



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

Delegate James M. LeMunyon, Chair  
Senator Richard H. Stuart, Vice Chair  
foiacouncil@dls.virginia.gov

Alan Gernhardt, Esq., Executive Director/ Senior Attorney  
Jessica L. Budd, Esq., Attorney

---

Pocahontas Building ~ 900 East Main Street, 10th Floor ~ Richmond, Virginia 23219  
804-698-1810 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-698-1899 ~ <http://foiacouncil.dls.virginia.gov>

August 1, 2017

*The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your electronic mail messages May 20, May 23, May 25, June 30, and July 26, 2017, and various telephone conversations with staff over the same time period.*

David L. Konick, Esq.  
P.O. Box 57  
Washington, Virginia 22747-0057

Dear Mr. Konick:

You have asked several questions concerning the requirements to provide direct notice of meetings to those individuals who request it. As background, you stated that you are a member of the Rappahannock Board of Zoning Appeals (the Board) and that notice of all regular meetings was posted following the annual organizational meeting of the Board. However, you stated that direct notice was not sent at the same time the general notice was posted. As an example, you stated that the Board held regular meetings in April and May of this year where direct notice was sent by electronic mail on a Sunday before a Wednesday meeting. You also provided an example of notice sent by electronic mail that contained an incorrect date in the subject line ("BZA Meeting - Wednesday May 24th 7:00 p.m." for a meeting actually scheduled to be held April 26), but the correct date in the attached agenda. You informed us that the day before the meeting was held, two more notices for the same meeting were sent by electronic mail. The subject line of the first such notice stated the correct day but the wrong month ("BZA Meeting tomorrow night - Wed. May 26th - 7:00 p.m."). The second notice was sent after the close of business, less than 24 hours before the meeting, with the correct day and month in the subject line ("The BZA Meeting is tomorrow - April 26th"). You wrote that at that meeting you expressed concern that persons who had requested direct notice may have been confused by the notice announced in the subject lines of these notices, but the other Board members voted to proceed with the meeting. You asked if "the wrong date in the subject line of the electronic notice invalidate[s] the notice, or does it conform to the requirements of Code §2.2-3707(E) if the date, time and place stated in the agenda attached to the notice are actually correct, even though the date on the e-mail to which that agenda was attached is incorrect?" Additionally, you asked that we "address

Mr. David L. Konick, Esq.

August 1, 2017

Page 2

meetings that occur after 5 p.m. or whenever 'the work day' ends. Since our Board only meets once a month at 7 o'clock p.m. the 4th Wednesday of each month, arguably its 'working day' is at night." Lastly, you asked, "[W]hat is a Board member supposed to do, if, after raising possible FOIA notice issues, the majority of the Board votes to proceed with the meeting anyway?"

The relevant policy of the Freedom of Information Act (FOIA) set out in subsection B of § 2.2-3700 of the Code of Virginia is to ensure "the people of the Commonwealth ... free entry to meetings of public bodies wherein the business of the people is being conducted." The policy statement goes on to direct that FOIA "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." As of July 1, 2017, the requirements to provide public notice of regular, special, emergency, and continued meetings are set forth in subsections C through E of § 2.2-3707 as follows:

C. Every public body shall give notice of the date, time, and location of its meetings by:

1. Posting such notice on its official public government website, if any;
2. Placing such notice in a prominent public location at which notices are regularly posted; and
3. Placing such notice at the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of meeting notices by electronic means by other public bodies shall be encouraged.

The notice shall be posted at least three working days prior to the meeting.

