

Comments from Megan Rhyne (VCOG) and Martin Crim (Sands Anderson) re: LD24101703.

From Megan Rhyne:

If clarity is the goal, I think focusing on the language in lines 28-29 and 31-32 is the most important.

I don't think "informational gathering" on line 29 or "or to gather information from the public" is necessary, but I don't think it does any harm.

The situation contemplated in lines 35 through 37 seems like it's already covered, but if it's not, it might be simpler to add to the list of gatherings on lines 29-30 the phrase "or meeting of another public body."

I do not support defining "public business." The term is used in the context of public records, as well as in the procedures for meetings (2.2-3707 through -3712), where we haven't discussed potential impacts and consequences. I also think it makes it less clear for members of a public body who accidentally find themselves at a gathering and are wondering what to do. If we keep the focus on talking amongst themselves, they know not to do it. Period. If the focus is on some definition of "public business," then they have to decide on the fly whether or when something's been undertaken or proposed. Likewise, a citizen who observes them can count to 3 and see them talking amongst themselves. Since the citizen is not privy to the conversation, she can't very well know whether the conversation meets a statutory definition of "public business."

From Martin Crim:

Clarity is certainly one goal, but not the only one. Unfortunately, the court's recent opinions left open our elected representatives to charges of FOIA violations for the kind of normal, beneficial interactions they have all the time. I once represented a locality where three council members attended the same church, so the Wheeler decision would have required one of them to leave if a matter of public concern was raised in the pulpit. We've heard many other examples of that type of situation so I won't repeat many of them here. A common situation I do want to highlight occurs when council members attend a planning commission hearing, which is what makes lines 35-37 necessary.

The definition of "public business" is absolutely necessary because the Wheeler court interpreted it so broadly as to create FOIA violations where no harm to public participation occurs. My go-to example: Takoma Park MD is a self-proclaimed nuclear-free zone, illustrating that there is literally no topic so far from the normal course of local government business that it might not end up on a council agenda for discussion and action. As for its use in other titles and chapters of the code of Virginia – that is a common occurrence and each definition section only lists definitions "as used in this chapter" or "as used in this title."

As for citizens observing elected officials without hearing their discussion, I don't understand what that argument is driving at. Should three or more members of council never be able to talk about sports or the weather or any topic at all? That would be a radical departure from existing law.

Response from Megan Rhyne (VCOG):

I continue to disagree with you on the need for a definition of public business* (and I'm open to talking on the phone or on Zoom, if you'd like), I did want to clarify one point. My point about the term's use was not about its use in other titles and chapters. It was about its use within FOIA (definition of "public record," 2.2-3707, 2.2-3710, 2.2-3711(A)(4) and 2.2-3712(D)).

*what if to counter the Supreme Court's reference to "listening" in footnote 9 and deal with the concern from the pulpit we beefed up the last sentence of the existing definition to make clear that someone from the pulpit raising an issue doesn't turn it into a public meeting. "even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate, or raised by individuals who are not members of the public body, or some such?"