

Chapter 29

Meeting Procedures and the Freedom of Information Act

29-100 Introduction

This chapter examines the requirements for conducting meetings under the Virginia Freedom of Information Act.

The Virginia Freedom of Information Act (“FOIA”):

[E]nsures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and 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.

Virginia Code § 2.2-3700(B).

FOIA requires that the meetings of a locality’s boards, commissions and committees be open to the public. *Virginia Code § 2.2-3700 et seq.* Open government is the overriding policy of FOIA. *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991).

Eight Important Principles To Know About Meetings Under FOIA and Other Laws

- A *meeting* may exist when three members of a public body are physically assembled (*see discussions pertaining to electronic communications in this chapter*); if a quorum of the public body is less than three, then a meeting exists whenever a quorum is established.
- If three or more members of a public body are assembled, but not for the purpose of conducting business (*e.g.*, at a dinner or a VDOT informational meeting), a meeting under FOIA is not established provided they do not transact business.
- Electronic communications such as e-mail communications between three or more members of a public body may be an unlawful meeting if the communications are conducted in real time; e-mail communications where there are periods of time between each correspondence are unlikely to constitute a meeting.
- Public meetings are the rule; closed meetings are the exception.
- A closed meeting is permitted only when an express statutory exemption (from the public meeting requirement) applies.
- A meeting may be established under FOIA even though a quorum is not established.
- If a quorum is not established, the only action the public body may take at a meeting is to adjourn the meeting.
- If the number of members of a public body allowed to participate in a matter otherwise falls below that constituting a quorum because one or more members are disqualified because of a conflict of interest, the remaining members constitute a quorum for the conduct of business and have the authority to act for the public body.

This chapter also examines the manner in which meetings are conducted by public bodies, and these procedures are governed by statute, the general rules of parliamentary procedure, and rules of procedure adopted by the public body.

29-200 Public bodies subject to FOIA

A *public body* is any legislative body, authority, board, bureau, commission, district or agency of the locality. *Virginia Code § 2.2-3701.* This definition includes the governing body, the planning commission, the board of zoning appeals, the architectural review board, the public recreational facilities authority, and the board of appeals established under the Virginia Uniform Statewide Building Code.

A *public body* is also any committee, subcommittee or other entity, however designated, of a public body created to perform delegated functions of the public body or to advise the public body, including those committees, subcommittees or entities comprised of private sector or citizen members. *Virginia Code* § 2.2-3701. This definition includes not only those committees established by the governing body or the planning commission that are comprised solely of a limited number of its members, but also those committees comprised primarily of private sector or citizen members, including those established by ordinance such as an agricultural and forestal district advisory committee, and those *ad hoc* committees established by a governing body such as a committee established to study and report on a specific topic such as a historic preservation committee, or a natural heritage committee. Subcommittees created from these committees are also public bodies.

The critical factors in determining whether a committee or subcommittee, including a citizens' advisory committee, is a public body are: (1) whether it was created by a public body; and (2) whether it was created to perform a function of the public body or to advise the public body. *AO-11-07*. Thus, a citizen advisory committee created by a mayor to advise the mayor is not a public body because, although a public official, the mayor was not a public body, the committee did not perform delegated functions of a public body, and the committee did not advise a public body. *1978-79 Va. Op. Atty. Gen. 316*. Similarly, a farmers' market rules committee was not a public body because it was established by the city manager to advise the city manager, not the city council. *AO-04-13*; see also *AO-07-13*, discussing a range of different types of committees. On the other hand, a citizen advisory group created by the Commonwealth Transportation Board ("CTB") was a public body because the CTB was a public body and the group was created to advise the CTB; likewise, a task force created by a county board of supervisors composed of 20 citizens was a public body because the board was a public body and the task force was created to advise the public body. *Opinions collected in AO-11-07*; see also *AO-10-07*, where a development review team formed by county staff, comprised of 10 county staff members, four outside consultants, two members of the board of supervisors, two members of the planning commission, and one church representative, was not itself a public body; however, the two board members and two commission members each may have constituted public bodies if they were designated by their respective bodies to perform delegated functions of, or to provide advice to, their respective bodies. Finally, a task force established by multiple public bodies to advise the respective governing bodies is itself a public body subject to FOIA. *AO-03-09*.

29-300 What constitutes a meeting

Whether members of a public body are engaged in a meeting is an important determination because, with limited exceptions described in section 29-400, public notice of a meeting must be provided and agendas must be posted prior to the meeting, and the meeting itself must be conducted in public.

The members of the public body are required to be physically assembled to engage in a lawful public meeting. *Virginia Code* §§ 2.2-3707(B), 2.2-3708(A). A public body may not conduct a meeting where the public business is discussed or transacted through means of electronic communications. *Virginia Code* §§ 2.2-3707(B), 2.2-3708(A); but see *Virginia Code* §§ 2.2-3708(G) and 2.2-3708.1, discussed in section 29-350 pertaining to member participation through electronic communication means. If the requisite number of members is present, a meeting is established regardless of whether the assemblage is formal or informal, votes will be cast or decisions made (e.g., work sessions are public meetings), or minutes will be taken. FOIA does not define the term *informal assemblage*.

A *meeting* exists under FOIA when three or more members of a public body are *physically assembled* and the purpose for assembling is to *discuss or transact the business* of the public body by those members. *Virginia Code* § 2.2-3701 (definition of "meeting"). A meeting is established regardless of whether the assemblage is formal or informal, votes will be cast, decisions will be made, or minutes will be taken. A meeting also exists under FOIA if a quorum, if less than three, of a committee or other public body is physically assembled to discuss or transact the business of that committee or public body. The *business* of a public body includes both procedural and substantive issues. *2011 Va. AG LEXIS 60*. Examples of public business include not voting, peripheral discussions surrounding the vote, deliberating policy, preparing to take action, and even conversations about scheduling, commenting on draft minutes, and discussing items to place or remove from the agenda. *2011 Va. AG LEXIS 60*.

If the purpose of a gathering of three or more members of the public is not to discuss or transact any of its public business, and the gathering or attendance was not called or prearranged for either of those purposes, the gathering is not a meeting under FOIA. *Virginia Code § 2.2-3701 (definition of “meeting”)*. In addition, the gathering of three or more members at a *public forum, candidate appearance, or debate* is not a meeting under FOIA if the purpose of the gathering is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the public body as a whole, or any of its members, in its conduct of its public business, is a topic of discussion or debate. *Virginia Code § 2.2-3701 (definition of “meeting”)*.

The most difficult analysis as to whether a meeting is established under FOIA typically arises when three or more members of a public body are in a situation where, for example, two of the members of the public body are members of a committee, the members of one public body attend the meeting of another public body, or the members of the public body attend meetings to gather information about matters of interest to their body.

These topics are considered in more detail in sections 29-310, 29-320, and 29-330 below. Public officials are cautioned that whether or not an issue is the public body’s business can be a fairly nebulous concept that can reach not only into the past and into the near future, but also can be related in varying degrees to matters that clearly are the public body’s business. The public official should apply these rules in a manner that promotes the purpose of FOIA that the government’s business be conducted in public.

29-310 Gatherings of three or more Board members that are meetings under FOIA

Any gathering outside of a regular or special meeting will be a meeting of the Board if 3 or more members assemble for the purpose of discussing or transacting public business.

Nature of the Gathering	Example	Comments
A. Gatherings of three or more members of a public body to meet with citizens off-site to receive their input on a pending matter	A gathering of three members of a school board, after receiving invitations from the citizens, to meet with about 20 of them to discuss the impact of a proposed school on the surrounding community, was a meeting under FOIA. Topics discussed at the meeting included issues such as traffic, the size of the school, and the citizens’ exclusion from the planning process. This gathering was a meeting under FOIA because the proposed school was a current issue pending before the school board. <i>AO-15-04.</i>	This example is different from the example (D) in the table in section 29-330, which is not a meeting under FOIA. The key difference is that, in the example here, the matter that was the topic of the gathering was pending before the school board at the time, in the example (D) in the table in section 29-330, the matter that was being discussed was not pending before the city council.
B. Gatherings of three or more members of a public body at a press conference on the status of public business pending before the public body	A gathering of three members of the governing body of a baseball stadium authority at a press conference, where the purpose of the press conference was to announce potential sites for stadium construction and financing schemes, was a meeting under FOIA because the press conference related to the business of the authority. <i>AO-13-03</i> (attendance at the press conference was limited to the media and to those invited, so members of the public who were not invited were excluded).	The opinion does not state whether the members of the governing body who attended actually participated by speaking at the press conference; it merely states that the three members attended the press conference. The result, however, makes sense – if three or more members of a public body received a staff report on a matter pending before the public body but asked no questions and did not otherwise discuss the matter, it would still be a meeting of the public body.
C. Gatherings of three or more	A gathering of three members of a wetlands board to tour a site for which a	An example of this situation is when a governing body tours a site before it considers the application

