



COMMONWEALTH of VIRGINIA

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March 20, 2020

The Honorable Richard C. (Rip) Sullivan, Jr.
Member, Virginia House of Delegates
P.O. Box 50735
Arlington, Virginia 22205

Dear Delegate Sullivan:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You have asked about how public bodies may continue to conduct business during the current state of emergency. In particular, you have asked:

1. Does Virginia Code § 2.2-3708.2(A)(3) permit public bodies (including local government bodies) to hold meetings solely by electronic communication during the period of the declared emergency?
2. Does Virginia Code § 44-146.21 allow local governing bodies, upon declaration of a state of emergency, to hold their meetings solely by electronic communication during the pendency of the emergency?
3. If the foregoing statutes do not allow solely electronic meetings of local governing bodies, how can the continuity of government provided by such meetings be ensured under Virginia law?

Background

On March 12, 2020, Governor Northam issued Executive Order Fifty-One declaring a state of emergency to help Virginia better respond to the threat posed by the COVID-19 virus. The Office of the

Attorney General has received multiple questions about how meetings of public bodies may be conducted electronically, while still complying with the Virginia Freedom of Information Act (VFOIA) and other legal requirements.¹

When considering how to conduct public meetings while the state of emergency remains in effect, we must remember that the requirements of VFOIA, open government, and transparency remain critically important. The General Assembly has declared that VFOIA “shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.”² That fundamental commitment to openness must be upheld and maintained even as we consider alternative methods to conduct the operation of the government.

Applicable Law and Discussion

VFOIA creates a strong presumption that meetings of “public bodies” are open to the public and conducted in person.³ The statute declares that “[a]ll meetings of public bodies shall be open, except as provided in” two specified statutory provisions.⁴ VFOIA further states that “[n]o meeting shall be conducted through telephonic, video, electronic or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708.2 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.”⁵ Accordingly, under current law, a public body may not conduct a meeting through “electronic communication means” unless doing so is authorized by either: (a) Code § 2.2-3708.2; or (b) another law that takes precedence over VFOIA in particular circumstances.

1. Code § 2.2-3708.2(A)(3) permits a public body to meet by electronic communication means for the duration of the declared emergency, but only for meetings whose “purpose . . . is to address the emergency.”⁶

¹ I also note that there might be other limiting factors—such as by-laws and ordinances—that set requirements for various entities and are outside the scope of this Opinion.

² VA. CODE ANN. § 2.2-3700(B) (2002).

³ The term “public body” is broadly defined to include “any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.” VA. CODE ANN. § 2.2-3701 (2019).

⁴ VA. CODE ANN. § 2.2-3707(A) (2018). The specified statutes are Code § 2.2-3707.01 (which applies only to “meeting[s] of the General Assembly or a portion thereof”) and Code § 2.2-3711 (which authorizes “[c]losed meetings . . . for certain limited purposes”).

⁵ VA. CODE ANN. § 2.2-3707(B) (2018).

⁶ The remaining provisions of Code § 2.2-3708.2 address situations where one or more of the members of a public body are unable to meet in person. *See* VA. CODE ANN. §§ 2.2-3708.2(A)(1) & (2) (establishing procedures for “all public bodies”); 2.2-3708.2(B) (providing additional provisions for “regional public bodies”); 2.2-3708.2(D)

In enacting VFOIA, the General Assembly included express provisions for how public bodies may conduct meetings in times of emergencies. Code § 2.2-3708.2(A)(3) provides that “[a]ny public body may meet by electronic communication means without a quorum of the public body physically assembled at one location” so long as three requirements are satisfied: (a) “the Governor has declared a state of emergency in accordance with § 44-146.17”; (b) “the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location”; and (c) “the purpose of the meeting is to address the emergency.”⁷

The first two requirements are plainly satisfied here. On March 12, 2020, the Governor “declare[d] that a state of emergency exists in the Commonwealth of Virginia to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat” and specifically cited the Governor’s authority under Code § 44-146.17.⁸ It is likewise clear that “the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location,”⁹ because avoidance of physical assembly whenever possible is critical to ongoing efforts to contain and manage a virus that is spread through close contact between people.¹⁰

