

# COUNTY OF ALBEMARLE



## MEMORANDUM

---

**TO:** Members of Community Advisory Councils

**FROM:** Greg Kamptner, Deputy County Attorney

**DATE:** March 24, 2014

**RE:** *Guidance on whether electronic communications may be a meeting under the Virginia Freedom of Information Act*

---

This guidance provides direction to members of the County's Community Advisory Councils on the issue of whether electronic communications, such as emails and text messages, may be a meeting under the Virginia Freedom of Information Act ("FOIA").

### Background

For purposes of FOIA, a meeting of a public body exists whenever three or more members, or a quorum if less than three, of the membership of a public body assemble either formally or informally, whether sitting physically or through electronic means. *Virginia Code § 2.2-3701 (definition of meeting)*.

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 with very limited exceptions; state-declared emergency or member's emergency, personal matter, disability or medical condition and quorum otherwise physically assembled) ("AO" refers to an opinion of the Freedom of Information Advisory Council).

One of the compelling questions over the past decade 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 (2004), a case involving some members of the Fredericksburg City Council, the issue was whether the use of e-mail by three or more members of the city council constituted an unlawful meeting under FOIA. The shortest interval between any e-mails was more than four hours; the longest interval was more than two days.

The Virginia Supreme Court held that, given the passage of time between emails, there was no simultaneity and, therefore, no assemblage of the public body and no violation of FOIA. The court distinguished the email communications from those that might be exchanged in a *chat-room* or *instant messaging* environment, in which simultaneous communications between members may occur. The Court reasoned: "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.

In *Hill v. Fairfax County School Board*, 284 Va. 306 (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.

## Guidance

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. It is clear, however, 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 County 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 obtained by using 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. Neither FOIA nor the State courts have clarified what an acceptable minimum interval might be before the communication is considered to be in real-time; from the *Beck* case, we know that an interval of four hours between communications lacks the required simultaneity for FOIA to apply.
- *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 the 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 that public matters be discussed in public meetings. **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.**