Nature of the Gathering	Example	Comments
members of a public body to tour a site, either with or without the owner or the applicant present, pertaining to pending public business	dredging permit application with the wetlands board had been filed was a meeting under FOIA because touring the site necessarily involved the discussion or transaction of public business. <i>AO-04-00</i> .	for a rezoning or a special use permit pertaining to the site.
D. Gatherings of three or more members of a public body arranged by others to discuss public business of the public body	A gathering of three members of a board of supervisors with a representative of the Commonwealth Transportation Board (“CTB”) to discuss a decision by the board of supervisors relating to the extension of a state highway was a meeting, even though the meeting was arranged at the request of the representative of the CTB. <i>AO-06-02</i>	Even though the meeting in the example was not arranged by the board members, their accepting and attending the meeting was presumably the reason the meeting was found to have been prearranged to discuss public business. This interpretation closes what otherwise would be a loophole in FOIA if third parties could arrange meetings of public bodies and circumvent the requirements of FOIA. We assume that, in the example, the board still had pending public business related to the decision it had already made.
E. Gatherings of three or more members of a public body that are a continuation of a discussion of the public body’s public business after its meeting has adjourned	Where three or more members of a public body continue discussions of public business after a public meeting has adjourned, the gathering is a meeting under FOIA, even if the members are discussing the business with staff. <i>AO-46-01</i> .	Because discussions are commonplace at the end of a meeting, members of a public body should be mindful of the rule against three or more its members discussing public business, particularly if the topic of the discussion is still pending or is likely to return to the public body in the near future. If the public body has taken final action, and the topic is no longer pending and is not likely to return in the near future, the discussion would not be a meeting under FOIA (see example (D) in the table in section 29-330).

29-320 Gatherings of members of a public body when they are serving on committees that are meetings under FOIA

Committees established by public bodies are public bodies themselves. When members of a public body compose or are members of a committee, their gathering may be a meeting under FOIA, even when the committee is composed of only two members of the public body.

If two members of the public body are designated or appointed to perform a particular task and to report back to the public body, the two-member delegation is a public body. *1990 Va. AG LEXIS 126* (attending a meeting with representatives from another public body to discuss joint service agreements or other governmental issues affecting both public bodies).

Nature of the Gathering	Example	Comments
A. Gatherings of both members of a two-member committee to discuss public business of the committee	A gathering of both members of a two-member committee appointed by a public body is a meeting if the purpose of the gathering is to discuss or transact business of the committee. <i>Shenandoah Publishing House, Inc. v. Shenandoah County Board of Supervisors</i> , 30 Va. Cir. 419 (1993); see <i>1981 Va. AG LEXIS 248</i> .	A meeting under FOIA exists in this situation if two committee members appointed by the public body gather to discuss or transact the business of the committee. However, two members of the public body appointed to a committee may discuss the business of their main public body and the gathering is not a meeting

Nature of the Gathering	Example	Comments
		under FOIA. The rule is the same when two members of a three-member committee (which is a quorum) gather for the purpose of discussing or transacting the business of the committee.
B. Gatherings of three members of a four-member joint committee	A gathering of three members of a four-member joint committee, composed of two members of one public body and two members of another public body, for the purpose of discussing public business of the joint committee, was a meeting of the joint committee under FOIA. <i>AO-11-05</i> .	As with example (A), above, the gathering in this example is a meeting under FOIA only if the committee members have gathered to discuss or transact the business of the joint committee.
C. Gatherings during committee meetings of the main public body at which the remaining members of the main public body attend and participate.	A committee composed solely of members of the board of supervisors, whose meetings were attended by the entire membership of the board, is a meeting of the board because the non-committee members participate in the committee meeting. <i>AO-03-14</i> .	A similar, but different, scenario is analyzed in example (H) in the table in section 29-330, where two board members serve on a committee and a third member attends the meeting of the committee.

29-330 Gatherings of Board members that are not a meeting under FOIA

If the purpose of a gathering is not to discuss or transact any public business of the public body, and the gathering or attendance was not called or prearranged for either of those purposes, the gathering is not a meeting under FOIA. The Attorney General has explained that informal meetings of members of a public body need not be “random” in order for the gathering to not be a meeting. In essence, this rule “recognizes that members of public bodies may be at the same social engagement, political event, community forum, or like events” without triggering the meeting requirements under FOIA. *2004 Va. AG LEXIS 1*. Nonetheless, given the purpose of FOIA to promote open government and the policy that FOIA be liberally construed to achieve its purpose, members of a public body should avoid those situations to the extent possible where there even appears to be a meeting under FOIA to the outside observer.

Nature of the Gathering	Example	Comments
A. Social functions attended by three or more members of a public body, where there is some general connection to the public body’s public business.	A gathering of members of the city council at a party to recognize the outstanding service performed by present and retiring members of the city council is not a meeting because social functions attended by three or more members of a public body are not meetings under FOIA, provided that the function was not prearranged for the purpose of discussing or transacting public business. <i>1982 Va. AG LEXIS 92</i> .	In the social function situation, if the function was not called or pre-arranged for the purpose of discussing public business, a gathering is not a meeting under FOIA, even if some public business is spontaneously discussed. Nonetheless, members of the public body should avoid even the appearance of a meeting under FOIA by not discussing any public business or, at least, avoiding having more than two members participating in a spontaneous discussion at the same time.
B. Social functions attended by three or more members of a public body that are purely social.	Where three or more members of a public body are invited to a function, such as a dinner, the assemblage is not a meeting of the public body under FOIA if the function was not called or pre-arranged for the purpose of discussing or	Same comment as in (A), above.

Nature of the Gathering	Example	Comments
	transacting public business and, in fact, no public business was actually discussed. <i>AO-46-01</i> .	
C. Gatherings of two members of a public body	Discussions between two members of a public body who are neither a committee nor acting on behalf of the public body are not meetings under FOIA. <i>1999 Va. AG LEXIS 68</i> .	Two members of a public body may gather at any time to discuss the public business of the public body or anything else.
D. Gatherings of three or more members of a public body where the purpose is not to discuss or transact pending public business.	A gathering of three members of city council who met with citizens at a city intersection, after receiving individual invitations from concerned citizens, to meet with the citizens at the intersection, was not a meeting under FOIA. The citizens were concerned about the lack of a stop sign at an intersection and other issues related to traffic safety. The Virginia Supreme Court characterized the gathering as a citizen-organized informational forum, there was no evidence that the purpose of the gathering was to discuss or transact any public business, and there was no evidence that the city council had any business pending before it on the issue of traffic controls, nor was it likely to have those matters come before it in the near future. <i>Beck v. Shelton, 267 Va. 482 (2004)</i> .	In order for a gathering to discuss public business to be a meeting under FOIA, the public business being discussed must be pending at the time, or at least be a matter that will be coming to the public body in the near future. A discussion of prior issues, or issues that might come before the public body at some unknown later date, lack that necessary link. Compare this to example (A) in the table in section 29-310, where the subject of the meeting was a matter pending before the school board.
E. Gatherings of two members of a public body with two members of another public body.	A gathering of two members of one public body and two members of another public body is not a meeting of either public body. <i>1981 Va. AG LEXIS 118</i> .	As explained in example in (B) in the table in section 29-320, the answer would be different if the two members were a public body-appointed committee of two. In that situation the gathering of the two members would be a meeting under FOIA if the purpose was to discuss or transact committee business. <i>1999 Va. AG LEXIS 68; AO-11-05</i> .
F. Gatherings of three or more members of a public body at an informational forum where the purpose is not to discuss or transact public business and participation is limited to asking clarifying questions.	A gathering of three members of a town council who met with members of a community organization, after receiving invitations from the organization to attend their meeting regarding a pending development, was not a meeting under FOIA. The participation in the meeting by the three members of the town council who attended was limited to asking clarifying questions; they did not debate any issues relating to the proposed development of the town land, did not deliberate public policy, did not prepare to take any action, and the only comment made by one of the members of town council was a statement that private organizations make better decisions than the council. <i>AO-02-02</i> .	This opinion is a rather broad application of the public forum exception. Members of a public body may rely on it to attend and participate in, for example, informational forums sponsored by the Virginia Department of Transportation to explain upcoming transportation projects, and charrettes sponsored by a private organization or the locality. Like social functions, individual members of a public body can avoid even the appearance of establishing a meeting under FOIA at a charrette if no more than two are participating in the same group or, better yet, each member attending joins a separate group.
G. Gatherings of two members of a public body who are members of a three-member committee, where the purpose is to discuss a topic other than the	A gathering by two members of a three-member board of supervisors (which would also be a quorum of that board) who met with the county administrator to discuss the county administrator's inability to attend the Virginia Association of Counties conference and the topics he wished to have considered at the conference, was not a meeting under FOIA because the purpose of the meeting was not the business of the board of	The example is being applied to the situations where two members of a public body are part of a three-member committee. The court's decision in <i>Nageotte</i> is a reminder that the <i>public business</i> being discussed or transacted must be the business of the particular public body (in this case, the committee).

