply with the provisions of this section.

The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.