



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Mr. Robin R. Lind  
Secretary, Goochland County Electoral Board  
Post Office Box 1013  
Goochland, Virginia 23063

Dear Mr. Lind:

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

## Issue Presented

You inquire whether under the open meeting provisions of the Freedom of Information Act (“the Act”) you may conduct a telephone conversation with another member of the Goochland County Board of Elections “for the purpose of ascertaining a member’s position with respect to the transaction of public business,” which would include “rescheduling board meetings, submitting agenda items, commenting on the unapproved draft minutes of prior meetings, and other items to be considered in forthcoming open public meetings.”

## Response

It is my opinion that the discussion of the business of the electoral board by two members of the Board constitutes a meeting of the Board under the Act that must be conducted in public and properly noticed as required by the Act. It is further my opinion that the transaction of public business includes conversations over the telephone involving “rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings” and other similar matters. Such matters, however, may be discussed via electronic mail. Electronic mail lacks the simultaneous feature of telephone meetings and, therefore, does not constitute a “meeting” under the Act.

## Applicable Law and Discussion

The General Assembly enacted the Virginia Freedom of Information Act to

[e]nsure[] the people of the Commonwealth . . . free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public

records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.<sup>[1]</sup>

In addition, the “provisions of this chapter 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.”<sup>2</sup>

The Act mandates that “[a]ll meetings of public bodies shall be open,” with limited exceptions.<sup>3</sup> Furthermore, subject to limited exceptions, “[n]o meeting shall be conducted through telephonic, video, electronic or other means where the members [of the public body] are not physically assembled to discuss or transact public business.”<sup>4</sup> Boards of local government are forbidden from “conduct[ing] a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled.”<sup>5</sup> In addition, before a meeting, a public body must “give notice of the date, time, and location of its meetings” in the manner specified by the statute.<sup>6</sup>

“Meeting” or “meetings” is defined in § 2.2-3701 as

the meetings including work sessions, when sitting physically, or through telephonic or video equipment . . . 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.

The Goochland County Board of Elections is composed of three individuals. A quorum is therefore present when one member of the Board telephones another member to discuss the business of the electoral board.<sup>7</sup> Consequently, under the Act, the discussion of the affairs of the Board between two members over the telephone constitutes a meeting. It would constitute an “informal assemblage” of the members of the Board.

The statute excludes certain assemblages among board members from the requirements of the Act. Section 2.2-3707(G) provides that

Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where *no part* of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body . . . . [Emphasis added.]

In addition, § 2.2-3710(B) provides that

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<sup>1</sup> VA. CODE ANN. § 2.2-3700 (2008).

<sup>2</sup> *Id.*

<sup>3</sup> Section 2.2-3707(A) (Supp. 2010).

<sup>4</sup> Section 2.2-3707(B).

<sup>5</sup> Section 2.2-3708(A) (2008).

<sup>6</sup> Section 2.2-3707(C).

<sup>7</sup> VA. CODE ANN. § 24.2-107 (Supp. 2010) (quorum for electoral board consists of two members).

nothing contained herein shall be construed to prohibit . . . separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business, whether such contact is done in person, by telephone or by electronic communication, *provided the contact is done on a basis that does not constitute a meeting as defined in this chapter*[.] [Emphasis added.]

You ask whether these provisions would permit the communication over the telephone of certain matters concerning the Board. While the determination of whether any particular conduct would violate the Act must be made on a case-by-case basis, I can offer the following guidelines.<sup>8</sup> Under the Act, exemptions from public access to meetings must be narrowly construed so that no meeting is closed “unless specifically made exempt pursuant to this chapter of other specific provision of law.”<sup>9</sup>

Although the Code does not define the term “public business,” no distinction can be found between procedural and substantive business affairs. This office previously has concluded that meeting “for the purpose of deliberating policy or preparing to take action” constitutes public business.<sup>10</sup> Further, the Roanoke Circuit Court concluded that “‘officially transacting public business’ . . . contemplates a broad view extended not only to the taking of an official vote but also to the peripheral discussions surrounding the vote.”<sup>11</sup> Under the plain language of the statute, a telephone conversation about scheduling, draft minutes, or items to place or remove from the agenda would constitute a “discussion . . . of . . . public business.”

Finding no applicable exception, I conclude that the discussion of the affairs of the Board, including rescheduling board meetings, submitting agenda items, and commenting on the draft minutes of prior meetings all constitute a part of the “public business” of the Board. By its plain terms, § 2.2-3710(B) offers no relief, because it applies only when no “meeting” is taking place. As noted above, when two or more members of the electoral board transact or discuss public business over the telephone, that constitutes a meeting of an electoral board.

You relate that it would impose a substantial hardship if telephone calls between two members of the Board were deemed to be a meeting under the Act. That may well be the case. No matter how impractical the requirements of the Act might be, however, where the Act applies, it must be followed. Exceptions to the Act must be enacted into law by the General Assembly.<sup>12</sup>

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<sup>8</sup> This Office historically has declined to issue opinions requiring a factual determination.

<sup>9</sup> Section 2.2-3700(B).

<sup>10</sup> 1984-85 Op. Va. Att’y Gen. 426, 427 (preparing city officials for individual court testimony was “public business,” but the Act did not apply because there was no “informal assemblage” under the facts presented).

<sup>11</sup> *WDBJ Telev. v. Roanoke Cnty.*, 4 Va. Cir. 349, 351 (Roanoke Cnty. Cir. Ct. 1985). The court concluded that the meetings at issue, which involved members of the board of supervisors and a professional who was there to teach the members of the board to better communicate with each other, how to handle stress and techniques of decision-making did not involve the transaction of public business. Rather, “it was a professional’s critique of their methods of dealing with the public and with each other but not upon the merits of how they should or should not vote or stand on an issue of public business.” *Id.* at 352.

<sup>12</sup> I note that the General Assembly is aware of the exigent peculiarities associated with the duties of electoral boards. The legislature has provided several exemptions from the FOIA meeting requirements to deal with these particular circumstances. *See* § 24.2-107.

I further note, however, that under the jurisprudence of the Supreme Court of Virginia, interaction from one board member to another via electronic mail does not offend the Act.<sup>13</sup> In contrast to telephonic interaction, which is simultaneous, electronic mail is “more like traditional letters sent by ordinary mail, courier, or facsimile.”<sup>14</sup> Such interaction is not an “assemblage” under the Act because it lacks the “quality of simultaneity.”<sup>15</sup> Therefore, two members of the Board may exchange emails about rescheduling board meetings, submitting agenda items, and commenting on draft minutes of prior meetings without triggering the provisions of the Act.

### Conclusion

Accordingly, it is my opinion that the discussion of the business of the electoral board by two members of the Board constitutes a meeting of the Board under the Act. It is further my opinion that the transaction of public business includes conversations over the telephone involving “rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings” and other similar matters. Such matters, however, may be discussed via electronic mail, which lacks the simultaneous feature of telephone meetings. Electronic mail, therefore, does not constitute a “meeting” under the Act.

With kindest regards, I am

Very Truly Yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>13</sup> Beck v. Shelton, 267 Va. 482, 489-92, 593 S.E.2d 195, 198-200 (2004). The Court cautioned that a meeting under the Act “may be present when e-mail technology is used in a ‘chat room’ or as ‘instant messaging.’” *Id.* at 490, 593 S.E.2d at 198.

<sup>14</sup> *Id.* at 491, 593 S.E.2d at 198.

<sup>15</sup> *Id.* at 491, 593 S.E.2d at 199.