Even when the first two requirements are satisfied, however, Code § 2.2-3708.2(A)(3) does not permit *all* meetings of a public body to be conducted electronically—only those where “the purpose of the meeting is to address the emergency.”¹¹ Neither “the purpose of the meeting” nor “address” is further defined by VFOIA. At the same time, however, the word “emergency” is specifically defined in Code § 44-146.16, which is part of the Commonwealth of Virginia Emergency Services and Disaster Law of 2000 (Emergency Law),¹² the same statute cross-referenced in Code § 2.2-3708.2(A)(3). As relevant here, that provision defines “emergency” as “any occurrence, . . . whether natural or man-made, which results or may result in substantial injury or harm to the population.”¹³

As the Governor’s Executive Order makes clear, the “occurrence” that prompted its issuance is “the potential spread of COVID-19, a communicable disease of public health threat” and “[t]he

(“state public bodies”). All of those provisions, however, require that “[a] quorum of the public body [be] physically assembled at one primary or central meeting location.” VA. CODE ANN. §§ 2.2-3708.2(C)(2), 2.2-3708.2(D)(1)(i).

⁷ VA. CODE ANN. § 2.2-3708.2(A)(3) (2019).

⁸ See Executive Order Number Fifty-One (Northam) (2020).

⁹ See VA. CODE ANN. § 2.2-3708.2(A)(3).

¹⁰ See, e.g., CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (explaining that the COVID-19 virus is spread through close contact with others); CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), *FAQs for Event Organizers & Individuals: FAQs for Administrators*, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/event-planners-and-attendees-faq.html> (noting that per the 15-day federal executive guideline established on March 16, 2020, all U.S. events of 10 or more people should be cancelled or held virtually); VIRGINIA DEP’T OF HEALTH, *Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions* (Mar. 19, 2020) at 5, http://www.vdh.virginia.gov/content/uploads/sites/182/2020/03/General-Questions-FAQ_03.19.20_FINAL.pdf (urging “everyone in Virginia to take extra precautions to prevent the spread of infectious respiratory disease,” including “[a]void[ing] in-person gatherings of 10 or more people”); Harry Stevens, *Why outbreaks like coronavirus spread exponentially, and how to “flatten the curve,”* WASH. POST (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator/>.

¹¹ VA. CODE ANN. § 2.2-3708.2(A)(3)(ii).

¹² VA. CODE ANN. § 44-146.13 (2000).

¹³ VA. CODE ANN. § 44-146.16 (2008).

anticipated effects” of that spread.¹⁴ Accordingly, Code § 2.2-3708.2(A)(3) permits a public body to meet electronically if “the purpose of the meeting is to address the emergency”—that is, the spread of the COVID-19 virus or its “anticipated effects,” including the inability of public bodies to assemble in person because of the need for social distancing for a prolonged period of time. Consistent with the definition of “emergency” in Code § 44-146.16, it is my view 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.¹⁵ 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.

What is clear, however, is that the General Assembly did not intend to permit public bodies to handle *all* business through electronic communication means, even during a declared emergency.¹⁶ Such an interpretation would essentially read out the specifically enumerated requirement that “the purpose of the meeting is to address the emergency,”¹⁷ thus violating the “rule[] of statutory construction that discourage[s] any interpretation of a statute that would render any part of it useless [or] redundant.”¹⁸ For that reason, public bodies should carefully consider whether taking a given action during a meeting held by electronic communication means is truly essential and should defer any and all decisions that can be deferred until it is once again possible to meet in person.

Even when a public body is authorized to meet via electronic communication means, moreover, Code § 2.2-3708.2(A)(3) details further procedural steps such bodies must take to comply with VFOIA. The public body must still have a quorum to conduct business¹⁹ and must “[m]ake arrangements for [the] public [to] access such meeting,”²⁰ which can include teleconferences, online streaming, online messengers, or other equivalent means. As always, the public must receive notice at least three days before the meeting,²¹ which must be provided “using the best available method given the nature of the emergency.”²² The notice must contain the date and time of the meeting, as well as information required for the public to access the electronic meeting.²³ As always, a copy of the proposed agenda and agenda packets must be made available to the public at the same time such documents are available to the members of the agency, and these materials may be placed on the same electronic forum as the public

¹⁴ Executive Order Number Fifty-One (Northam) (2020).

¹⁵ See VA. CODE ANN. § 44-146.16 (definition of “emergency”) (referring to situations where “governmental inaction . . . would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof”).

