Access to Public Meetings

Virginia Freedom of Information Act

Virginia Freedom of Information Advisory Council

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Roadmap

- FOIA Policy - § 2.2-3700
- Definitions - § 2.2-3701
- Meeting Requirements
  - Open Meetings - §§ 2.2-3707, 2.2-3707.1, 2.2-3707.2, and 2.2-3710
  - Closed Meetings - §§ 2.2-3711 and 2.2-3712
- Electronic Meetings - §§ 2.2-3708.2 and 2.2-3708.3

FOIA Policy

§ 2.2-3700

- All meetings of a public body are presumed open unless a specific exemption applies.
- Liberal construction "to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government"
- Narrow construction of exemptions
- Not to be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth

Meetings Issues Not Addressed in FOIA

- Definition of "quorum"
  - Generally, the ordinary meaning of "quorum" is a simple majority of the members
  - Sometimes particular bodies have charters, enabling statutes, or other requirements that change the usual meaning of "quorum" – for example, defining "quorum" as a certain minimum number of members or drawing distinctions between members who are elected as opposed to members who are appointed
- Parliamentary procedure & powers of a public body to control its meetings (examples: controlling who may speak at any given time, limiting public comment, determining which motions take precedence over others, etc.)

Definitions

§ 2.2-3701

- "Public body"
  - Traditional public bodies (state boards, local governing bodies, school boards, bureaus, commissions, districts, etc.)
  - "[O]ther organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds."
  - "[A]ny committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body."

Definitions

§ 2.2-3701

- "Meeting"
  - means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2 or 2.2-3708.3, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.
  - Exception: gatherings of employees
  - Exception: gatherings where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, and no discussion or transaction of public business takes place among the members of the public body

Definitions

§ 2.2-3701

- Exception: public forum, informational gathering, candidate appearance, meeting of another public body, or debate, the purpose of which is to inform the electorate or to gather information from the public and not to transact public business or to hold discussions relating to the transaction of public business, where no discussion or transaction of public business takes place among the members of the public body, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion, debate, or question presented by others
- For purposes of public meetings only, "public business" means "any activity a public body has undertaken or proposes to undertake on behalf of the people it represents."

Open Meetings – Requirements
§§ 2.2-3707, 2.2-3707.1, 2.2-3707.2, and 2.2-3710

- Notice to the Public
  - Note that notice to members is not covered by FOIA, but is often stated elsewhere in other laws
- Open to the Public
  - "Open meeting" or "public meeting" means a meeting at which the public may be present. (§ 2.2-3701)
- Minutes

Notice Contents
§ 2.2-3707 (D through F)

- Date
- Time
- Location

Where should notice be posted? § 2.2-3707 (D)

- FOIA requires all public bodies to post notice in three locations:

1. Official public government website, if any;
   - Definition: "any Internet site controlled by a public body and used, among any other purposes, to post required notices and other content pursuant to this chapter on behalf of the public body." (§ 2.2-3701)
2. Prominent public location in which notices are regularly posted; and
3. At the office of the clerk of the public body OR at the office of the chief administrator

***State public bodies** must also post notice on a central, publicly available electronic calendar maintained by the Commonwealth.

When should notice be posted? § 2.2-3707 (D) and (E)

- **Regular meetings** → at least three working days prior to the meeting
  - Do not count the day of the meeting
  - Do not count weekends, holidays, or days when the office is closed
- **Special, emergency, or continued meetings** → at the same time as the notice that is provided to the members of the public body that are conducting the meeting AND reasonable under the circumstance

Are specific people entitled to notice? § 2.2-3707 (F)

- Anyone who annually files a written request for notification with a public body
- Written request must include:
  - Requester's name
  - Address/Zip Code
  - Daytime telephone number
  - E-mail address, if available
  - Organization, if any

Agendas – Inspection & Posting § 2.2-3707 (G)

