

99-075

**ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.**

**Notification of meeting of board of visitors of state college provided less than 30 days in advance of June 17, 1999, meeting date violates advance notice requirement of Act. Notice identifying location where quorum was physically assembled, but not locations of those participating by telephonic means, was proper. After July 1, 1999, all places from which members participate in electronic communication meeting must be identified in published notice as locations for board meeting. Records custodian must grant access to public records maintained by college to any Virginia citizen, whether or not he is member of college's board of visitors.**

The Honorable William C. Wampler Jr.  
Member, Senate of Virginia  
February 17, 2000

You ask several questions regarding application of The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the *Code of Virginia* (the "Act"), to a meeting of the board of visitors of a state college ("board" and "college"), held June 17, 1999 ("board meeting"), which was before the newly amended Act became effective on July 1, 1999.

The information presented in the materials enclosed with your opinion request are restated as follows. Notice of the board meeting was announced in the Virginia Register of Regulations on June 7, 1999.<sup>1</sup> Publication of the notice was requested on a "Notice of Meeting" form and date stamped as having been received by the Registrar of Regulations on May 19, 1999,<sup>2</sup> a total of twenty-nine days before the meeting. The notice provided a general, rather than a specific, description of the purpose of the board meeting, and it did not identify the location where board members not in attendance would be connected to the board meeting by telephone.<sup>3</sup>

You further advise that, pursuant to the Act, a board member requested from the rector of the college<sup>4</sup> copies of the following records: employment contracts, compensation agreements, letters of appointment, board minutes, and any similar documents relating to the compensation and employment relationships between the presidents of all public and certain private institutions of higher education in Virginia<sup>5</sup> and their universities, boards or foundations. In addition, the board member requested copies of the same information as it relates to the relationship between the president of the college and the main private foundation of the college and the board. You indicate that the board member making such request of documents and information did not feel his request had been adequately complied with and answered.

In addition to the above information, I have been advised of the following regarding the board meeting. The board members received notification on May 18, 1999, of a special meeting of the board to be held June 17, 1999. The notification advised that members

who were unable to attend in person could be connected to the meeting by telephone, and that the location of the telephonic connection would have to be accessible to the public. The cover letter transmitting a facsimile of the Notice of Meeting form was dated May 19, 1999, and advised that the board meeting was to be a telephone meeting. By letter of the same date, the Director of the Department of Information Technology received notice of a special telephone meeting of the board. On May 28, 1999, the college transmitted a press release to the news media concerning the board meeting. On June 17, 1999, the board meeting was held and was open to the public. Eleven of the seventeen board members were present. The six board members who were not present were connected to the meeting by speaker phone. Representatives from the media were present, and the board meeting was tape recorded for the purpose of producing minutes of the meeting.

You first inquire whether the actions of the officials of the college satisfy the advance notice requirement specified in § 2.1-343.1.

The Act was revised substantially by the 1999 Session of the General Assembly.<sup>6</sup> Section 2.1-343.1, however, received only minor revisions. Section 2.1-343.1(B) provides:

For purposes of this section, "*public body*" means any public body of the Commonwealth, but excludes any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government.

State public bodies may conduct any meeting, except closed meetings held pursuant to § 2.1-344, wherein the public business is discussed or transacted through telephonic or video means. Where a quorum of a public body of the Commonwealth is physically assembled at one location for the purpose of conducting a meeting authorized under this section, additional members of such public body may participate in the meeting through telephonic means provided such participation is available to the public.

The remainder of § 2.1-343.1 establishes the requirements under which public bodies other than the local government bodies named in § 2.1-343.1(A) may hold meetings through telephonic or video means. Section 2.1-341 defines "meetings" to include "meetings ..., when sitting physically, ... as a body or entity, or as an informal assemblage of ... as many as three members ... of any public body."

Section 2.1-343.1(C) provides:

Notice of any meetings held pursuant to this section shall be provided at least thirty days in advance of the date scheduled for the meeting. The notice shall include the date, time, place and purpose for the meeting and shall identify the locations for the meeting. All locations for the meeting shall be made accessible to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to

address the public body as persons attending the primary or central location. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.

