COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

November 3, 2016

Mr. James M. Heilman
Secretary, Albemarle County Electoral Board
401 McIntire Road, Room 130
Charlottesville, Virginia 22902

Dear Mr. Heilman:

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 have asked for an interpretation of Virginia Code § 24.2-107, in light of the 2016 amendment to that statute. Specifically, you have asked whether local Electoral Boards must post on an official website draft minutes of their meetings.

Background

The amendment at issue was enacted through Senate Bill 89 (2016 Session) and added the following paragraph to § 24.2-107:

> Minutes of meetings that are required to be recorded pursuant to § 2.2-3707 shall be posted on the website of the electoral board or the official website for the county or city, when such means are available. Minutes of meetings shall be posted as soon as possible but no later than one week prior to the following meeting of the electoral board.[1]

You note that, in its original, introduced form, S.B. 89 made explicit reference to the posting of draft minutes, as follows:

> Minutes of meetings that are required to be recorded pursuant to § 2.2-3707 shall be posted on the website of the electoral board or the official website for the county or city. Draft minutes of meetings shall be posted as soon as possible but no later than 10 working days after the conclusion of the meeting. Final approved meeting minutes shall be posted within three working days of final approval of the minutes.[2]

---

[1] 2016 Va. Acts ch. 403, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+CHAP0403.

[2] S.B. 89 (2016 Sess.) (offered Jan. 13, 2016), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB89.

You further note that amendments during the legislative process eliminated the reference to draft minutes.[3] You state that "the Albemarle County Electoral Board reads the legislative history of SB 89 as clearly indicating a legislative intent that draft minutes are not required to be posted, but that final approved minutes are required to be posted,"[4] given that "the legislature saw fit to eliminate the requirement regarding draft minutes from the final version of the bill" and that "the legislative history reveals that there was nothing in any way partisan or contentious about the legislation," which passed both houses of the General Assembly unanimously.[5]

Your question is solely about the affirmative obligation to post draft minutes on an official website. You are not questioning whether a local Electoral Board is required to release draft minutes, recordings, or other records of open meetings upon request, which is an issue expressly addressed and resolved in § 2.2-3707.[6]

Applicable Law and Discussion

The general framework for statutory interpretation in Virginia is well-settled:

> When construing a statute, our primary objective is "'to ascertain and give effect to legislative intent,'" as expressed by the language used in the statute. "'When the language of a statute is unambiguous, we are bound by the plain meaning of that language.'" And if the language of the statute "'is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'"
>
> In evaluating a statute, moreover, we have said that "consideration of the entire statute . . . to place its terms in context to ascertain their plain meaning does not offend the rule because 'it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" Thus, "'[a] statute is not to be construed by singling out a particular phrase.'"[7]

Related statutes should be construed together, particularly where one statute cross references another, and should be read to give full meaning, force, and effect to each.[8]

---

[3] *See* Senate committee amends. (agreed to Jan. 29, 2016) to S.B. 89, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+amd+SB89AS.

[4] Emphasis in original.

[5] *See* S.B. 89 (2016 Sess.), History, *at* http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB89.

[6] *See* VA. CODE ANN. § 2.2-3707(I) (Supp. 2016) ("Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter."); *accord* Va. Freedom of Info. Advisory Council Op. AO-13-03 (May 30, 2003), *available at* http://foiacouncil.dls.virginia.gov/ops/03/AO_13_03.htm.

[7] Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425-26 (2012) (citations omitted, alteration in original).

[8] *See, e.g.*, L.F. v. Breit, 285 Va. 163, 176 (2013) (expressly disagreeing with the argument "that when a statute is unambiguous, we must apply the plain meaning of that language without reference to related statutes" and stating that the assisted conception statute's explicit cross reference to another part of the *Code of Virginia* "requires that [it] be read in conjunction with" the other Code section); Ainslie v. Inman, 265 Va. 347, 353 (2003) ("[I]t is a familiar rule of statutory construction that when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each.").

Although legislative history may be consulted when interpreting an ambiguous statute, resort to legislative history and extrinsic facts generally is not permitted when examining an unambiguous statute because the statute's words provide its meaning.[9] Moreover, it can be difficult to divine legislative intent from somewhere other than the legislation itself,[10] particularly given that "Virginia does not keep official legislative history, like that which can be found at the congressional level."[11]

Attempts to interpret statutes based on language the General Assembly did not adopt, as you suggest, are especially fraught with difficulty and uncertainty because the legislature's decision not to enact particular language can often support multiple, differing conclusions.[12] For example, one might as easily conclude from the legislative history of S.B. 89 that the General Assembly thought specific reference to draft minutes was unnecessary because the existing and enacted statutory language already was sufficient to include both draft and final minutes.[13]

In this case, the paragraph added to § 24.2-107 states unambiguously that minutes of local electoral board meetings shall be posted. The paragraph cross references § 2.2-3707, subsection I of which sets forth the legal requirements for minutes under the Virginia Freedom of Information Act (FOIA). Although § 2.2-3707(I) often uses the term "minutes" without differentiation among different possible types of minutes, a key part of § 2.2-3707(I) expressly states that draft minutes are included in referencing "minutes."[14] Nowhere does the plain language of either § 24.2-107 or § 2.2-3707 exclude draft minutes or support ascribing more than one meaning to the word "minutes" as used in those statutes. Accordingly, the plain language of § 24.2-107 and § 2.2-3707 unambiguously encompasses both draft and final minutes.