¹⁶ *Boasso Am. Corp. v. Zoning Adm’r of Chesapeake*, 293 Va. 203, 207, 796 S.E.2d 545, 546 (2017) (describing the “central focus” of statutory interpretation as “to ascertain and give effect to the intention of the General Assembly”) (internal quotation marks and citation omitted).

¹⁷ VA. CODE ANN. § 2.2-3708.2(A)(3)(ii).

¹⁸ *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 497, 764 S.E.2d 256, 260 (2014).

¹⁹ See VA. CODE ANN. § 2.2-3708.2(A)(3) (permitting “meet[ing] by electronic communication means without a quorum of the body physical assembled at one location” but not dispensing with the quorum requirement).

²⁰ VA. CODE ANN. § 2.2-3708.2(A)(3)(b).

²¹ VA. CODE ANN. § 2.2-3707(C) (final sentence); see also VA. CODE ANN. § 2.2-3707(D) (permitting less than three days’ notice only for “special, emergency, or continued meetings”).

²² VA. CODE ANN. § 2.2-3708.2(A)(3)(a).

²³ VA. CODE ANN. §§ 2.2-3707(C), 2.2-3708.2(A)(3)(b).

notice.²⁴ Minutes of meetings during the state of emergency must record “[t]he 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.”²⁵ For state public bodies, VFOIA also requires that all votes “taken during the meeting . . . be recorded by name in roll-call fashion and included in the minutes.”²⁶

2. Code § 44-146.21 does not authorize local governing bodies to hold meetings solely by electronic communication during the pendency of the emergency.

Code § 44-146.21 authorizes “local director[s] of emergency management” to declare “[a] local emergency” “with the consent of the governing body of the political subdivision.”²⁷ Such a declaration “shall activate the local Emergency Operations Plan and authorize the furnishing of aid and assistance thereunder.”²⁸ It also grants the relevant “director of emergency management” a variety of enumerated powers, including “proceed[ing] without regard to time-consuming procedures and formalities prescribed by law (except mandatory constitutional requirements) pertaining to the performance of public work, entering into contracts, incurring of obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, and other expenditures of public funds.”²⁹

Compliance with VFOIA is not a “time-consuming procedure[.]” or “formalit[y]” that may be waived by a single local official. Rather, an examination of the full text of Code § 44-146.21 reveals that the “time-consuming procedures and formalities” referenced in that provision involve matters like the formal competitive bidding process that is often necessary for governments to enter into contracts because such formalities might frustrate efforts “necessary to combat [a] threatened or actual disaster.”³⁰

That is not to say, of course, that Code § 44-146.21 has no role in an emergency situation. But, in my view, that provision relates, for example, to important emergency powers for procurement and other contract making without bidding requirements and other formalities, and does not authorize departures from the procedures set forth in VFOIA.

3. Code § 15.2-1413 provides additional authority for localities to ensure continuity of government during the declared emergency.

You also ask if Virginia law provides any other methods for ensuring continuity of government for local governing bodies. In my view, Code § 15.2-1413 provides such authority.

Code § 15.2-1413 provides:

Notwithstanding any contrary provision of law, general or special, any locality may, by ordinance, provide a method to assure continuity in its government, in the event of an

²⁴ VA. CODE ANN. § 2.2-3707(F); *see* VA. CODE ANN. § 2.2-3708.2(A)(3)(c) (stating that a public body proceeding under Section 2.2-3708.2(A)(3) must “[o]therwise comply with the provisions of this section”).

²⁵ VA. CODE ANN. § 2.2-3708.2(A)(3) (final sentence).

²⁶ VA. CODE ANN. § 2.2-3708.2(D)(7).

²⁷ VA. CODE ANN. § 44-146.21(A) (2016).

²⁸ VA. CODE ANN. § 44-146.21(B).

²⁹ VA. CODE ANN. § 44-146.21(C).

