

SENATE OF VIRGINIA

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COMMITTEE ASSIGNMENTS:
GENERAL LAWS AND TECHNOLOGY
LOCAL GOVERNMENT
REHABILITATION AND SOCIAL SERVICES
TRANSPORTATION
RULES

Dear General Herring:

Worries about the spread of Covid-19, the coronavirus, abound and health authorities' general recommendations of social distancing, while important to prevent transmission, present challenges to doing business in many quarters.

Concern that the local governments in my district and the rest of the Commonwealth can continue to provide expected and required services causes me to write you is to inquire whether certain exemptions in the Virginia Freedom of Information Act (FOIA) allow local governing bodies to continue their meetings without endangering the members or the public by holding those meetings wholly electronically/remotely.

County boards of supervisors, city and town councils, school boards, commissions, authorities, etc., must continue to conduct their business. An important example, this is budget season. Time-sensitive public hearings, as well as decisions on the budget and appropriation of funds must occur in order for funding of operations, running the gamut of schools to landfills to construction of public facilities to public safety to continue. This and other decision-making on business brought to the attention of governing bodies in order to ensure the provision of public services constitutes the continuity of government operations.

My specific questions follow:

1. Since the Governor has declared a state of emergency, may local governing bodies hold their meetings solely by electronic communication during the pendency of the emergency pursuant to Va. Code §2.2-3708.2.A.3?

Health officials advise that, while this emergency exists, the very assembly of individuals is unsafe. Therefore, the purpose of meeting electronically, rather than in person, is to address the peculiar aspects of this emergency's impact on government operations.

Pursuant to FOIA Va. Code §2.2-3708.2.A.3:

“Any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with §44-146.17, provided that (i) the

catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency...”¹

2. Does Va. 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?

Whenever a local emergency has been declared or the Governor has declared a state of emergency, a local government can exempt itself from time-consuming procedures and formalities prescribed by law. Wouldn't this authority permit a locality to suspend the FOIA requirements of assemblage of a quorum and meet solely electronically for the duration of the emergency?

Va. Code §44-146.21.C. provides:

“the director of emergency management of each political subdivision or any member of the governing body in the absence of the director, if so authorized by the governing body, may. . .[among other powers] proceed without regard to time-consuming procedures and formalities prescribed by law (except mandatory constitutional requirements) pertaining to the performance of public work. . .”

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?

To be direct, must the Governor expand his declaration of a state of emergency to specifically address this issue? Must the General Assembly be convened in special/emergency session to amend the Code of Virginia?

The impetus behind this inquiry to you is not just to address the concerns of an individual locality. A clear understanding as to all localities is critical to the ongoing credibility of local

¹ The statute continues with the requirements for such meetings consistent with and to ensure the transparency of government intent of FOIA:

“The public body convening a meeting in accordance with this subsection shall:

- a. Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the public body conducting the meeting;
 - b. Make arrangements for public access to such meeting; and
 - c. Otherwise comply with the provisions of this section [e.g. notice, distribution of agenda, taking of minutes, recordation of votes, report to the FOIA Council, etc.].
- The 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 shall be stated in the minutes.”

government actions in this difficult time. Given our digital world, localities can address the requirements for notice and public access to the meeting proceedings can be accomplished by Virginia local governments as they are compelled to meet during this emergency.

Localities must make critical decisions on tax rates and water and sewer fees, approval of budgets and appropriation of funds, and hold public hearings prior to making those decisions. In addition the need for timely government action extends to land use decisions (which may often contribute to local and state economies), adoption of/amendment to ordinances affecting public health, safety and welfare, authorization of construction of public facilities such as schools, fire stations and roads, decisions regarding economic development. Localities need to be able to use the “electronic meeting tool” to keep government running without impairing the health of their members or the interested public.

Thank you for your earliest reply to these inquiries, and for your service during this difficult time.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jerry M. P.", is positioned to the right of the word "Sincerely,".

cc: Virginia Municipal League
Virginia Association of Counties
Local Government Attorneys of Virginia