Nature of the Gathering	Example	Comments
business of that committee.	supervisors. <i>Nageotte v. Board of Supervisors of King George County</i> , 223 Va. 259 (1982).	
H. Gatherings of three members of a public body, where two members serve on a committee that is meeting, and the third member attends but does not participate.	A gathering of three members of the main public body, where two of those members serve on a committee, and a third member attends the committee meeting, is not a meeting of the main public body under FOIA, provided that the third member merely attends and observes the proceedings, but does not participate. <i>AO-03-14</i> . When the third member “strays from merely observing to participating in the discussion or transaction of public business, then it turns the committee meeting into a meeting” of the main public body. <i>AO-03-14</i> .	It is common for up to two members of a main public body to be appointed to serve on committees that include other public officials and citizens and involve a matter of public business. The example is an important 2014 opinion that clarified some uncertainty in how this situation is to be handled. The fact that the third member of the main public body does not participate in the committee meeting is one of the key factors that distinguishes this example from example (C) in section 29-320.
I. Gatherings of three members of a public body appointed by the public body to serve on the governing board of a private body.	When three members of a board of supervisors are appointed by the board to the board of trustees of a private hospital association, the three members of the board of supervisors do not establish a meeting of that board when they are gathered to conduct the business of the private body, even though they may be acting in the “public interest.” <i>1983 Va. AG LEXIS 82</i> .	The example again reinforces the point that a meeting under FOIA exists if three or more members of the public body gather to discuss or transact the business of the public body. In the example, a meeting under FOIA did not exist because the three members of the board of supervisors were discussing and transacting hospital business.

Whether the gathering of three or more members of a public body will be a meeting under FOIA depends on whether three or more members are *physically assembled* and the purpose for assembling is to *discuss or transact the business* of the Board by those members. *Virginia Code § 2.2-3701 (definition of “meeting”)*. Some exceptions apply, such as the rules that apply to a committee, as discussed in section 29-320.

29-340 Whether electronic communications may be meetings under FOIA

A meeting may not be conducted through electronic or other communication means where the members are not physically assembled to discuss or transact public business. *Virginia Code § 2.2-3707(B)*; see *AO-16-02* (FOIA prohibits any local public body from conducting a meeting via teleconference, audio-visual conference, or other kind of electronic connection; any meeting of a local public body must be held where all of the participating members are assembled in one physical location; no member of a local public body may participate in a meeting of that public body unless that member is physically present at the meeting); *but see section 29-350 discussing Virginia Code § 2.2-3708.1, which allows a member of a public body to participate in a meeting through electronic communication means in specific circumstances.*

One of the compelling questions arising in recent years is whether e-mail and other electronic communications between members of a public body constitute an unlawful meeting under FOIA. In *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004), a case involving some members of the Fredericksburg City Council, one of the issues was whether the use of e-mail by three or more members of the city council constituted an unlawful meeting under FOIA. The circuit court had ruled that exchanges of e-mail between more than two city council members constituted a meeting of the public body, and the failure of the council to publish notice and otherwise hold such a meeting in a public manner violated FOIA. The shortest interval between any e-mail being sent and a response being received was more than four hours; the longest interval was more than two days.

The Virginia Supreme Court reversed the holding of the circuit court, relying in part upon a 1999 Attorney General’s opinion that distinguished between e-mail communications exchanged in a *chat-room* or *instant messaging* environment, in which simultaneous communications between members occur, and e-mails sent through a system that is essentially a form of written communication. The key issue in the Supreme Court’s analysis was whether there

was an *assemblage* of the public body, which the Court reasoned requires simultaneity: “While such simultaneity may be present when e-mail technology is used in a ‘chat room’ or as ‘instant messaging,’ it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier or facsimile transmission.” *Beck*, 267 Va. at 490, 593 S.E.2d at 199.

In *Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75 (2012), the Virginia Supreme Court again held that the exchange of emails between members of a local school board regarding the possible closure of a school did not constitute a meeting within the meaning of the Freedom of Information Act because the emails were not sufficiently simultaneous to constitute a meeting. The Court also noted that the emails that had been distributed to more than two school board members merely conveyed information unilaterally, in the manner of an office memorandum, rather than generating group conversations or responses.

The Virginia Supreme Court’s holdings in *Beck* and *Hill* reveal that the three most important considerations will be the *number* of members of the public body involved, the *simultaneity* of the communications, and whether the communications are *generating discussion* among the public body’s members.

In the absence of simultaneity, an undefined term, most e-mail communications among members of a public body will continue to be considered similar to traditional correspondence, such as letters sent by mail or other means, and will not violate the public meeting requirements of FOIA. Members of public bodies must avoid engaging in interactive group e-mail or other real-time electronic communication discussions with other members concerning official business of the public body, especially where responses are exchanged immediately between three or more members.

Although neither the *Beck* nor *Hill* courts found the non-simultaneous e-mail communications to be assemblages in violation of FOIA, it is clear that FOIA encourages and requires that a public body’s business be conducted at public meetings. With this in mind, the following is offered as guidance pertaining to electronic communications:

- *Distributing information*: The distribution of information between staff and members, as well as among members, is permitted. See *AO-07-09* (no violation of FOIA where department director contacted by telephone individual members of board in one-on-one conversations about rescheduling a board meeting and other administrative matters).
- *Organizing meetings*: Establishing meeting dates, times and locations is prohibited if these are matters being decided by the public body because these actions can be taken only at a public meeting. However, information about a member’s availability can be gathered by the use of electronic written communications and notices of meetings can be distributed electronically.
- *Discussion of pending matters by three or more members in real time*: Discussing any pending matter by three or more members of the public body is prohibited if it is discussed in real-time electronic communications.
- *Discussion of pending matters by three or more members but not in real time*: Discussing any pending matter by three or more members of the public body is permitted if the communications are not in real-time, but through conventional e-mail communications where there is some meaningful time interval between communications. Note that the *Beck* court did not decide what an acceptable minimum interval might be before the communication is considered to be in real-time.
- *Discussion of pending matters by two members*: Discussing a pending matter is permitted if it is discussed by not more than two members of the public body, whether the discussion is in a real-time electronic communication or through a conventional e-mail communication. However, if other members of the public body are copied on these communications, then the discussion may be prohibited if at least one copied member is “present” in real-time, regardless of whether the copied members actively participate in the discussion by sending communications to the other “present” members.

- *Taking action:* Taking any action on any matter by the public body is prohibited because such action must be taken only at a public meeting.

Without further belaboring the point, these guidelines should be applied in a manner that is mindful of the spirit of FOIA.

29-350 Participation in a meeting through electronic communication means

A member of a public body may participate in a public meeting through electronic communication means from a remote location that is not open to the public if: (1) the public body has adopted a *written policy* allowing for and governing participation of its members by electronic communications means, including an approval process for participation; (2) a quorum of the public body is physically assembled at the body’s primary or central meeting location; and (3) the public body makes arrangements for the voice of the remote member to be heard. *Virginia Code § 2.2-3708.1(B)*. The three circumstances under which a member of a public body may participate remotely are as follows:

- *Emergency or personal matter:* On or before the day of a meeting, a member notifies the chair that he is unable to attend the meeting due to an emergency or personal matter and identifies with specificity the nature of the emergency or personal matter, and the public body holding the meeting records in its minutes the specific nature of the emergency or personal matter and the remote location from which the member participated. In a calendar year, a member may participate in a meeting from a remote location because of an emergency only two meetings, or 25 percent of the meetings, of the public body, whichever is fewer. If a member’s participation from a remote location is disapproved because participation would violate the public body’s policy, the disapproval must be recorded in the minutes with specificity.
- *Disability:* If a member notifies the chair that she is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents her physical attendance and the public body records this fact and the remote location from which the member participated in its minutes.
- *Distance; regional public bodies only:* If, on the day of a meeting, a member of a *regional* public body notifies the chair that the member’s principal residence is more than 60 miles from the meeting location identified in the required notice for the meeting and the regional public body records in its minutes the remote location from which the member participated. If a member’s participation from a remote location is disapproved because participation would violate the policy, the disapproval shall be recorded in the minutes with specificity.