Thirty-day notice shall not be required for telephonic or video meetings continued to address an emergency as provided in subsection F or to conclude the agenda of a telephonic or video meeting of the public body for which the proper notice has been given, when the date, time, place and purpose of the continued meeting are set during the meeting prior to adjournment.

The public body shall provide the Director of the Department of Information Technology with notice of all public meetings held through telephonic or video means pursuant to this section.<sup>[7]</sup>

Section 2.1-343.1(C) clearly requires that notice of any meeting be given "at least thirty days in advance of the date scheduled for the meeting." Section 2.1-343(C)<sup>8</sup> requires every public body to

give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted; in the office of the clerk of the public body, or in the case of a public body which has no clerk, in the office of the chief administrator.

A primary rule of statutory construction is that one must look first to the language of a statute. If the statute is clear and unambiguous, it should be given its plain meaning.<sup>9</sup> Section 2.1-343.1(C) clearly and unambiguously provides that "[n]otice of any meetings held pursuant to this section *shall* be provided at least thirty days in advance of the date scheduled for the meeting."<sup>10</sup> (Emphasis added.) The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.<sup>11</sup> Additionally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.<sup>12</sup>

Section 2.1-343.1(C) requires that notice of meetings be provided at least thirty days in advance of the meeting date. (In addition, after July 1, 1999, § 2.1-343(C) also now specifically requires that such notice be placed "in a prominent public location at which notices are regularly posted; in the office of the clerk of the public body, or in the case of a public body which has no clerk, in the office of the chief administrator.") You advise that notice of the June 17 board meeting was provided via the "Notice of Meeting" form, which was received by the Registrar on May 19 and published in the Virginia Register of Regulations on June 7.<sup>13</sup> Therefore, I must conclude that said notice did not satisfy the time requirement established in § 2.1-343.1(C), since the enclosures with your opinion request indicate that the notice was transmitted by facsimile on May 19 for publication in the Virginia Register on June 7.<sup>14</sup>

You next ask whether the actions of the college officials satisfy the content of the notice requirements under § 2.1-343.1.

Section 2.1-343.1(B) permits members of a public body who are unable to attend a meeting of the body to participate in the meeting by telephone, provided a quorum of the public body is physically assembled at one location. I am advised that a quorum of the board was physically assembled in Washington, D.C., on June 17.

When the notice was given and the meeting held, § 2.1-343.1(C) provided the following with respect to the contents of meeting notices: "The notice shall include the date, time, place and purpose for the meeting and shall identify the location or locations for the meeting."<sup>15</sup> The notice of the board meeting published in the Virginia Register stated the date, time and purpose of the meeting.<sup>16</sup>

You specifically ask whether all the places from which the members participated telephonically were required to be listed in the notice as meeting locations. The meeting notice listed only one location, that being where the quorum was physically present.

As noted above, prior to the 1999 amendments, § 2.1-343.1(C) required listing the "location or locations."<sup>17</sup> This language, using both the singular and the plural, obviously meant that it was permissible to have only one location for an electronic communication meeting.<sup>18</sup> Read together with the language in § 2.1-343.1(B), which allows members to participate by telephonic means where a quorum is present "at *one location*,"<sup>19</sup> it was reasonable to interpret § 2.1-343.1(C) to allow listing one location for an electronic communication meeting. In the case where a quorum was physically present in one location, the location of the meeting would be the location of the quorum.<sup>20</sup> In this case, that location was stated on the notice for the board meeting. I conclude, therefore, that the notice of meeting location was proper under the Act as it existed at the time of the notice and board meeting.

The 1999 amendment to § 2.1-343.1(C) deleted the words "location or."<sup>21</sup> A rule of statutory construction requires the presumption that when the language of a statute is amended, the General Assembly intends to change the then existing law.<sup>22</sup> By amending the statute to require the listing of "locations" for all electronic communication meetings, the General Assembly requires that for every electronic communication meeting after July 1, 1999, multiple locations must be included in the notice.<sup>23</sup> Although the statute does not so specify, I conclude that, by deleting the singular "location" in § 2.1-343.1(C), the General Assembly intended to consider as "locations" for the meeting all places from which members participate in the meeting by telephone, whether or not a quorum is physically present in one location. Accordingly, for telephonic communication meetings after July 1, 1999, all places from which members participate telephonically must be identified in the published notice as "locations" for the board meeting.

