



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

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

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The Honorable Sally Hudson
Member, Virginia House of Delegates
Post Office Box 2375
Charlottesville, Virginia 22902

Dear Delegate Hudson:

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

Issue Presented

You ask whether Virginia Code § 15.2-1413 permits localities to modify or indefinitely extend the time limits for responding to requests for records set forth in § 2.2-3704 of the Virginia Freedom of Information Act (VFOIA).

Applicable Law and Discussion

1. VFOIA calls for transparency in government and establishes specific time limits for responding to requests for records.

“[T]he tenets of open government and transparency are the core principles of VFOIA.”¹ The General Assembly has emphasized that VFOIA “shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.”² As this Office has previously explained, even during a state of emergency, “the requirements of VFOIA, open government, and transparency remain critically important.”³

¹ 2020 Op. Va. Att’y Gen. No. 20-036 at 2, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1632-2020-official-opinions#september>.

² VA. CODE ANN. § 2.2-3700(B) (This and all other citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2020 Regular Session, and 2020 Special Session I, c. 1, of the General Assembly.).

³ 2020 Op. Va. Att’y Gen. No. 20-011 at 2, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1632-2020-official-opinions#march>.

Section 2.2-3704 of VFOIA establishes a strong presumption of public access to government records, providing that, “[e]xcept as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth.”⁴ That same provision also imposes specific time limits for a public body to respond to requests for records unless the public body and the requester have reached a different agreement.⁵ In particular, the statute provides that a public body that is the custodian of requested records “shall promptly, but in all cases within five working days of receiving [the] request,” do one of five things: (1) provide the records in full; (2) provide the records in part but with portions withheld as authorized by statute; (3) advise the requester that the records are being withheld entirely as authorized by statute; (4) advise the requester that the records could not be found or do not exist; or (5) advise the requester that it is not practically possible to provide the records or to determine their availability within the five-work-day period and provide an explanation of the conditions that make a response impossible.⁶ If the last response is made within the five-work-day period, the statute provides that the public body “shall have an additional seven work days” to respond to the requester under one of the four preceding responses.⁷

2. Virginia Code § 15.2-1413 does not authorize a locality to suspend VFOIA’s time limits for responding to requests for records.

In March of this year, this Office issued an opinion addressing whether local governing bodies may conduct certain meetings solely by electronic communication during the COVID-19 emergency. The opinion concluded that the answer to that question was yes, relying in part on language in § 15.2-1413 that authorizes localities to “provide a method to assure continuity in its government.”⁸ The opinion also specifically “emphasize[d] the limits of the authority conferred by Code § 15.2-1413,” noting that “[a]ny ordinances enacted pursuant to that provision—particularly those authorizing departures from otherwise-governing state law—must be carefully limited in scope to allowing the locality ‘to assure continuity in its government’ during the declared emergency.”⁹

⁴ VA. CODE ANN. § 2.2-3704(A).

⁵ VFOIA specifically permits such agreements. *See, e.g.*, VA. CODE ANN. §§ 2.2-3700, -3704(C); VA. FREEDOM OF INFORMATION ADVISORY COUNCIL, Op. No. A05-14, available at http://foiacouncil.dls.virginia.gov/ops/14/AO_05_14.htm (June 12, 2014).

⁶ *See* VA. CODE ANN. § 2.2-3704(B).

⁷ VFOIA also permits a public body to “petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by [VFOIA] will prevent the public body from meeting its operational responsibilities.” VA. CODE ANN. § 2.2-3704(C). “Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.” *Id.*

⁸ 2020 Op. Va. Att’y Gen. No. 20-011 at 6, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1632-2020-official-opinions#march> (quoting VA. CODE ANN. § 15.2-1413); *see also* H.B. 29, 2020 Reg. Sess., Item 4-0.01 (2020 Va. Acts ch. 1283), and H.B. 30, 2020 Reg. Sess., Item 4-0.01, both enactments available at <https://budget.lis.virginia.gov/> (effectively codifying this conclusion by providing that any public body “may meet by electronic communication means [during a declared emergency], provided . . . (i) the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location[,] [and] (ii) the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body . . . and the discharge of its lawful purposes, duties, and responsibilities”).

⁹ *Id.* (quoting VA. CODE ANN. § 15.2-1413).

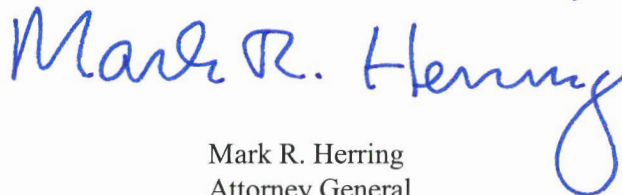
The actions you describe in your request do not satisfy that standard. As this Office's previous opinion emphasized, § 15.2-1413 permits a locality to adopt a plan to provide "continuity in its government," including "the coordination of essential functions during an emergency" and "ensur[ing] that essential functions are continued during [that] emergency."¹⁰ But nothing in that opinion—or in the text of § 15.2-1413—recognizes a general power to determine whether statutory directives imposed by the General Assembly constitute "essential" or "non-essential" functions, and then, on that basis, to suspend compliance with directives of state law that the locality deems "non-essential." Such a construction would be particularly unwarranted in this context, because the General Assembly has specifically instructed that the provisions of VFOIA must be liberally construed to promote transparency.¹¹ For that reason, it is my opinion that § 15.2-1413 does not authorize a locality to enact an ordinance that modifies or indefinitely extends the time limits for responding to requests for records set forth in VFOIA. And because VFOIA specifically states that "[a]ny ordinance adopted by a local governing body that conflicts with the provisions [VFOIA] shall be void,"¹² any such ordinance would be without legal effect.

Conclusion

It is my opinion that § 15.2-1413 does not empower a locality to modify or indefinitely extend the deadlines for responding to requests for records set forth in § 2.2-3704(B) of the Virginia Freedom of Information Act. The time limits for responding to requests for records in VFOIA remain in place and must be complied with even during the current emergency.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink that reads "Mark R. Herring". The signature is fluid and cursive, with a large loop at the end of the last name.

Mark R. Herring
Attorney General

¹⁰ *Id.* at n.6 (quoting VA. CODE ANN. § 15.2-1413).

¹¹ VA. CODE ANN. § 2.2-3700(B); *see also* *Marble Techs, Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (stating that under the Dillon Rule, "if there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body").

¹² *See* VA. CODE ANN. § 2.2-3700.