Virginia Code § 2.2-3708.1(A). *Virginia Code § 2.2-3708(G)* authorizes any local governing body, any authority, board, bureau, commission, district, or agency of local government to 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 *Virginia Code § 44-146.17*.

29-400 Types of meetings

There are various types of meetings and they can be divided into two general categories. The first category is based on whether the meeting is open or closed to the public.

A Comparison of Public and Closed Meetings			
Type	Key Features	When May Be Held	Notice or Procedure Required
Public meeting	A meeting at which the public may attend	All meetings of a public body are public meetings unless another type is expressly authorized	Must give notice of the date, time and location of the meeting by placing a written notice in a prominent location specified by law at least 3 working days before meeting, and provide written notice to everyone requesting such notice

Closed meeting	A meeting at which the public is excluded, held in conjunction with a public meeting	A public body may hold a closed meeting only for one of the specific purposes authorized in Virginia Code § 2.2-3711; may be held only in conjunction with a public meeting; may not take formal action in a closed meeting	Must approve motion to go into closed meeting; must certify in public meeting after closed meeting that only matters lawfully exempt from public meeting were discussed
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The second category is based on the circumstances under which the meeting is called, *i.e.*, whether the meeting is a regularly scheduled meeting, a special meeting, or an emergency meeting.

A Comparison of Regular, Special and Emergency Meetings			
Type	Key Features	When May Be Held	Notice or Procedure Required
Regular Meeting	A public meeting that is regularly scheduled and whose date was set during the public body's organizational meeting	At the date, time and location set during the public body's organizational meeting	Must give notice of the date, time and location by placing a written notice in a prominent location at which notices are regularly posed, in the office of the clerk of the public body or, if there is no clerk, the office of the chief administrator for the public body; the notice must be posted at least 3 working days prior to the meeting
Special meeting	A public meeting that is other than a regularly scheduled public meeting	At any time, provided it is called by the requisite number of members of the public body and appropriate notice is given	Must give notice of the date, time and location of the meeting by placing a written notice as required for a regular meeting; the timing of the posed notice must be <i>reasonable under the circumstances</i>
Emergency meeting	A public meeting of a governing body arising from an unforeseen circumstance that requires immediate action	At any time by a governing body	Must give notice that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the governing body conducting the meeting

29-410 Public meetings

A *public meeting* is a meeting at which the public may be present. *Virginia Code § 2.2-3701*. All meetings of a public body are public meetings, unless a closed meeting is authorized for a specific purpose. *Virginia Code § 2.2-3707*. FOIA guarantees citizens the right to be present at meetings and to witness the operations of government; however, it does not guarantee a right to participate in those meetings. *AO-22-03* (also explaining that FOIA does not require that public bodies provide for public comment periods at its regular meetings, nor does it set forth procedures for accepting public comment).

A meeting may have portions that are both public and closed. A public body may only hold a closed meeting in the context of an open meeting. The public body must make a motion in open meeting to convene a closed meeting, and at the conclusion of the closed portion of the meeting, reconvene in open session to certify the closed meeting. *AO-02-04*.

29-420 Closed meetings

A *closed meeting* is a meeting from which the public is excluded. *Virginia Code § 2.2-3701*. The overwhelming majority of the FOIA-related case law and numerous opinions of the Freedom of Information Advisory Council focus on a number of issues surrounding closed meetings.

29-421 When a public body may go into a closed meeting

Public bodies may hold closed meetings only for the specific purposes authorized in Virginia Code § 2.2-3711. The General Assembly has authorized public bodies to go into a closed meeting for many reasons; however, a number of those apply only to specific public bodies. For public bodies serving localities, the authorized purposes for convening a closed meeting range from discussing personnel matters to actual or probable litigation, the

acquisition of real property for a public purpose, and the award of a public contract involving the expenditure of public funds.

Of the numerous reasons to convene a closed meeting, only one is relevant for the purposes of this handbook – the so-called *litigation or legal consultation exemption* set forth in Virginia Code § 2.2-3711(A)(7) (litigation) and (8) (consultation on specific legal matters). This exemption allows a public body to go into a closed meeting to discuss matters pertaining to *actual or probable litigation or for consultation regarding specific legal matters*. The *litigation* exemption allows the public body to consult “with legal counsel and briefings by staff members or consultants.” The *specific legal matters* exemption allows the public body to consult “with legal counsel employed or retained by a public body . . . requiring the provision of legal advice by such counsel.” Although the litigation exemption does not necessarily require that the attorney for the public body calling the closed meeting be the legal counsel with whom the public body is consulting, the FOI Advisory Council has informally opined that that is what the statute probably requires.

The term *probable litigation* means litigation that has been specifically threatened or about which the public body or its legal counsel has a reasonable basis to believe will be filed. *Virginia Code § 2.2-3711(A)(7)*; see also *Parvin v. Virginia Department of Transportation*, 15 Va. Cir. 349 (1989) (the filing of a notice of intent by a highway construction contractor is sufficient to threaten litigation to permit defendants’ correspondence with the Attorney General to achieve attorney-client privilege status, as well as work product status, under FOIA).

The *specific legal matters* exemption permits closed meetings for consultation with legal counsel employed or retained by a public body “regarding specific legal matters requiring the provision of legal advice by such counsel.” The Attorney General has opined that this exemption applies only to discussions of specific legal transactions or disputes and may not be used to justify closed meetings involving more general issues, even those that eventually may have legal consequences. *1992 Va. Op. Atty. Gen. 1*. Stated differently, the *specific legal matters* exemption requires more than a desire to discuss general legal matters and may not be used as a catch-all exception to FOIA’s open meeting requirement and does not justify the discussion of general legal matters in a closed meeting, absent an appropriate, specific, legal issue. *1986-87 Va. Op. Atty. Gen. 31*. For example, this exemption would not allow a public body to go into a closed meeting to discuss general legal matters such as those pertaining to the purposes of zoning and the steps in the rezoning process (*1985-86 Va. Op. Atty. Gen. 103*) or the discussion of general water and sewer policy issues (*AO-01-07*).

The exemption also provides that a public body may not exclude the public and close a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter under discussion. Rather, the attorney must be a participant in the discussion in the closed meeting.

29-422 The procedure to go into a closed meeting

A public body must follow specific procedures when going into, conducting, and concluding a closed meeting. Before a closed meeting may convene, the public body must take an affirmative recorded vote during a public meeting approving a motion that:

- Identifies the subject matter;
- States the purpose of the meeting; and
- Makes a specific reference to the applicable statutory exemption from the public meeting requirements.

Virginia Code § 2.2-3712(A). The matters contained in the motion must be set forth in detail in the minutes. *Virginia Code § 2.2-3712(A)*.

The Freedom of Information Advisory Council has observed that “there is often confusion in differentiating between the subject and the purpose of a closed meeting. Conceptually, it may be helpful to think of the subject as what the meeting is about, while the purpose is why the meeting is to be held.” *AO-13-09*. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the

closed meeting is not sufficient to satisfy the requirements for holding a closed meeting. *Virginia Code* § 2.2-3712(A). Thus, public bodies may run afoul of the rules for convening a closed meeting when they fail to adequately identify the subject matter and the purpose for convening the closed meeting. In *Shenandoah Publishing House v. Winchester City Council*, 37 Va. Cir. 149 (1995), the city council convened a closed meeting on a motion that recited the “personnel exemption” set forth in FOIA. The circuit court found that the statutory method for closing a meeting was not strictly followed where only a general reference tracking the statutory language for the closed meeting was given. “[N]o specific purpose was stated which reasonably identified the subject matter to be discussed at the closed session incident to motion to close.” Although the closed meeting discussion pertained to issues that fell within the personnel exemption, the city council had technically violated FOIA. The Freedom of Information Advisory Council has provided the following guidance on the required specificity of the motion in identifying the subject:

The subject need not be so specific as to defeat the reason for going into closed session, but should at least provide the public with general information as to why the closed session will be held. For example, a public body might state that the subject of a closed session would be to discuss disciplinary action against an employee of the public body. This statement goes a step beyond just stating that the purpose of the meeting is to consider a personnel matter, but does not go so far as to disclose the identity of the individual being discussed and defeat the reason for the closed session. In these circumstances, a proper motion should indicate that the public body was entering [the] closed meeting to discuss possible disciplinary action or termination of a Council appointee as authorized by Virginia Code § 2.2-3711(A)(1). Such a motion sufficiently identifies the subject matter and purpose of the closed meeting without compromising confidentiality.