---

[9] *See* Brown v. Lukhard, 229 Va. 316, 321 (1985); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. ___, 133 S. Ct. 2517, 2528-29 (2013) ("'What the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.'") (quoting Gardner v. Collins, 27 U.S. 58, 93 (1829)).

[10] *See* DIV. OF LEGISLATIVE SERVS. [DLS], "Legislative Reference Center" *at* http://dls.virginia.gov/lrc/leghist.htm (last visited Oct. 20, 2016) (explaining how to conduct legislative research in Virginia, and noting that "The intent of the General Assembly in passing the bill is generally not recorded, and if it is, it is printed on the face of the bill or referenced in the Code of Virginia.").

[11] *Id.* DLS is a legislative agency, charged by statute with helping General Assembly members in performing their legislative duties, including drafting bills. *See* Edwards v. Vesilind, No. 160643, 2016 Va. LEXIS 125, at *36-37 & n.13 (Va. Sept. 15, 2016); *see generally* VA. CODE ANN. § 30-28.12 to § 30-28.18 (2015) (creating DLS and defining its duties). Although DLS's position regarding what can be determined from drafting and legislative history is not binding, it is informative. *See, e.g.*, LaCava v. Commonwealth, 283 Va. 465, 470 (2012) (discussing the need to consider agency decisions when they fall within an area of the agency's specialized competence).

[12] *See, e.g.*, Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989) (noting, in light of the "unexplained disappearance of one word from an unenacted bill" in amendments to the bill, that "'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent") (quoting Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947)). The numerical vote on a particular bill also does not, by itself, provide any reliable indicator of legislative intent.

[13] *See* Commonwealth v. Shifflett, 257 Va. 34, 44 n.1 (1999) (stating that the Court was not persuaded that the General Assembly's failure to enact a bill was evidence that a statute should be interpreted in a restrictive manner because "the legislature may well have determined that such amendment was unnecessary because the statutory and case law already so provided").

[14] *See* VA. CODE ANN. § 2.2-3707 (Supp. 2016) ("Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.").

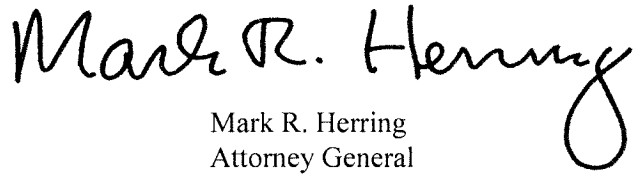
Even if there were statutory ambiguity, the same conclusion would result. Reading "minutes" as encompassing whatever kinds of minutes public bodies keep, including both draft and final minutes, best carries out the intent that the General Assembly has expressed in the *Code of Virginia*. In the specific publication requirement added in 2016 to § 24.2-107, in § 2.2-3707(I)'s requirements for minutes, and in § 2.2-3700(B), the General Assembly has expressed a legislative intent that minutes of public meetings be open and available to the public. Interpreting the word "minutes" as including both draft and final minutes best effectuates such enacted legislative intent. Interpreting "minutes" broadly also ensures that the specific disclosure requirement of § 24.2-107 is meaningful regardless of how public bodies exercise their substantial discretion regarding minutes.[15]

Conclusion

For the reasons set forth above, it is my opinion that § 24.2-107 of the *Code of Virginia* requires local electoral boards to post on an official website whatever kinds of minutes they keep, including both draft and final minutes.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

[15] Minimum requirements for minutes have been the subject of both legislation and guidance, but public bodies retain substantial discretion regarding matters such as the process by which minutes are produced and finalized, whether and how to use recordings, and the level of detail to include in minutes. *See* VA. CODE ANN. § 2.2-3707(I) (Supp. 2016) (requiring written minutes and setting forth certain required content); Va. Freedom of Info. Advisory Council Op. AO-05-15 (June 10, 2015), *available at* http://foiacouncil.dls.virginia.gov/ops/15/AO_05_15.htm (assessing the sufficiency of planning commission minutes and quoting an opinion of this Office, 1977-78 Op. Va. Att'y Gen. 39).