³⁰ *Id.*

enemy attack or other disaster. Such ordinance shall be limited in its effect to a period not exceeding six months after any such attack or disaster and shall provide for a method for the resumption of normal governmental authority by the end of the six-month period.³¹

In my view, the spread and effects of the COVID-19 virus constitute a “disaster” within the meaning of Code § 15.2-1413. The term “disaster” is not specifically defined in Title 15.2 of the Code of Virginia. But both the ordinary meaning of that term and its definition in other Virginia statutes about similar subject matter clearly encompass a “communicable disease of public health threat” such as the COVID-19 virus.³² Indeed, the Governor’s Executive Order specifically concludes that “[t]he anticipated effects of COVID-19 constitute a disaster as described in § 44-146.16 of the *Code of Virginia*.”³³

For that reason, it is my view that Code § 15.2-1413 permits “any locality” to “provide a method to assure continuity in its government” in light of the ongoing emergency, “[n]otwithstanding any contrary provision of law, general or special,” including VFOIA.³⁴ Because such “method[s]” must be adopted “by ordinance,”³⁵ the adoption of such ordinances must comply with all state-law requirements for adopting ordinances, including being adopted in accordance with VFOIA. It is further my view, however, that public meetings to adopt such ordinances may be held electronically and without a quorum of members physically assembled because “the purpose of the meeting [would be] to address the [COVID-19 virus] emergency” by adopting a plan to ensure the continuity of the local government.³⁶

Here too, it is important to emphasize the limits of the authority conferred by Code § 15.2-1413. Any ordinances enacted pursuant to that provision—particularly those authorizing departures from otherwise-governing state law—must be carefully limited in scope to allowing the locality “to assure continuity in its government” during the current emergency.³⁷ In addition, such ordinances must “be

³¹ VA. CODE ANN. § 15.2-1413 (1997).

³² VA. CODE ANN. § 44-146.16 (defining “disaster” for purposes of the Emergency Law); accord Webster’s Dictionary (defining “disaster” as meaning “a sudden calamitous event bringing great damage, loss, or destruction”), <https://www.merriam-webster.com/dictionary/disaster>. It is appropriate to construe these separate statutory uses of disaster *in pari materia* because “they relate to . . . the same subject or to closely connected subjects or objects.” *Lucy v. Cty. of Albermarle*, 258 Va. 118, 129, 516 S.E.2d 480, 485 (1999) (internal quotation marks and citation omitted).

³³ Executive Order Number Fifty-One (Northam) (2020).

³⁴ VA. CODE ANN. § 15.2-1413; *see* 2015 Op. Va. Att’y Gen. 60, 68 (explaining that a provision beginning with the words “[n]otwithstanding any law or regulation to the contrary” clearly demonstrated “that the General Assembly intended for [the provision in question to] supersede any provision of the *Code* . . . that contradicts or conflicts with the requirements of” that statute).

³⁵ VA. CODE ANN. § 15.2-1413.

³⁶ VA. CODE ANN. § 2.2-3708.2(A)(3).

³⁷ VA. CODE ANN. § 15.2-1413. Code § 15.2-1413 does not define the phrase “assure continuity in its government.” Emergency management law, regulations, and guidance, however, typically use the related term “continuity of government” to describe coordinated efforts taken to ensure the continuation of essential functions during an emergency and describe a “continuity of government” plan as one designed to ensure that essential functions are continued during an emergency. *See, e.g.*, FEDERAL EMERGENCY MANAGEMENT AGENCY, CONTINUITY GUIDANCE CIRCULAR at 3, 37 (published Mar. 12, 2018), <https://www.fema.gov/media-library-data/1520878493235-1b9685b2d01d811abfd23da960d45e4f/ContinuityGuidanceCircularMarch2018.pdf>.

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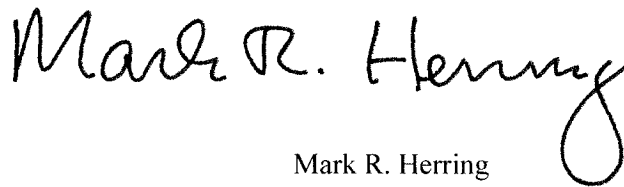
limited in . . . effect to a period not exceeding six months . . . and shall provide a method for the resumption of normal governmental authority by the end of the six-month period.”³⁸

Conclusion

In sum, it is my opinion 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. It is also my opinion that Code § 44-146.21 does not authorize local governing bodies to hold meetings solely by electronic communication during the pendency of the emergency, but that Code § 15.2-1413 provides additional authority for localities to ensure continuity of government during the declared emergency.

With kindest regards, I am,

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looped final letter 'g'.

Mark R. Herring
Attorney General

³⁸ VA. CODE ANN. § 15.2-1413.