D. Notice, reasonable under the circumstance, of special, emergency, or continued meetings shall be given contemporaneously with the notice provided to the members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by

the person, the public body may provide electronic notice of all meetings in response to such requests.<sup>1</sup>

We have previously summarized these notice requirements by stating that the general rule is that notice of a public meeting should be posted three working days prior to the meeting, as set forth in subsection C. The three working days do not include weekends or legal holidays, and the day of the meeting should not be counted as one of the three working days. The first requirement of subsection D is that all notices of special meetings be reasonable under the circumstance. A decision regarding whether any particular notice given was reasonable under the circumstance necessarily involves factual determinations that can only be made by a court. Generally speaking, public bodies should post notice at least three working days in advance of any meeting unless the particular factual circumstances surrounding a special or emergency meeting necessitate some shorter time period. The second requirement of subsection D is that notice of a special meeting must always be given contemporaneously with the notice provided to members of the public body. Additionally, if any person requested direct individual notice as set forth in subsection E of § 2.2-3707, then the public body would also be required to provide notice of all meetings directly to each such person. Public bodies may choose to provide such notice by electronic means (e.g., electronic mail or telephone call) if there is no objection by the person requesting such notice. In the case of a special, emergency, or continued meeting, then pursuant to subsection D of § 2.2-3707, such direct notice should be provided contemporaneously with the notice provided to the members of the public body.<sup>2</sup>

Because we are considering the timing as well as the substance of the notice in this opinion, we must also consider the relevant provisions of § 1-210 of the Code of Virginia regarding the computation of time:

A. When an act of the General Assembly or rule of court requires that an act be performed a prescribed amount of time before a motion or proceeding, the day of such motion or proceeding shall not be counted against the time allowed, but the day on which such act is performed may be counted as part of the time. When an act of the General Assembly or rule of court requires that an act be performed within a prescribed amount of time after any event or judgment, the day on which the event or judgment occurred shall not be counted against the time allowed.

\* \* \*

---

<sup>1</sup> Note that subsections C and D of § 2.2-3707, as well as several other sections concerning meetings, were amended by omnibus legislation that was recommended by the FOIA Council after a three-year study conducted pursuant to House Joint Resolution No. 96 (2014). (2017 Acts of Assembly, c. 616.) While subsections C and D were amended, the amendments did not change timing provisions at issue in this opinion.

<sup>2</sup> See Freedom of Information Advisory Opinions 08 (2007) and 03 (2001).

E. When an act of the General Assembly or local governing body, order of the court, or administrative regulation or order requires, either by specification of a date or by a prescribed period of time, that an act be performed or an action be filed on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state or local government office where the act to be performed or the action to be filed is closed, the act may be performed or the action may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state or local government office is closed.

F. For the purposes of this section, any day on which the Governor authorizes the closing of the state government shall be considered a legal holiday.

Summarized succinctly: "When an act is to be done a certain time *before* a certain proceeding, the day for the proceeding is not to be counted, but the day the act was done is counted."<sup>3</sup> [Emphasis in original.] In addition to these statutory provisions, when considering your questions regarding the time of day of the notice and the meeting, we must also consider the common law principle that the law does not recognize a fraction of a day.<sup>4</sup>

Turning to your first inquiry, concerning the incorrect date being in the subject line of an email sent to those who had requested notice pursuant to subsection E of § 2.2-3707, it is clear that, pursuant to subsection C, meeting notices must include the date, time, and location of the meeting. As previously opined by this office, if any of these three elements are lacking from either the notice posted generally or the notice provided directly to individuals who request it, then notice of the meeting would be insufficient.<sup>5</sup> As a practical matter, if any of these items is missing or incorrect, it renders the notice ambiguous at best, as a person seeking to attend the meeting would not know exactly when or where the meeting was to be held. In the instance you describe, the subject line of the first electronic mail notice contained the incorrect date, but the attached agenda was correct. However, while the inconsistency between the subject line and the attached agenda may have been enough to put a reader on notice that one of the two was wrong, there would not have been a way to tell which date was correct. Therefore, the initial notice was insufficient. The same analysis applies to the second notice, which still had an

---

<sup>3</sup> W. Hamilton Bryson, *Bryson on Virginia Civil Procedure, Excursus on Time Limits*, at Exc-1 (4th ed. 2005).