AO-24-04; see also AO-02-10 (mere reference to “legal contracts” is insufficient because it does not identify the subject of the contracts).

On the subject of properly identifying the purpose of the closed meeting in the motion, the Freedom of Information Advisory Council has also said:

In identifying the purpose of a closed meeting, it is helpful to keep in mind the introductory language of subsection A of § 2.2-3711: *Public bodies may hold closed meetings only for the following purposes.* This introductory language makes clear that the exemptions themselves identify the purposes for which closed meetings may be held.

AO-13-09.

Public bodies also may run afoul of the rules for convening a closed meeting when the stated exemption does not allow the actual purpose for the closed meeting discussion. In *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006), the board of supervisors went into a closed meeting for the stated purpose of discussing “the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body,” as provided in Virginia Code § 2.2-3711(A)(30). The actual purpose of the board’s discussion was to consider the application or enforcement of the scope or terms of a previously awarded public contract. The Virginia Supreme Court held that the board’s closed meeting was in violation of FOIA because the purpose for the “award of a public contract” exemption is to:

[P]rotect a public body’s bargaining position or negotiating strategy vis-a-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body’s bargaining position or negotiating strategy regarding the contract.

White Dog Publishing, Inc., 272 Va. at 386-387, 634 S.E.2d at 339.

The *White Dog* court concluded that the exemption did not allow the board to convene a closed meeting in order to consider the application or enforcement of the scope or terms of a previously awarded public contract. In so concluding, the Court reminded public bodies that, because the provisions of FOIA are to 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, any exemption from public access to meetings will be narrowly construed and no meeting may be closed to the public unless specifically made exempt under FOIA or other specific provisions of law.

In *City of Danville v. Laird*, 223 Va. 271, 288 S.E.2d 429 (1982), the city council moved to go into a closed meeting to discuss legal matters using language that did little more than recite the language from the statute and failed to specify which item on the agenda the motion pertained. However, the motion was made at a special meeting of the city council in which the only items on the agenda pertained to actual pending litigation. Under these facts, the Virginia Supreme Court held that the motion was valid.

29-423 What may be discussed, who may participate, and reaching a tentative decision, in a closed meeting

During a closed meeting, a public body must restrict its discussion only to those matters specifically exempted (e.g., the litigation that was threatened during the meeting) and identified in the motion convening the closed meeting. *Virginia Code* § 2.2-3712(C); see *Shenandoah Publishing House v. Warren County School Board*, 41 Va. Cir. 113 (1996) (when a public body enters into a closed meeting, the jurisdiction of FOIA is triggered, and the permissible range of the action and discussion is limited by the particular exemption).

The courts will narrowly construe the permissible scope of the discussion in a properly convened closed meeting. *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006) (discussed in section 29-422). In *White Dog*, the board went into a closed session under the “award of public contract” exemption, and under that exemption it could not consider the application or enforcement of the scope or terms of a previously awarded public contract. In *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 288 S.E.2d 415 (1982), the Virginia Supreme Court upheld the trial court’s finding that the scope of a closed meeting held by the Richmond city council to discuss legal matters exceeded the permissible scope of the closed meeting. The trial court had found that, although the city council contended that the meeting was exempt because it was to receive a briefing by the mayor, an attorney, and by city staff pertaining to potential litigation of pending anti-annexation bills and alternatives to litigation. In fact, the court found that there was little, if any discussion, of legal matters or potential litigation but, instead, the focal point of the discussion was a city proposal that the counties of Henrico and Chesterfield cooperate by assuming a proportionate share of the cost of services and facilities provided by the city for the benefit or residents of all three jurisdictions. The Virginia Supreme Court also found that the mayor was not appearing as an attorney for the city but, rather, was representing the city in his official capacity as an advocate of regional cooperation. In *Media General Operations, Inc. v. City Council of Richmond*, 64 Va. Cir. 406 (2004), the circuit court held that the city council exceeded the scope of a closed meeting under the “performance evaluation” exemption in *Virginia Code* § 2.2-3711(A)(1) to discuss the performance of the city manager because it related to rising crime in the city. See also *1992 Va. Op. Atty Gen. 1* (summarizing opinions in which the legal consultation exemption was considered, and concluding that the exemption applies only to discussions of specific legal transactions or disputes and may not be used to justify closed meetings involving more general issues, even though those issues eventually may have legal consequences).

Persons who are not members of the public body may attend a closed meeting if they are deemed necessary or if their presence will reasonably aid the public body in its consideration of the matters. *Virginia Code* § 2.2-3712(F). Minutes may be taken during a closed meeting, but are not required. *Virginia Code* § 2.2-3712(H). In *Mannix v. Washington County Board of Supervisors*, 27 Va. Cir. 397 (1992), the circuit court considered the situation where a staff person attending a closed meeting raised an issue that was beyond the scope of the stated purpose for the closed meeting. The circuit court said that the employee was not subject to the same rules under FOIA as the board members, and the court declined to hold the board “responsible for the spontaneous utterances that any such non-member might unwittingly make.” The court said that the board erred in taking up the discussion of the issue raised

by the employee, and that “the proper action would have been for the chairman to simply declare the non-member out of order and forbid any further discussion on the topic.”

Members of a public body may reach a tentative decision while still in a closed meeting. *AO-01-03* (the law recognizes that during a closed meeting, the course of the discussion may lead the members of the public body to take an informal vote to ascertain their position or to reach an informal agreement, and FOIA allows members to poll each other individually about their position on a matter of public business); *AO-15-02* (use of a “straw poll” in closed meeting is permitted by FOIA). However, as discussed in section 29-424, no action may be taken in a closed meeting.

29-424 Reconvening in a public meeting at the conclusion of a closed meeting

At the conclusion of a closed meeting, the public body must immediately reconvene in a public meeting and take a roll call or other recorded vote to be included in the minutes certifying that, to the best of each member’s knowledge, only public business matters lawfully exempt from the public meeting requirements and identified in the motion that convened the closed meeting were heard, discussed or considered in the closed meeting. *Virginia Code* § 2.2-3712(D). See *Appendix C* for a sample certification. A member of the public body who believes that there was a departure from the exemption identified in the motion must so state prior to the vote, and indicate the substance of the departure that, in his opinion, has taken place. *Virginia Code* § 2.2-3712(D).

A resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting is not effective unless the public body reconvenes in a public meeting and takes a vote of the membership on the matter. *Virginia Code* §§ 2.2-3711(B), 2.2-3712(G). If the members of the public body reached a tentative agreement or decision during the closed meeting, that tentative decision is not binding on any of the members, and a public body cannot act upon the decision until it identifies the substance of the issue and takes a vote in an open meeting, because no decision becomes effective until then. *AO-01-03*.

29-430 Special meetings

Governing bodies and planning commissions are authorized to convene special meetings. See, e.g., *Virginia Code* §§ 15.2-1417 (board), 15.2-2214 (commission). A *special meeting* is a meeting that is other than a regularly scheduled meeting. In Albemarle County, the rules of procedure of those bodies allow either the chairman or two or more members of the body to call a special meeting, and provide how notice will be provided to the bodies’ members.

29-440 Emergency meetings

A governing body may also convene emergency meetings. An *emergency meeting* is a meeting arising from an unforeseen circumstance that requires immediate action. See *Virginia Code* § 2.2-3701.

29-500 Notice requirements for regular, special, and emergency meetings

For regular meetings, the public body must give notice of the date, time and location of the meeting by placing a written notice in a prominent location at which notices are regularly posted, in the office of the clerk of the particular public body or, if there is no clerk, the office of the chief administrator for the public body (e.g., in Albemarle County, the office of the director of planning is the chief administrator for the planning commission and the architectural review board; the office of the zoning administrator is the chief administrator for the BZA). *Virginia Code* § 2.2-3707(C). The notice must be posted at least three working days prior to the meeting. *Virginia Code* § 2.2-3707(C). A public body must give notice of the time, date, and location of its meetings, even if the only item on the agenda for the meeting is a closed meeting. *AO-02-04*. The failure of the public body to post the written notice of a meeting required by *Virginia Code* § 2.2-3707(C) renders any vote taken at the meeting null and void. *2009 Va. Op. Atty. Gen. LEXIS 2, 2009 Va. Op. Atty. Gen. WL 103686; 2009 Va. Op. Atty. Gen. LEXIS 4, 2009 Va. Op. Atty. Gen. WL 103688*.

