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## Virginia Freedom of Information Advisory Council

### Meetings Issues Subcommittee

May 26, 2021, at 1:00 p.m.

Electronic Meeting

[foiacouncil.dls.virginia.gov](https://foiacouncil.dls.virginia.gov)

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The Meetings Issues Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) met electronically with Cullen Seltzer, chair, presiding.<sup>1</sup> The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting, as well as all written public comments, are accessible through the [Council's 2021 Subcommittees webpage](#).

### Presentation and Public Comment: HB 1997 (Murphy, 2021)

*Delegate Kathleen Murphy*

Delegate Murphy gave an overview of HB 1997 and noted that the current standard under the Virginia Freedom of Information Act (FOIA) for what constitutes a public meeting does not account for the size of a public body. HB 1997 amends current FOIA provisions by increasing from three to four the number of members of a public body meeting as an informal assemblage that constitutes a meeting under FOIA. Delegate Murphy explained that she introduced the bill as a way to allow members of the Fairfax County School Board, which has 12 members, to have casual conversations among more than two members at a time about general school board topics without having to give notice and hold a public meeting.

Delegate William C. Wampler, III, clarified that, as written, the language in the bill applies to all public bodies and not just school boards. Chidi James inquired about the possibility of utilizing a percentage of the public body membership instead of a set number. Billy Coleburn noted that, as drafted, HB 1997 would result in numerous smaller public bodies being able to discuss public business at will with a majority of the members present. He expressed his opinion that the bill is unnecessary and that FOIA laws should not be changed to make it easier for members of a public body to conduct public business privately.

Delegate Murphy noted that HB 1997 was not introduced as a way to undermine the law and that she has no issue with the language in the bill only applying to larger public bodies. Mr. Seltzer mentioned that public business should be conducted in public, but there may be some logistical or administrative matters that could be taken care of behind the scenes. Mr. James expressed his opinion that utilizing a percentage instead of a set number of members would offer a good balance for both large and small public bodies. Mr. Seltzer agreed that the current law that requires a public body to hold a public meeting if three or more members are meeting to conduct public business has a disproportionate limiting effect on larger public bodies than on smaller public bodies. He offered potential language that would allow no more than three members or 30 percent of a public body to meet as an informal assemblage.

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<sup>1</sup> **Members Present:** Cullen Seltzer (chair), Delegate William C. Wampler, III, Lee Bujakowski, William "Billy" Coleburn, Chidi James

**Members Absent:** Matthew Conrad

The Subcommittee heard comments on HB 1997 from the following members of the public:

- Phyllis Errico, on behalf of the Virginia Association of Counties (VACo), noted that VACo has no particular position on the bill and informed the Subcommittee that there are few larger boards in the Commonwealth, with the vast majority of boards having between five and seven members. Because of this, she agreed that utilizing a percentage of the membership may be beneficial for the few larger boards.
- Melanie Meren, on behalf of the Fairfax County School Board, said that the school board is in favor of HB 1997 because it currently faces challenges and inefficiencies with doing public business that have been exacerbated by the COVID-19 pandemic. She noted that the school board would be content with legislation outlining a set number or percentage of the membership, with the school board's recommendation being 33 percent, or with language that only pertains to public bodies with more than a certain number of members.
  - Mr. Seltzer asked if the school board would be amenable to language that specifies that a public body must hold a public meeting if three members or 35 percent of the membership, whichever is greater, are present for the purpose of conducting public business. Ms. Merren said that the school board would agree to such language.
- Mark Hickman, on behalf of the Virginia Press Association (VPA), noted that the VPA is opposed to HB 1997 because the bill would significantly and unnecessarily decrease access to government deliberations for the public and press for no compelling purpose or real benefit. He noted that the current law is well-established, works well, and maintains uniformity and equal treatment across all sizes and types of public bodies.
- Megan Rhyne, on behalf of the Virginia Coalition for Open Government (VCOG), said that VCOG is also opposed to HB 1997. She noted that VCOG has received numerous complaints regarding "serial meetings" where a rotating group of two members of a public body talk to each other and then proceed to talk to other members of the public body, thereby effectively circumventing FOIA public meetings laws. Ms. Rhyne mentioned that even if the motives of public body members are pure, it creates suspicion when the public finds out about conversations that occurred behind closed doors. Lastly, she noted that the definition of "meeting" under FOIA was added around 1980 and changing the definition now will upend the current, well-established system.
  - Mr. Seltzer asked Ms. Rhyne if VCOG supports a change to the law that specifies that a public body must hold a public meeting if three members or 35 percent of the membership, whichever is greater, are present for the purpose of conducting public business. Ms. Rhyne said that VCOG does not favor a sliding scale as it would complicate current public meetings laws.
- Jonathan Williams, on behalf of the Virginia Association of Broadcasters (VAB), noted that the VAB is opposed to HB 1997 for many of the same reasons as the VPA and VCOG. Mr. Williams mentioned that the VAB is concerned about the potential for government business to be done in private and without public participation.
- City of Alexandria Vice Mayor Elizabeth Bennett-Parker noted that many states define a quorum as a simple majority of the public body and that it does not make sense to establish