- At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The public body shall also post the proposed agenda on the public body's official government website, if any, prior to the meeting.
- Proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

Agendas – Final Actions § 2.2-3707 (G)

- No final action may be taken on items added to the agenda after the meeting commences unless they are time-sensitive or are the subject of a closed meeting properly identified in a motion in accordance with § 2.2-3711.
- "Final action" means a vote, adjudication, or other formal action taken by a public body that completes a matter or acts as final consideration of an item. "Final action" does not include:
  1. Referral to a committee or advisory body;
  2. Referral to a future meeting for action;
  3. Direction to staff to provide further information; or
  4. Issuance of a commending or memorial proclamation.

What does it mean for a meeting to be open to the public?

- Definition (§ 2.2-3701): "Open meeting" or "public meeting" means a meeting at which the public may be present.
- Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. (§ 2.2-3707 (H))
- No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited. (§ 2.2-3707 (H))

Meeting Minutes
§ 2.2-3707 (I)

- Only required to be taken at open meetings
- Must include:
  - Date, time, location of the meeting
  - Members of the public body present and absent
  - A summary of matters discussed, deliberated, or decided
  - A record of any votes taken
  - Any motions to enter into a closed meeting and certification after a closed meeting

Posting Meeting Minutes §§ 2.2-3707.1 and 2.2-3707.2

- State executive branch public bodies (§ 2.2-3707.1)
  - Post on official public government website
  - Draft minutes posted no later than ten working days after the conclusion of the meeting
  - Final minutes posted no later than three working days after final approval
- Local public bodies (§ 2.2-3707.2)
  - Post on official public government website, if any
  - If no such website, make copies available at a prominent public location in which meeting notices are regularly posted or the office of the clerk or chief administrator
  - Post final minutes within seven working days of final approval

Votes
§§ 2.2-3710 and 2.2-3711 (B)

- All votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting conducted in accordance with FOIA
- No written or secret ballots
- May reach consensus or take straw polls in closed meetings
- However, decisions made in closed meetings are not effective until a vote is taken in an open meeting that reasonably identifies the substance of the vote (§ 2.2-3711 (B))

Closed Meeting Procedures §§ 2.2-3711 and 2.2-3712

Motion, Discussion, Certification

Motion to Enter into a Closed Meeting § 2.2-3712 (A)

- Public body must take an affirmative recorded vote in an open meeting approving a motion that:
  1. Identifies the subject matter for the closed meeting;
     - (Must be more than quoting or paraphrasing the exemption)
  2. States the purpose of the closed meeting; and
     - (Quoting or paraphrasing the exemption does state the purpose)
  3. Makes specific reference to the applicable exemption from the open meeting requirements

Closed Meeting Discussions § 2.2-3712 (C, F, G, and I)

- Restricted to those matters specifically exempted from the provisions of FOIA and identified in the motion (do not stray off topic)
- Who may attend?
  - Nonmembers if they are necessary or will aid consideration of the topic
  - Other members of public bodies may attend, but not participate in, closed meetings of committees, subcommittees, and other sub-entities of the parent body
- Minutes are not required, and if taken, are exempt from FOIA

Certification of a Closed Meeting §§ 2.2-3712 (D) and 2.2-3714 (C)

- At the conclusion of a closed meeting, public body must certify that the only things heard, discussed, or considered in the closed meeting were:
  1. Public business matters lawfully exempted from the open meeting requirements
  2. Such public business matters as were identified in the motion by which the closed meeting was convened
- Additional penalty for improper certification
  - Civil penalty of up to $1,000 paid by the public body to the Literary Fund
  - Court may consider mitigating factors

Exemptions
§ 2.2-3711 (A)

- Discussion of personnel - § 2.2-3711 (A)(1)
- Consideration of acquisition or disposition of real property - § 2.2-3711 (A)(3)
- Discussion of prospective business or industry - § 2.2-3711 (A)(5)
- Actual or probable litigation - § 2.2-3711 (A)(7)
- Consultation with legal counsel on specific legal matters - § 2.2-3711 (A)(8)
- Discussion of public safety - § 2.2-3711 (A)(19)
- Discussion of award of public contract - § 2.2-3711 (A)(29)