You next ask whether the actions of the college officials satisfy the requirements of § 2.1-343.1 regarding the locations of board members participating outside Washington, D.C.

After a quorum is assembled at one location, § 2.1-343.1(B) permits additional members to participate in a meeting through telephonic means, "provided such participation is available to the public." Furthermore, § 2.1-343.1(C) requires that the notice of the meeting identify the locations of the meeting and that the locations for the additional members who are not assembled with the quorum at one location "be made accessible to the public." A quorum of the board was physically assembled in Washington, D.C., and additional members were permitted to participate in the board meeting by speaker phone. The locations of the additional members participating by speaker phone were not made known to the public in the notice. As noted above, however, the Act in effect before July 1, 1999, did not require the listing of more than the one location of an electronic communication meeting where the quorum was present. Consequently, the actions of the college officials did satisfy the requirements of § 2.1-343.1 regarding the locations of board members participating outside Washington, D.C., under the wording of the statute in effect at the time of the board meeting.

Your final inquiry is whether an individual, either as a member of the board who is a citizen of the Commonwealth or simply as a citizen of the Commonwealth, is entitled to have access to the information and documents requested by the board member.

The Act defines "public records" as

all writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.<sup>[24]</sup>

Section 2.1-342(A) requires public records to be "open to inspection and copying by any citizens of the Commonwealth."

Section 2.1-342.01(B) provides:

Neither any provision of [the Act] nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this title shall be construed as denying public access to (i) contracts between a public official and a public body, other than contracts settling public employee employment disputes held confidential as personnel records under subdivision 4 of subsection A; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subsection, however, shall

not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.<sup>[25]</sup>

"Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."<sup>26</sup> "The manifest intention of the legislature, clearly disclosed by its language, must be applied."<sup>27</sup> "[T]ake the words as written' ... and give them their plain meaning."<sup>28</sup>

Both the former and current provisions of § 2.1-342(A) require the records custodian to "take all necessary precautions for [record] preservation and safekeeping."<sup>29</sup> You advise that a board member requested copies of records pursuant to the Act. The request was made to the then rector of the college for all employment contracts, compensation agreements, letters of appointment, board minutes, or any similar documentation relating to the compensation and employment relationships between the presidents of certain institutions of higher education<sup>30</sup> and their universities, boards or foundations. In addition, the board member requested copies of the same information as it relates to the compensation and employment relationship between the president of the college and the main private foundation in support of the college and the board. If the rector of the college is the custodian of the requested records and if the college has such requested records, then I would conclude that an individual who requests records pursuant to the Act, either as a member of the board who is a citizen of the Commonwealth or simply as a citizen of the Commonwealth, is entitled to have access to the information and documents.

<sup>1</sup>See 15:19 Va. Regs. Reg. 2521 (June 7, 1999).

<sup>2</sup>See Notice of Meeting Form RR06 (rev. 1987) (on file with Virginia Code Commission, Registrar of Regulations).

<sup>3</sup>The Notice of Meeting Form provides that the board was to meet on Thursday, June 17, 1999, 11 a.m. to noon, at a specified location in Washington, D.C. The meeting was described as a called meeting of the board to act on a resolution concerning contract and personnel of the college. Public comment was not to be received at the meeting, and an informational release was to be available four days before the board meeting. *See id.*; *see also* 15:19 Va. Regs. Reg., *supra* note 1.

<sup>4</sup>See § 23-49.1(B). For the purposes of this opinion, I shall assume that the rector of the college is the custodian of the requested records.

<sup>5</sup>The institutions represented were Christopher Newport University, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, the University of Richmond, the University of Virginia, Virginia Commonwealth University, the College of William and Mary, Virginia State University, Virginia Polytechnic Institute and State University, Virginia Union University, and Washington and Lee University.

<sup>6</sup>See 1999 Va. Acts: ch. 726, at 1218, 1219-45, 1248; ch. 703, at 1149, 1150-76, 1180.