For special meetings, the public body must give the notice required above that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the public body conducting the meeting. *Virginia Code* § 2.2-3707(D). Further, the rules of the public body may require, for example, that the secretary of those bodies notify the general news media of the time and place of the special meeting and the matters to be considered.

For emergency meetings, the governing body must give notice that is reasonable under the circumstances, and it must be given contemporaneously with the notice to the members of the public body conducting the meeting. *Virginia Code* § 2.2-3707(D).

In addition to posting notice, notice of all meetings must also be provided directly to any person who files an annual written request for notification with the public body. *Virginia Code* § 2.2-3707(E). The notice must be in writing, but may be provided by electronic means if the person requesting notice does not object. *Virginia Code* § 2.2-3707(E). Finally, at least one copy of all agenda packets and, unless exempt from public disclosure under FOIA or other state law, all materials furnished to members of a public body for a meeting must be made available for public inspection at the same time those documents are furnished to the members of the public body. *Virginia Code* § 2.2-3707(F). FOIA also encourages posting notices by electronic means. *Virginia Code* § 2.2-3707(C).

29-600 Conducting a meeting

Public bodies act only at authorized meetings as a corporate body and not by the actions of its members separately and individually. *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (applying to boards of county supervisors); *Sundlun v. Fauquier County Board of Zoning Appeals*, 23 Va. Cir. 53 (1991) (the individual members of the BZA act only as an entity), citing *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985).

29-610 Following applicable rules of parliamentary procedure

Most boards and commissions have adopted rules of parliamentary procedure to guide them through the various procedural issues that arise in the course of a meeting, such as the order of business and voting procedures. Public bodies may also adopt in whole or in part other rules of parliamentary procedure, such as Robert's Rules of Order.

These rules of procedure should, of course, be followed. Parliamentary rules exist for the simple purpose of facilitating and rendering orderly the public body's official actions, and the custom of following these rules is simply procedural. *Shannon Fredericksburg Motor Inn, Inc. Spotsylvania County Board of Supervisors*, 9 Va. Cir. 418 (1977). Failure to comply with the parliamentary procedures will not invalidate an action when the requisite number of members has agreed to the particular measure. *County of Prince William v. Rau*, 239 Va. 616, 391 S.E.2d 290 (1990); *Shannon Fredericksburg Motor Inn, supra* (procedural rules are not jurisdictional).

In *Centex Homes v. Loudoun County Board of Supervisors*, 74 Va. Cir. 54 (2007), the board approved a rezoning application at one meeting but at its next meeting, following a successful motion to reconsider, the rezoning was denied. The plaintiffs contended that the board's denial was ineffective, claiming that the board's approval of the rezoning at the prior meeting was effective on that date. No notice of the board's reconsideration of the rezoning was provided. The circuit court concluded that the board's reconsideration complied with its rules of procedure and upheld the board's decision to deny the rezoning, which allowed a matter to be reconsidered "during the same or succeeding meeting" upon a proper motion by a board member "voting with the prevailing side or who ha[d] not voted on the question." *Centex Homes*, 74 Va. Cir. at 55. The court also relied in part on this passage from *1975-76 Va. Op. Atty. Gen.* 403, in which the Attorney General opined:

[L]ocal governing bodies often enact rules of procedure which provide for reconsideration of ordinances. Such rules usually provide that an ordinance which has been defeated can be reconsidered if a motion to that effect passes at or before the next ensuing regular meeting of the governing body. *In such circumstances, the reconsidered ordinance is not treated as a new ordinance, and regular notice and hearing requirements do not apply.*

Centex Homes, 74 Va. Cir. at 56. In *Madison v. Loudoun County Board of Supervisors*, 82 Va. Cir. 106 (2011), the circuit court declined to grant a writ of mandamus in a facial challenge to a rule of procedure of the county’s historic district review committee. The rule authorized the committee to reconsider the plaintiff’s application for a certificate of appropriateness. The court held that because the county’s zoning regulations authorized the committee to adopt operating procedures, which included the process for reconsideration, the plaintiff’s facial challenge to the rule failed.

29-620 Establishing and maintaining a quorum

Establishing and maintaining a quorum is essential in order for a public body to transact business. A quorum is usually comprised of a majority of the members of the public body. For a locality’s governing body, a majority of the governing body constitutes a quorum. *Virginia Code § 15.2-1415*. However, some public bodies may have unique definitions of a quorum. For many years, the Albemarle County Public Recreational Facilities Authority’s rules provided that a quorum was established by a majority of the members plus one. Thus, a quorum for the nine-member body was six, rather than five.

29-621 No action may be taken unless quorum present other than to adjourn meeting

A public body may not take a valid action unless a quorum is present. *Virginia Code § 15.2-1415 (board of supervisors), § 15.2-2215 (planning commission), § 15.2-2308(B) (board of zoning appeals); see also the rules of procedure adopted by the board of supervisors, the planning commission and the board of zoning appeals*. Their continuing presence is necessary in order that the public body may act. *Jakabcin v. Town of Front Royal*, 271 Va. 660, 628 S.E.2d 319 (2006). An exception to this rule applies when a member is disqualified under the State and Local Government Conflict of Interests Act, and is discussed in section 29-623(2). Absent a quorum, the only *action* the public body may take is to adjourn the meeting. *Jakabcin, supra*. The acts of members of a public body in the absence of a quorum, except to adjourn a meeting, are void. *Jakabcin, supra*. Until adjournment, the public body may at most receive information from staff and have discussions before adjourning the meeting. The public body may not open public hearings, debate the merits of agenda items, or take informal votes on agenda items.

29-622 A meeting under FOIA may exist even though a quorum is not present

It is possible for a meeting to exist under FOIA without the quorum that would allow the public body to take action on a matter. For example, a meeting is established under FOIA for a seven-member body when the third member arrives; though a quorum is not established until the fourth member arrives.

A meeting and a quorum would be established for public bodies of various sizes as follows:

Membership	Meeting	Quorum
3	2	2
4	3	3
5	3	3
6	3	4
7	3	4
8	3	5
9	3	5
10	3	6

29-623 Establishing a quorum when members absent or disqualified

Questions may arise about establishing a quorum when members of a public body are absent or are disqualified from participating in an item because of a conflict of interest. The simple answer is that the number of members required to be *present* to establish a quorum does not change because members are absent. *Jakabcin v. Town of Front Royal*, 271 Va. 660, 628 S.E.2d 319 (2006).

In *Jakabcin*, the town council was faced with a controversial rezoning. Two members of at the six-member council disqualified themselves under the State and Local Government Conflicts of Interest Act (*see chapter 30*); a third member absented himself from the public hearing and the first reading of the ordinance required under the town charter, stating in a letter that he was recusing himself from participating without stating any reason. The three remaining members of the town council held the public hearing and the first reading of the ordinance on the rezoning. At the second reading of the ordinance, the two disqualified members again disqualified themselves – one left the room, the other remained. The council member who had absented himself from the prior meeting stated in a letter that he was “legally entitled to participate and vote on the matter,” but was absent again. After the second reading of the ordinance, the rezoning was approved with three affirmative votes, four council members present (one who was disqualified), and two who were absent (one who was disqualified).

1. Absent member

The *Jakabcin* court had this to say about the council member who decided to absent himself from the meetings, even though he was not disqualified from participating in the matter:

In our system of representative government, the voters must of necessity rely on their elected legislative representatives to protect their interests, to defend their freedoms, to advocate their views and to keep them informed. Elected representatives who voluntarily absent themselves from meetings of the governing body to which they have been elected cannot fully discharge those duties. For that reason, penalties are often provided for the unauthorized absences of members.

Jakabcin, 271 Va. at 666, 628 S.E.2d at 322.

These principles apply to appointed members of other public bodies as well, though they are undoubtedly strongest when applied to elected officials. *See, e.g., Virginia Code § 15.2-2212*, authorizing a governing body to remove a planning commissioner from office if the commissioner is absent from any three consecutive commission meetings, or is absent from any four commission meetings within any 12-month period.

2. Disqualified member

The key issue in *Jakabcin* was whether the number required to establish a quorum changed because two members of the town council disqualified themselves because of conflicts of interest. Virginia Code § 2.2-3112(C), which is part of the State and Local Government Conflict of Interests Act, provided at the time:

If disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining members shall have authority to act for the agency by majority vote.

Jakabcin, 271 Va. at 667, 628 S.E.2d at 322.