<sup>4</sup> *See, e.g., Brumley v. Grimstead*, 170 Va. 340, 356 (1938) ("It is true that as a general rule the law does not separate the parts of a day, and, therefore, will not take cognizance of fractions thereof; but even this principle is subject to departure therefrom to promote right and the ends of justice."); *Crump v. Trytitle*, 32 Va. 251, 261, 5 Leigh 251 (1834) ("[I]f the day of the act be included at all, the whole day must be included, for fractions of a day are not allowed.... [H]alf a day may be included and computed as a whole day."); *Humphrey v. Humphrey*, 5 Va. Cir. 37 (Clarke County 1982) ("In making what I consider appropriate computation of time, the common law rule that fractional days are generally not considered applies."); 1978–1979 Op. Atty. Gen. Va. 113 ("The law does not recognize fractions of a day.").

<sup>5</sup> Freedom of Information Advisory Opinion 23 (2003).

incorrect date in the subject line and therefore was also insufficient. The third notice, however, appears to have set out the correct date, time, and location for the meeting, as required under subsection C of § 2.2-3707. However, subsection C of § 2.2-3707 requires that such notice be posted "at least three working days prior to the meeting." Therefore sending a corrected notice less than 24 hours prior to a regular meeting does not meet the requirements of subsection C of § 2.2-3707.

Your second inquiry asked that we address "meetings that occur after 5 p.m. or whenever 'the work day' ends." While the term "working day" is not defined in FOIA, as stated in prior opinions and in light of § 1-210 quoted above, a "working day" generally does not include Saturdays, Sundays, or legal holidays.<sup>6</sup> Rules of statutory interpretation direct that in the absence of a statutory definition, one must use the ordinary meaning of a term. Therefore we considered three dictionary definitions of "working day:"

1. Commerce: Any day (other than Sunday or legal holiday) on which legal business can be conducted. Whether Saturday is a working day or not depends on the custom or usage of the trade or jurisdiction.
2. Law: Any day other than Sunday or gazetted or statutory holiday. Also called *dies juridicus*, Latin for judicial day.<sup>7</sup>

1. the amount of time that a worker must work for an agreed daily wage.
2. a day ordinarily given to working (distinguished from holiday).
3. the daily period of hours for working.<sup>8</sup>

1. a day on which work is done, esp. for an agreed or stipulated number of hours in return for a salary or wage
2. the part of the day allocated to work  
*a seven-hour working day*
3. (*often plural*) business  
any day of the week except Sunday, public holidays, and, in some cases, Saturday<sup>9</sup>

These definitions comport with prior opinions from this office and the general rule for computation of time in § 1-210 in making clear that "working days" generally do not include weekends, legal holidays, or other days when the office of the public body is closed. Whether Saturday or Sunday may be a "working day" would appear to be a question of fact depending on the circumstance, i.e., whether the public body's office is open for business on that particular day. While some public bodies may treat Saturdays or

---

<sup>6</sup> See, e.g., Freedom of Information Advisory Opinions 01 (2017), 06 (2014), and 08 (2007).

<sup>7</sup> Business Dictionary online, <http://www.businessdictionary.com/definition/working-day.html> (last visited July 23, 2017).

<sup>8</sup> Dictionary.com, <http://www.dictionary.com/browse/working-day> (last visited July 23, 2017).

<sup>9</sup> Collins English Dictionary online, <https://www.collinsdictionary.com/us/dictionary/english/working-day> (last visited July 23, 2017) (*italics in original*).

Mr. David L. Konick, Esq.

August 1, 2017

Page 6

Sundays as working days on a regular or an occasional basis, those would be exceptions to the general rule that most public bodies are not open on weekends.