a set number of public body members that cannot meet without having to hold a public meeting.

### **Discussion: HB 1997**

The Subcommittee discussed whether to recommend HB 1997 to the Council for consideration. Delegate Wampler mentioned that the Subcommittee may want to look at exempting certain types of public bodies from the current public meetings requirements of FOIA. Mr. Coleburn expressed his opinion that creating different rules for different public bodies does not make sense and reiterated that public business should be conducted publicly.

Mr. Seltzer asked the Subcommittee members for their thoughts on whether the Subcommittee should recommend HB 1997 to the Council as is, recommend HB 1997 to the Council with additional changes, or refer HB 1997 to the Council without a specific recommendation from the Subcommittee. Council staff informed the Subcommittee that if a percentage of public body membership is utilized in the language, a decision will be needed on whether to round up or round down to the nearest whole number.

Mr. Coleburn made a motion that the Subcommittee not recommend HB 1997 to the Council. Delegate Wampler seconded that motion. The motion passed with a vote of 4–1.

Mr. James made a motion to ask Council staff to prepare draft legislation that for a public body with a membership of 12 or more members increases from three to four the number of members of the public body meeting as an informal assemblage that constitutes a meeting under FOIA.

Mr. Coleburn called for a point of order and expressed his opinion that because the Subcommittee was charged with studying HB 1997, it was going outside of the scope of its duties by creating new legislation to study. Mr. Seltzer overruled the point of order by noting that the work of the Subcommittee is largely informal and that it can study additional related topics. Mr. James's initial motion was then seconded by Mr. Seltzer. Mr. Coleburn offered a substitute motion that the Subcommittee cease discussion of any additional draft legislation unless asked specifically to do so by the Council or the General Assembly. Mr. Coleburn asked Council staff what the Council's bylaws allow the Subcommittee to do. Council staff explained that while the Council does not have bylaws, it does have certain statutory powers and duties<sup>2</sup> that give the Council and its subcommittees general authority to discuss FOIA matters. As such, the Council and its subcommittees can propose changes to a concept of a bill. Council staff noted that the official charge given to the Subcommittee by the Council is to study HB 1997 and other issues related to electronic meetings, which implies that the Subcommittee has general authority to discuss other related matters. Mr. Coleburn withdrew his substitute motion. The motion proposed by Mr. James failed with a vote of 2–3.

### **Presentation and Public Comment: Definition of "Official Public Government Website"**

#### *Council Staff*

Council staff gave a brief overview of the issue regarding the lack of a definition for "official public government website" under FOIA and explained that the issue stems from a general district court case in which the Town of Pound was challenged because it failed to post notice of a public meeting on the town's website. The court ruled that the town's website is not an official

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<sup>2</sup> See VA CODE § 30-179.



public government website because it uses a .com domain instead of a .gov domain. Therefore, the court found that there was no requirement to post notice on the town's website because only a .gov domain site can be an official public government website. Council staff referred members of the Subcommittee and the public to written comments submitted by Joshua Heslinga, Director of Legal and Legislative Services for the Virginia Information Technologies Agency, for more detailed information on domain names as they relate to public bodies in the Commonwealth.