In *Jakabcin*, the Virginia Supreme Court considered whether the application of Virginia Code § 2.2-3112(C) allowed the three town council members to act at the public hearing and the first reading of the ordinance, because two members were disqualified. In other words, did section 2.2-3112(C) have the effect of reducing the membership of the town council from six to four (because two members were disqualified and absent), so that the three members present constituted a quorum? Even with two members disqualified, the town council’s required quorum was still four, and the unexcused absence by the other council member did not change that. The Court held that Virginia Code § 2.2-3112(C) did not change the underlying quorum requirements for a public body to act and that the public hearing and the first reading of the ordinance were a nullity because the three members present were not a quorum. Because the town charter required two readings and the ordinance received only one lawful reading before its adoption, the ordinance as well as the related approvals, were invalid.

After *Jakabcin*, Virginia Code § 2.2-3112(C) was amended (highlighted in italics) to provide in relevant part:

Notwithstanding any other provision of law, if disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining member or members shall *constitute a quorum for the conduct of business and* have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members

The portion of Virginia Code § 2.2-3112(C) that was not amended remains significant – it does not change the sole grounds under which the quorum may be reduced – disqualification under the State and Local Government Conflict of Interests Act. Under this interpretation, the law is applied as follows:

How Virginia Code § 2.2-3112(C) Operates to Establish a Quorum	
Hypotheticals	Effect of Virginia Code § 2.2-3112(C)
7 member public body for which a quorum to act is 4; 4 members are disqualified because of a conflict of interest under the State and Local Government Conflict of Interests Act	Virginia Code § 2.2-3112(C) provides that, notwithstanding the general law for quorums, the 3 remaining members would constitute a quorum and have the authority to act
7 member public body for which a quorum to act is 4; 3 members are absent from the meeting because they are on vacation and a 4 th member is disqualified because of a conflict of interest under the State and Local Government Conflict of Interests Act	Virginia Code § 2.2-3112(C) does not apply and the 3 remaining members do not constitute a quorum with the authority to act; the failure to establish a quorum under the general law was not due solely to the disqualification of the members of the public body under the State and Local Government Conflict of Interests Act

The Virginia Conflict of Interest and Ethics Advisory Council, in an opinion dated April 24, 2017, analyzes Virginia Code § 2.2-3112(C) differently. The Council concluded that the savings clause (“Notwithstanding any other provision of law”) allows the number required for a quorum to be reduced even when some members are absent for reasons other than being disqualified due to a conflict of interest. Thus, the Council states, “if five members of a seven-member public body are in attendance at a meeting and constitute a quorum, and then two of those members are disqualified due to a conflict under the Act, the remaining three members constitute a quorum, pursuant to subsection C of § 2.2-3112. It is immaterial whether or not the absent members could have participated, or for what reasons they are absent.” *Virginia Conflict of Interest and Ethics Advisory Council, Formal Advisory Opinion 2017-F-001*. The savings clause in Virginia Code § 2.2-3112(C), however, only allows for the number of members required for a quorum to be reduced; it did not change the condition under which a quorum may be reduced – disqualifications of officers or employees because of conflicts of interest under Virginia Code § 2.2-3112 – and no other reason.

29-630 Maintaining control of the meeting; disruptions

Although members of the public may have the right to speak at a public meeting, the right to do so is not unlimited. “Officials presiding over such meetings must have *discretion* . . . to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner. [citation omitted].” *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 385 (4th Cir. 2008); *Mannix v. Commonwealth of Virginia*, 31 Va. App. 271, 281, 522 S.E.2d 885, 890 (2000) (“the chairman of a public meeting has a legitimate interest in conducting the meeting in an orderly and efficient manner”).

The First Amendment to the United States Constitution provides:

Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment protections apply to public meetings. See, *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999) (county commissioners meeting); *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (school board meetings).

The federal courts have identified two key functions of the First Amendment’s Free Speech Clause: (1) to preserve an *uninhibited marketplace of ideas* in which truth will ultimately prevail; and (2) to ensure that the government has *not regulated speech based on hostility – or favoritism – towards the underlying message expressed*.

The United States Supreme Court has said that the First Amendment reflects “a profound national commitment to the principle that *debate on public issues should be uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (italics added). “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion.” *Sullivan*.

Under the First Amendment’s Free Speech Clause, a locality “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). Any restriction in a public body’s meeting rules that maintains decorum versus merely preventing disruption may run the danger of being content-based (and, therefore, being in violation of the First Amendment). *Griffin v. Bryant*, 30 F. Supp. 3d 1139 (D.N.M. 2014).

Reasonable and *content-neutral* time, place, and manner restrictions on speech are permissible under the First Amendment.

The chair of a public body is fully authorized to declare a disruptive person at a meeting to be out of order, to direct that the person sit down and be quiet, and to have him or her forcibly ejected from the meeting room upon resistance or refusal to cease and desist. *Mannix, supra* (defendant properly convicted of disorderly conduct and obstruction of justice where, during the “citizen’s comments” session on an issue before the board of supervisors, he posed argumentative questions to the county attorney and, after being instructed by the chairman to confine his remarks to the issue at hand, he became argumentative and accusatory toward the chairman; after being declared out of order and refusing to take his seat, defendant was then forcibly removed from the meeting room).

Determining whether particular speech or behavior is disruptive must be based on the chair’s reasonable perception of disruption. There must be actual disruption or a specific and significant fear of disruption, not merely undifferentiated fear or a remote apprehension of disruption. As one court has said, “government officials in America occasionally must tolerate offensive or irritating speech.” When a speaker is disrupting a meeting, the Chair may take a series of steps to end the disruption, beginning with a warning and escalating all the way to asking the police to remove the speaker for disorderly conduct.

Following are 10 types of speech and behavior that may or may not be disruptive. These examples are from the case law collected from throughout the United States. Some types of permitted speech and behavior, such as complaining about public officers or employees, may nonetheless be disruptive if the complaints are, for example, yelled from the audience or are irrelevant to the issue at hand.

- *Refusing to stop speaking after the time limit expires*: Speakers are disruptive when they speak beyond the established time limit.
- *Speaking when not at the podium or yelling from the audience*: Speakers are disruptive when they: (1) are not at the podium and yell from the audience; or (2) heckle the public body from the audience by cupping their hands and yelling when a member of the public body attempts to speak.
- *Refusing to speak to issues relevant to the agenda item*: A speaker who speaks during a public hearing for an extended period on issues that are irrelevant to the matter at issue is disrupting the meeting. This rule applies only during public hearings pertaining to specific matters. It does not apply to persons speaking during periods on the agenda when speakers are invited to speak about anything.
- *Being unduly repetitious*: Speakers are disruptive when they are unduly repetitive.

- *Using profanity*: Speakers are not disruptive when they use profanity that does not cause an actual disruption (e.g., speaker said “God damn”). A public body may prohibit speech that is *obscene* because a speaker has no First Amendment right to use obscene language. Profanity is not necessarily obscenity. In the First Amendment context, *obscenity* is speech that, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. This is not a standard that is easily administered during a meeting.
- *Demonstrative conduct*: Speakers are not disruptive when they make silent gestures toward the public body, including the Nazi salute, provide that they do not otherwise disrupt the meeting. On the other hand, speakers are disruptive when they dump debris on the floor at a public meeting to dramatize a point.
- *Speaking about public officers or employees*: Speakers are not disruptive when they: (1) question the fitness of public officers or employees; (2) discuss specific public officers or employees; (3) complain about public officers or employees; (4) make personal attacks on public officers or employees; or (5) raise objections about how a public body conducts its business.
- *Speaking about groups or members of the public*: Speakers are not disruptive when they: (1) speak about groups or individuals even when the speech has racist or sexist overtones, involves overbroad caricatures of certain groups or citizens, or is sophomoric and offensive; (2) speak about groups or individuals even when the speech uses virulent ethnic and religious epithets or scurrilous caricatures; or (3) make defamatory attacks on groups or individuals.
- *Speech that offends or agitates persons in the audience*: Speakers are not disruptive: (1) merely because members of the public body or the audience are offended by what the speakers say; (2) merely because of the listeners’ reactions to what the speakers saying; or (3) because they will speak about a particular topic, even when the public body knows that the speech is assertedly or demonstrably offensive to some members of the public.
- *Speech that threatens violence*: Speakers who threaten violence are disruptive; the speech must: (1) threatens illegal acts; (2) be *fighting words* (words that, by their very utterance, tend to incite an *immediate* breach of the peace) because the First Amendment does not apply to that kind of speech; or (3) be *incitement to imminent violence* (violence that is truly imminent) because the First Amendment does not apply to that kind of speech.

A public body may take reasonable steps to assure that a meeting is not disrupted by a non-member. Robert’s Rules of Order states:

Any nonmembers allowed in the hall during a meeting, as guests of the organization, have no rights with reference to the proceedings. An assembly has the right to protect itself from annoyance by nonmembers, and its full authority in this regard – as distinguished from cases involving disorderly members – can be exercised by the chair acting alone. The chair has the power to require nonmembers to leave the hall, or to order their removal, at any time during the meeting; and the nonmembers have no right of appeal from such an order of the presiding officer. However, such an order may be appealed by a member.