Electronic Meetings
§§ 2.2-3708.2 and 2.2-3708.3

- As of September 1, 2022, there are three general categories:
  - Remote participation: "participation by an individual member of a public body by electronic communication means in a public meeting where a quorum of the public body is otherwise physically assembled." (§ 2.2-3701)
  - All-virtual public meeting: "a public meeting (i) conducted by a public body, other than those excepted pursuant to subsection C of § 2.2-3708.3, using electronic communication means, (ii) during which all members of the public body who participate do so remotely rather than being assembled in one physical location, and (iii) to which public access is provided through electronic communication means." (§ 2.2-3701)
  - States of emergency declared by the Governor or the locality

Electronic Meetings

Remote participation (may be used by any public body) - § 2.2-3708.3

- Four allowed reasons for remote participation:
  - Temporary or permanent disability or other medical condition that prevents member's attendance
  - Medical condition of a family member that prevents member's attendance
  - Member's principal residence is more than 60 miles from the meeting location
  - Personal matter that prevents member's attendance
- All require a physical quorum and prior adoption of a participation policy
  - Exception: persons with disabilities and their caregivers who participate remotely are counted as if physically present for purposes of determining whether there is a quorum
- Remote location from which the member participates does not have to be open to the public
- Personal matters may be used twice per calendar year per member or 25 percent of the meetings of the public body rounded to the next whole number, whichever is greater

Electronic Meetings

All-virtual public meetings - § 2.2-3708.3

- May be used by any public body except "local governing bodies, local school boards, planning commissions, architectural review boards, zoning appeals boards, and boards with the authority to deny, revoke, or suspend a professional or occupational license"
- Requires prior adoption of a participation policy (but no quorum)
- Remote locations do not have to be open to the public unless 3 or more members are present at that location
- All-virtual public meetings may be used twice per calendar year or for 50 percent of the meetings of the public body rounded to the next whole number, whichever is greater
- Additional procedural requirements

Electronic Meetings

Policy for remote participation and all-virtual public meetings - § 2.2-3708.3 (D)

- Before using remote participation or all-virtual public meetings, the public body must adopt a policy on participation at least once annually that:
  - Is applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member or the matters to be considered or voted upon
  - Describes the circumstances under which an all-virtual public meeting and remote participation will be allowed and the process the public body will use for making requests to use remote participation, approving or denying such requests, and creating a record of such requests
  - Fixes the number of times remote participation for personal matters or all-virtual public meetings can be used per calendar year, not to exceed the limitations set forth in FOIA
  - Does not prohibit or restrict any individual member of a public body who is participating in an all-virtual meeting or who is using remote participation from voting on matters before the public body

Electronic Meetings

During declared states of emergency (§ 2.2-3708.2)

- During a Governor-declared or local state of emergency:
  - *Purpose:* to provide for the continuity of operations of the public body or the discharge of its lawful purposes, duties, and responsibilities- § 2.2-3708.2
- May be used by any public body
- No requirement for a physical quorum or to have a policy in place

Electronic Meetings

(continued)

- Members may monitor (listen/watch) even if they cannot participate
- Public & staff participation is always allowed – restrictions only apply to members
- Please see our Electronic Meetings Guide on the Reference Materials webpage for a more detailed discussion

FOIA & Social Media

- Because the definition of "public records" includes all types of records that are in the transaction of public business, various forms of social media may be public records.
- Because any assemblage of three or more members (or a quorum of two) of a public body discussing or transacting public business simultaneously is a meeting subject to FOIA, social media may also be used to conduct meetings.
- Please see our guide on FOIA & Social Media on the Reference Materials webpage for a more detailed discussion.

Q&A