Council staff explained that as a result of the 2014–2016 Council study conducted pursuant to HJR 96 (LeMunyon, 2014), the Council recommended using the term "official public government website" for meeting notices.<sup>3</sup> The term was purposely left undefined because public bodies use an array of different domains or may not have websites. Council staff noted that, although the general district court ruling in the Town of Pound case is not controlling statewide, it does raise the question of whether the Council should amend Code of Virginia language or include a definition of "official public government website" to avoid ambiguity or differing interpretations.

Mr. Seltzer disagreed with the general district court's ruling in the Town of Pound case that a public body's website has to have a .gov domain to be official. He offered draft language that defined "official public government website" as "any Internet site or sites controlled by the public body and used for, among any other purposes, providing required notices and information on behalf of the public body."

The Subcommittee heard public comment on the matter. Ms. Errico noted that the general district court's ruling in the Town of Pound case could be problematic if it were applied across the Commonwealth. She informed the Subcommittee that of the 95 counties in Virginia, 26 use a .gov domain, 26 use a .us domain, 23 use a .org domain, 16 use a .com domain, three use a .net domain, and one uses a .info domain. She advised that any definition proposed by the Subcommittee needs to be broad enough to encompass all of the public bodies in the Commonwealth.

Mr. Seltzer made a motion to ask Council staff to draft legislation that defines "official public government website" for the purposes of FOIA. That motion was seconded by Mr. Coleburn and passed unanimously.

## **Other Business: Other Electronic Meetings Issues**

### *Council Staff*

Council staff gave an overview of other electronic meetings issues, some of which have arisen in the past year as public bodies adopted new technologies for electronic communications due to the COVID-19 pandemic. Many of the issues stem from the differences in the procedural requirements for different types of electronic meetings, and some stem from technological developments. Council staff presented the following issues:

- Whether the provisions concerning electronic meetings should explicitly state that votes may be taken and closed meetings may be held by electronic communication means under § 2.2-3708.2 of the Code of Virginia;

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<sup>3</sup> HB 1540 (LeMunyon, 2017) was introduced as a recommendation of the Council following the 2014–2016 HJR 96 study to amend many of the meetings provisions of FOIA, including the meeting notice provisions, and was enacted as Chapter 616 of the Acts of Assembly of 2017. Before this legislation was enacted, only state-level public bodies were required to post meeting notices on their websites.



- Whether the requirement for state public bodies to take votes by name in roll-call fashion under subdivision D 7 of § 2.2-3708.2 should apply to all public bodies and all types of electronic meetings;
- Whether the annual reporting requirement for state public bodies under subdivision D 8 of § 2.2-3708.2 should apply to all public bodies and all types of electronic meetings; and
- Whether the public comment forms required under subdivision D 6 of § 2.2-3708.2 should be required to be published in a smartphone compatible format.

Mr. Seltzer noted that the Subcommittee may not be able to address all of the issues now, but said that he was most interested in the fact that there are multiple statutory schemes governing electronic meetings for different types of public bodies. Delegate Wampler expressed his opinion that simplifying those statutory schemes may be necessary, but cautioned the Subcommittee against amending language dealing with emergency declarations at the state or local level, considering the legislation<sup>4</sup> that passed during the 2021 Special Session I that addressed those issues.

The Subcommittee asked Council staff to give a presentation on the different electronic meetings provisions at the next meeting and agreed to take a deeper look at the statutory schemes governing electronic meetings at its next meeting with an eye toward simplification and harmonization, if feasible.

Lastly, the Subcommittee heard public comment from Ms. Errico who cautioned the Subcommittee against making too many changes to electronic meetings provisions because of the level of confusion those changes may cause. She also asked the Subcommittee to keep in mind, as it potentially amends electronic meetings provisions, that not everyone has the same level of access to technology across the Commonwealth.

### **Next Meeting**

Council staff will poll members of the Subcommittee regarding a future meeting date. Once a date is set, it will be posted on the [\*Council's 2021 Subcommittees webpage\*](#).

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For more information, see the [\*Council's website\*](#) or contact the Division of Legislative Services staff:

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<sup>4</sup> SB 1271 (McPike).

