



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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

April 28, 2020
UPDATE

Among other recommendations, Governor Ralph S. Northam recommended amendments to the 2020 Reconvened Session of the General Assembly that would amend the budget bills, House Bills 29 and 30 (Torian, 2020), in order to allow more flexibility "for public bodies to meet electronically when circumstances related to an emergency—such as social distancing—make it impractical to meet in a single location." HB 29, which amends the current state budget, was enacted effective April 24, 2020.¹ The amendment applies to all public bodies and to governing boards of common interest communities. Please see the full text, copied below as Appendix A, for the requirements and limitations on holding an electronic meeting under this provision. Additionally, please keep in mind that this amendment provides an additional option for holding electronic meetings during a state of emergency. Public bodies may still hold electronic meetings under existing FOIA provisions in § 2.2-3708.2 and as described below following the prior Executive Orders and opinion of the Attorney General. Therefore, there are now two procedures by which public bodies may hold electronic meetings without a quorum (as described in the new budget amendment and as provided in § 2.2-3708.2 (A) (3)), as well as four other procedures for holding electronic meetings when a quorum is physically assembled in one location (as described in the other provisions of § 2.2-3708.2).

(Below is the update issued March 23, 2020.)

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

¹ The full text of the Governor's Amendment 28 to HB 29 as enrolled is copied below in Appendix A, and is also available on the Virginia Legislative Information System at <https://budget.lis.virginia.gov/amendment/2020/1/HB29/Enrolled/GE/>. The same language may be found in the reenrolled version of HB 29 at Item 4-0.01 (g), available at <https://budget.lis.virginia.gov/item/2020/1/HB29/Reenrolled/4/4-0.01/>. Amendment 137 to HB 30 as enrolled is available at <https://budget.lis.virginia.gov/amendment/2020/1/HB30/Enrolled/GE/>.

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 provision 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. 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>.

Appendix A: Governor's Recommendation - Amendment 28 to HB 29 (Torian, 2020)

Amendment 28: Allow policy-making boards to meet virtually during emergency declarations

Item 4-0.01

Operating Policies

Operating Policies

Language

Language:

Page 280, after line 26, insert:

“g. Notwithstanding any other provision of law, any public body, including any state, local, regional, or regulatory body, or a governing board as defined in § 54.1-2345 of the Code of Virginia may meet by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location; (ii) the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body or common interest community association as defined in § 54.1-2345 of the Code of Virginia and the discharge of its lawful purposes, duties, and responsibilities; (iii) a public body shall make available a recording or transcript of the meeting on its website in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the Code of Virginia; and (iv) the governing board shall distribute minutes of a meeting held pursuant to this subdivision to common interest community association members by the same method used to provide notice of the meeting.

A public body or governing board convening a meeting in accordance with this subdivision shall:

1. Give notice to the public or common interest community association members 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 or governing board conducting the meeting;

2. Make arrangements for public access or common interest community association members access to such meeting through electronic means including, to the extent practicable, videoconferencing technology. If the means of communication allows, provide the public or common interest community association members with an opportunity to comment; and

3. Public bodies must otherwise comply with the provisions of § 2.2-3708.2 of the Code of Virginia.

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 of the public body or governing board.”

Explanation:

(This amendment provides authority for public bodies, including agencies, boards, and common interest communities to conduct electronic meetings during a declared state of emergency when it is impracticable or unsafe to assemble a quorum in a single location.)

Appendix B: FOIA 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.