Robert’s Rules of Order, Newly Revised, 10th ed., 628. Robert’s Rules of Order *also advises* that the chair should “be guided by a judicious appraisal of the situation.”

29-640 Motions

All matters requiring a vote of the public body must be preceded by an appropriate motion by a member, and a seconding of that motion by another member.

The motion should clearly state the intent of the motion maker, and include a reference to any conditions that are included with the motion. One nationally-known parliamentarian recommends that motions be stated: “It is moved that . . .” rather than “I make a motion that . . .” *Ericson, Notes and Comments on Robert’s Rules, 7.*

Although the action reflected by the motion may come in various forms, for those decisions by the governing body, as well as decisions of other public bodies that are not making mere recommendations, the best practice may be to merely have the body adopt a resolution that reflects its decision along with any conditions.

Acting Body	Sample Motion Language
Governing body	It is moved that we approve Zoning Map Amendment 2017-555, with the proffers. It is moved that we approve Special Use Permit 2017-777, with the following conditions conditions stated in the staff report. . . . conditions stated in the staff report, amended as follows . . . It is moved that Zoning Map Amendment 2017-888 be denied, for the following reasons . . . It is moved that we adopt the resolution [approving or denying] the application . . .
Planning commission	It is moved that we recommend that Zoning Map Amendment 2017-555, with the proffers, be approved. It is moved that we recommend that Special Use Permit 2017-777, be approved with the following conditions conditions stated in the staff report. . . . conditions stated in the staff report, amended as follows . . . It is moved that we recommend that Zoning Map Amendment 2011-888 be denied for the following reasons . . .
Board of Zoning appeals	It is moved that we approve Variance 2017-222, with the following conditions . . . It is moved that we affirm the decision of the zoning administrator in Appeal 2017-333. It is moved that we affirm the decision of the zoning administrator in Appeal 2017-333, with the following modifications . . . It is moved that we deny Variance 2017-444, for the following reasons . . . It is moved that we deny Variance 2017-444, for the reasons set forth in the staff report. It is moved that we adopt the resolution [approving or denying] the application . . .
Architectural review board	It is moved that we approve the certificate of appropriateness for ARB 2017-111 with the following conditions conditions stated in the staff report. . . . conditions stated in the staff report, amended as follows . . . It is moved that we recommend that the board of supervisors adopt the following guidelines . . . It is moved that we adopt the resolution [approving or denying] the certificate of appropriateness. . .

The motion then must be seconded. The purpose of a second is to prevent time from being consumed by the public body having to dispose of a motion that only one person wants to see introduced. *Ericson, supra, 12.* Thus, requiring a second restores balance between individual members and the majority by requiring that at least one other member believe that the motion is worth talking about. *Ericson, supra, 13.* A second need not be made by a member who actually supports the motion.

When a motion has been made and seconded, the chair should then state the motion: “It is moved and seconded that . . .” At that point, the debate may begin. If the debate begins without a second, neither the debate nor any ensuing action is out of order. Because the reason for requiring a second is to ensure that at least one other member thinks the motion is worth talking about, once debate begins, the rationale for a second has been satisfied. *Ericson, supra, 13.* Likewise, an adopted motion is not defective if a second was not made because, if a motion receives a majority vote, the rationale for a second has been satisfied. *Ericson, supra, 14.*

29-650 Debate

A public body’s rules of procedure may specify how the debate should be conducted. *Ericson* recommends that the chairman follow this procedure:

- *Recognize the maker of the main motion first:* The maker of the main motion should be recognized first. This is not only a courtesy to the motion maker. It also requires the motion maker to assume the burden of proof. The maker of the motion may not speak against the motion; however, if he no longer supports the motion, he may withdraw it.
- *Alternate debate:* After the maker of the motion has spoken, the debate should alternate between those who support the motion and those who oppose it.
- *All members speak before members speak a second time:* Members who have not yet spoken should be recognized before other members are allowed to speak a second time.

Ericson, supra, 9. These procedures are most necessary in large assemblies. Local public bodies, however, are small and they typically do not have this level of formality. The debates are typically informal discussions among the members.

On most matters, the debate reaches a natural conclusion and the chairman asks the public body whether it is ready to vote or is *ready for the question*. However, the debate on any motion may be terminated by any member moving the *previous question*. The motion may be made in various forms, such as: “I move the previous question,” “I call the previous question,” or “I move that we close the debate.” *Ericson, supra, 53-58.* The motion on the previous question must be seconded, and may not be debated before the vote.

29-660 Voting

An action is valid only if it is authorized by a majority vote of those members present and voting. The two exceptions to this rule are appeals and applications for variances considered by the BZA, where a vote of the majority of the membership of the BZA (*i.e.*, three members of a five-member BZA, even if only three members are present) is required to reverse a determination by the zoning administrator or to grant a variance. *Virginia Code § 15.2-2312.*

On a final vote by the governing body on any ordinance or resolution, the name of each member voting and how he or she voted must be recorded (*i.e.*, a roll call vote is required). *Virginia Constitution, Article VII, § 7; Town of Madison v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998). Thus, for example, a roll call vote is required on a zoning text amendment or a zoning map amendment. A voice vote is authorized on all other matters considered. On those matters for which a planning commission is making a recommendation to the governing body, the governing body may prefer that the commission vote by a roll call vote so that it has a clear understanding as to which commissioners voted for and against the matter. Voting by secret or written ballots is prohibited. *Virginia Code § 2.2-3710.*

A member of a public body may vote on a matter even if he or she was not present for the public hearing or the presentation of all of the evidence. For legislative matters, there is little law on point. As explained by the circuit court in *Hutton v. Town of Elkton*, 57 Va. Cir. 278, 280 (2002):

For ages, members of all types of public bodies vote on issues and legislation when they have not been present at all or some of the hearings and debates which are normally conducted before voting on particular legislation. Therefore, the Court holds that Council members are not disqualified from voting on an issue simply because they failed to attend a public hearing on the issue.

For non-legislative matters, “the officer who makes the determinations, must consider and appraise the evidence,” but need not necessarily receive the evidence in the first instance. *Morgan v. United States*, 298 U.S. 468, 482, 56 S. Ct. 906, 912 (1936), overruled in part in *Morgan v. United States*, 313 U.S. 409, 61 S. Ct. 999 (1941); *Southwest Bank of Virginia v. Peoples Bank, Inc.*, 216 Va. 788, 789, 224 S.E.2d 130, 131 (1976) (allowing absent members of the State Corporation Commission to vote on a matter where they reviewed the record before voting on the matter; “consideration of the evidence by those responsible for making the decision is all that due process requires”). To

“consider and appraise” the evidence does not mean that each member of a public body read all of the evidence or even that he or she read any of it; rather, it is sufficient for a member to read a summary or analysis prepared by subordinates (e.g., a staff report) (2 *Davis, Administrative Law*, § 11.03 (1958)) and to listen to a recording of the proceeding. Thus, on non-legislative matters, when a hearing is continued to another date, or the decision is made after the hearing, an absent member may vote on a matter provided that he or she has considered and appraised the evidence before the decision. The member should state on the record that she listened to a full tape recording of the prior proceedings on the matter, read the written materials, and considered all aspects of the matter. *Southwest Bank, supra*.

29-670 Minutes

Minutes must be recorded at all public meetings. *Virginia Code* § 2.2-3707(I). However, committees or subcommittees appointed by a public body are not required to record minutes unless a majority of the governing body is on the committee or subcommittee. *Virginia Code* § 2.2-3707(I). Minutes may be taken during closed meetings, but are not required. *Virginia Code* § 2.2-3712(I).

Minutes must be in writing and include: (1) the date, time and location of the meeting; (2) the members of the public body recorded as present and absent; and (3) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. *Virginia Code* § 2.2-3707(I).

29-680 Photographing and recording meetings

Any person may photograph, film, record or otherwise reproduce any portion of a public meeting. *Virginia Code* § 2.2-3707(H). A public body may adopt rules governing the placement and use of equipment necessary for broadcasting, filming or recording a meeting in order to prevent interference with the proceedings. *Virginia Code* § 2.2-3707(H). However, a public body may not prohibit or prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. *Virginia Code* § 2.2-3707(H). In addition, *Virginia Code* § 2.2-3707(H) prohibits a public body from conducting a meeting required to be open in any building or facility where recording devices are prohibited.