While the definitions are generally consistent in excluding weekends, legal holidays, and other days when offices are closed, there does appear to be an important distinction between the commercial usage and the legal definition in considering parts or fractions of days. In applying the phrase "working day" in a commercial or business setting, the definitions quoted above all contemplate the "working day" as that part of the day when someone works in return for compensation, distinct from the part of the day when someone is not working. However, as previously mentioned, the law generally does not recognize fractions of a day.<sup>10</sup> This concept is recognized in the first definition quoted above, which clearly distinguishes between commercial and legal usage of the phrase "working day." Applying these concepts in consideration of your inquiry about meetings that start after 5 p.m. (or otherwise after the typical "working day" has ended), it makes no difference at what time of day a meeting begins, because for legal purposes under FOIA, the entire day is part of the same "working day."

You indicated that at least some of your fellow Board members felt that providing notice on a Sunday for a meeting to be held at 7 p.m. on Wednesday constituted notice "at least three working days prior to the meeting." However, if we consider a regular meeting that is scheduled to begin on a Wednesday in light of the analysis above, it becomes clear that notice given on Sunday is generally insufficient. As stated above, subsection C of § 2.2-3707 would require that notice be given three working days prior to the meeting and the day of the meeting itself does not count. Because the day of the meeting is not counted, the notice requirement would be the same whether the meeting began at 7 a.m., at 7 p.m., or at any other time that day. Counting backward from Wednesday, Tuesday and Monday would count as two working days prior to the meeting. As stated above, most public bodies' offices are closed on weekends, so Saturday and Sunday are not counted as "working days." Based on your description of events, in this instance the notice was sent on Sunday but the public body's offices were not open, so Sunday was not a "working day" and does not count. Therefore, presuming the public body's offices were in fact closed on the weekend, the notice would have to have been posted on Friday in order to be three working days prior to the Wednesday meeting. The time of day on Friday when the notice was posted would not make a difference since any time on Friday is still Friday under the law. However, as a matter of best practices, we have urged public bodies in such a situation to post the notice one or more days before the required day whenever possible for two reasons. First, posting earlier gives the public, as well as members and staff of public bodies, the advantage of foreknowledge and additional time to prepare for meetings, and it serves to implement FOIA's policy of openness and awareness of governmental activities. Second, as demonstrated by this opinion and prior experience, many people have questioned whether the time of day when notice is posted relative to the time of day when a meeting is held affects the

---

<sup>10</sup> *Supra*, n. 4.

Mr. David L. Konick, Esq.

August 1, 2017

Page 7

validity of the notice. Rather than fuel such speculations, it is generally easier to avoid them altogether by posting notice earlier than required.

Your final inquiry asked what a Board member should do if that member believes there may be problems with the notice of a meeting but the majority of the Board votes to hold the meeting anyway. You indicated a particular concern that the member might be held liable for a knowing and willful FOIA violation under § 2.2-3714. FOIA does not address this situation specifically. Research did not reveal any court opinions or other precedents advising how a member should proceed in such a situation. Note, however, that subsection D of § 2.2-3712 does address what a member is to do if the member believes there was a problem in the conduct of a closed meeting:

Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

Reasoning by analogy, if a member feels that the notice for a meeting was insufficient, one option would be to make a statement to that effect at the meeting to be included in the minutes. Regarding your concern about a knowing and willful violation, such matters are questions for a court to decide. One would imagine that if a member made a statement about possible errors during a meeting, a court would take cognizance of that fact, but there is no way to predict the outcome should someone choose to bring a petition and allege that the member committed a knowing and willful violation of FOIA. I would note, however, that a prior opinion from the Office of the Attorney General<sup>11</sup> concluded that any vote taken at a meeting would be ineffective if the notice was insufficient, because subsection A of § 2.2-3710 provides that "no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter."

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Alan Gernhardt  
Executive Director

---

<sup>11</sup> Op. Atty. Gen. Va. No. 08-112 (2009) (concluding that a city council's vote to appoint a school board member was "null and void" because of insufficient notice of the meeting at which the vote was taken).