M E M O R A N D U M

To: All Chairs of VLAB Committees and Secretary Robert Mejia

From: Justin I. Bell
               Assistant Attorney General

Date: August 7, 2017

Subject: FOIA and VLAB Meetings

Introduction

It has come to my attention that Virginia Latino Advisory Board (VLAB) Executive Committee plans to meet via conference call on August 8, 2017. Because VLAB is a board subject to FOIA (see definition of "public body" in Va. Code § 2.2-3701), the following requirements must be met to prevent VLAB from violating the open meeting provisions of FOIA. This memorandum also provides a refresher on the open meeting requirements of the Virginia Freedom of Information Act (FOIA), specifically as they apply to meetings that do not occur in person.

Discussion

VLAB is a public body under § 2.2-3701 of FOIA:

"Public body" means any legislative body, authority, *board*, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

(emphasis added).[1]   Accordingly, VLAB must comply with FOIA's open meeting requirements, unless there is an exemption.   Exemptions can apply to specific public bodies or specific circumstances.   There is no specific exemption for VLAB so it must comply with FOIA generally.

The policy laid out in § 2.2-3700 of FOIA is for the public to have access to the records and meetings of public bodies. "Meetings" is defined in FOIA as follows:

> "Meeting" or "meetings" means the meetings including work sessions, *when sitting physically, or through telephonic or video equipment* pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. [Emphasis added]

The provisions of FOIA are generally liberally construed to "afford citizens every opportunity to witness the operations of government." *Id*. So, if three members of VLAB, or a quorum of a VLAB committee if the committee is smaller than three, are present on the call, it is a public meeting and must comply with FOIA.

Meetings of VLAB Must Be Open

As a public body, all of VLAB's meetings must be open to the public in the manner detailed in § 2.2-3707:

1. Notice of the meeting must be posted on its official website;

2. Notice of the meeting must be posted in a prominent public location at which notices are regularly posted;

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

4. 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; and

5. Notice of the meeting must be posted on the Commonwealth Calendar.

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[1] The same is true for all VLAB Committees.

Currently there are no notices of any VLAB related conference calls on the VLAB website. There are no VLAB related conference calls noticed for all of 2017 on the Commonwealth Calendar. In order for any meeting of VLAB to take place, each of the requirements identified above must be fulfilled. These provisions are not optional; they are mandatory. No VLAB conference calls with three or more participants can legally happen until these requirements are met.

That does not mean a few VLAB members cannot have dinner and have a conversation. However, if that conversation turns to the specific issues and concerns on the VLAB agenda, then that dinner conversation might transition into the realm of a public meeting.

Additional Concerns for Telephonic Meetings

Public bodies can hold their meetings using electronic and telephonic means as detailed in §§ 2.2-3708 and 2.2-3708.1. As with other provisions of FOIA, VLAB must follow all requirements regarding electronic and telephonic meetings to ensure compliance with FOIA. In particular, for a telephonic meeting such as a conference call to satisfy FOIA's requirements, a quorum of the public body must be gathered at a central location open to the public with arrangements for the voice of the remote participants to be heard. With respect to electronic committee meetings, VLAB must have a quorum physically meeting in one place in order to have other members attend telephonically or electronically. In other words, if there was a VLAB committee with three members, two members must physically be in the same room so the third member could call in. The call would not comply with the requirements of FOIA if all three members were in three separate locations.

I also want to make VLAB members aware of the requirement to report the following to the Virginia Freedom of Information Advisory Council by December 15 every year:

1. The total number of electronic communication meetings held that year;

2. The dates and purposes of the meetings;

3. A copy of the agenda for the meeting;

4. The number of sites for each meeting;

5. The types of electronic communication means by which the meetings were held;

6. The number of participants, including members of the public, at each meeting location;

7. The identity of the members of the public body recorded as absent and those recorded as present at each meeting location;

8. A summary of any public comment received about the electronic communication meetings; and

9. A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.

Alternatives and Solutions

FOIA can be difficult to navigate when it comes to public meetings. However, it is important to remember that to be considered a public meeting, there must be three or more members or a quorum present. Two VLAB members can have a series of daily calls without noticing the public to discuss any topic they so choose, provided that those two members do not form a quorum for purposes of a subcommittee. While memoranda, voicemails, emails, and written reports are potentially records under FOIA, there is no limitation as to whom you can send a written response. If VLAB cannot easily arrange meeting facilities or the remote access detailed above, a series of one-on-one calls or written correspondence may be a workable alternative.

Potential Violation of FOIA

Any persons denied the rights and privileges conferred by this chapter may file a petition under § 2.2-3713 against any public body alleging a violation of their rights. If a meeting occurs that was not properly noticed or open to the public, any of Virginia's roughly 8 million citizens could bring suit against VLAB. Petitions alleging FOIA violations can also be brought against members of public bodies in their individual capacities. A finding of a FOIA violation has a

minimum penalty of $500 and maximum of $2,000 for the first violations. For subsequent violations the penalty minimum is $2,000 and $5,000 for each offense. A member of a public body is considered to be familiar with FOIA and its provisions unless such member is within two weeks of his appointment.

VLAB must keep all of the above concerns in mind when planning and holding a conference call or meeting.