<sup>7</sup>See 1999 Va. Acts: ch. 726, at 1218, 1219-45, 1248; ch. 703, at 1149, 1150-76, 1180.

<sup>8</sup>The 1999 Session of the General Assembly added subsection C to § 2.1-343. 1999 Va. Acts, *supra* note 6: ch. 726, at 1239; ch. 703, at 1170; *see id.* ch. 696, at 1136.

<sup>9</sup>Loudoun Co. Dept. Soc. Serv. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

<sup>10</sup>See 1982-1983 Op. Va. Att’y Gen. 309, 311 (illogical result frustrates purpose of statute).

<sup>11</sup>See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); *see also* *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); 1998 Op. Va. Att’y Gen. 56, 58.

<sup>12</sup>See 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5<sup>th</sup> ed. 1992 & Supp. 1999); 1992 Op. Va. Att’y Gen. 145, 146, and opinions cited therein.

<sup>13</sup>See *supra* note 1 and accompanying text.

<sup>14</sup>My conclusion is the same under the provisions of the Act in effect both before and after July 1, 1999. I also note that, under the applicable law in effect both before and after July 1, 1999, the deficiency in the notice does not affect the validity of any action taken at the board meeting. *See Nageotte v. King George County*, 223 Va. 259, 267, 288 S.E.2d 423, 427 (1982) (board actions are not invalidated by violation of notice requirements of Act); *see also* § 9-6.14:22(C) (failure to publish required notice of meeting in Virginia Register shall not affect legality of actions taken at that meeting).

<sup>15</sup>1999 Va. Acts, *supra* note 6: ch. 726, at 1240; ch. 703, at 1171. As previously noted, § 9-6.14:22(C) of the Administrative Process Act also provides that "[e]ach notice shall include (i) the date, time and place of the meeting."

<sup>16</sup>See *supra* note 3.

<sup>17</sup>1999 Va. Acts, *supra* note 6: ch. 726, at 1240; ch. 703, at 1171.

<sup>18</sup>Use of singular and/or plural terms in legislation is purposeful. *Nationwide Mutual Insurance v. Scott*, 234 Va. 573, 577, 363 S.E.2d 703, 705 (1988); *Tiller v. Commonwealth*, 193 Va. 418, 423, 69 S.E.2d 441, 444 (1952).

<sup>19</sup>1999 Va. Acts, *supra* note 6: ch. 726, at 1240; ch. 703, at 1171 (emphasis added).

<sup>20</sup>Section 2.1-341 defines "meeting" to include "the meetings ... when sitting physically ... as a body or entity, or as an informal assemblage of ... as many as three members" of a governing body.

<sup>21</sup>1999 Va. Acts, *supra* note 6: ch. 726, at 1240; ch. 703, at 1171.

<sup>22</sup>*Richmond v. Sutherland*, 114 Va. 688, 77 S.E. 470 (1913).

<sup>23</sup>1999 Va. Acts, *supra* note 6: ch. 726, at 1240; ch. 703, at 1171.

<sup>24</sup>Section 2.1-341. Prior to July 1, 1999, § 2.1-341 referred to "public records" as "official records," which included "all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business." 1999 Va. Acts, *supra* note 6: ch. 726, at 1220; ch. 703, at 1151. Section 2.1-342(A) required official records to be "open to inspection and copying by any citizens of the Commonwealth." *Id.* at 1221, 1152.

<sup>25</sup>Prior to July 1, 1999, § 2.1-342(C) contained substantially the same language that was enacted as § 2.1-342.01(B). *See* 1999 Va. Acts, ch. 793, at 1427, 1436; ch. 438, at 588, 597.

<sup>26</sup>*Last v. Virginia State Bd. of Medicine*, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

<sup>27</sup>*Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

<sup>28</sup>*Adkins v. Com.*, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting *Birdsong Peanut Co. v. Cowling*, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989)).

<sup>29</sup>*See also* 1999 Va. Acts, *supra* note 25: ch. 793 at 1427; ch. 438, at 588; *id.*, *supra* note 6: ch. 726, at 1221; ch. 703, at 1152.

<sup>30</sup>*See* institutions listed *supra* note 5.