

Good Evening – Attorney General Herring has issued an [advisory opinion](#) outlining the authority of public bodies, including local governments, to conduct meetings and critical public business while meeting social distancing needs and important transparency and accountability obligations.

Please feel free to quote from the opinion, and you can attribute the following statement to Attorney General Herring:

“This guidance will ensure that local governments and other public bodies can provide services, make decisions, and address Virginians’ needs while remaining open, transparent, and accountable to the public during this unprecedented emergency,” said Attorney General Herring.

The [opinion](#) says that Virginia law allows public bodies to conduct meetings electronically if “the purpose of the meeting is to address the emergency,” which includes meeting “to make decisions that must be made immediately and where failure to do so could result in irrevocable public harm.”

The opinion also outlines important limitations, saying that “the General Assembly did not intend to permit public bodies to handle all business through electronic communication means, even during a declared emergency,” and that “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.”

Finally, the opinion reinforces that important public accountability and transparency measures must be followed even during an electronic meeting or an emergency, including the need for public access, proper public notice, publicly available agendas, roll-call votes, and recorded minutes.

Here are a few key passages from the opinion:

- 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.” That fundamental commitment to openness must be upheld and maintained even as we consider alternative methods to conduct the operation of the government. [Page 2]

- 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 anticipated effects” of that spread. 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. 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. [Page 3-4]

- 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. Such an interpretation would essentially read out the specifically enumerated requirement that “the purpose of the meeting is to address the emergency,” 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.” 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. [Page 4]

- 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 business and must “[m]ake arrangements for [the] public [to] access such meeting,” 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, which must be provided “using the best available method given the nature of the emergency.” The notice must contain the date and time of the meeting, as well as information required for the public to access the electronic meeting. 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 notice. 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.” 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.” [Page 4-5]

- 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. [Page 7]

Have a good one,  
Charlotte

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