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HOUSE BILL NO. 1738

Offered January 11, 2023

Prefiled January 9, 2023

A BILL to amend and reenact §§ 2.2-3707, 2.2-3707.2, 2.2-3708.3, 15.2-1416, 15.2-2308.1, and 23.1-1303 of the Code of Virginia, relating to the Virginia Freedom of Information Act; state public bodies; meetings; virtual public access.

Patrons—Carr, Adams, D.M., Bennett-Parker, Gooditis, Guzman, Helmer, Murphy, Shin and Simon

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3707, 2.2-3707.2, 2.2-3708.3, 15.2-1416, 15.2-2308.1, and 23.1-1303 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.

A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. All state public bodies subject to the provisions of this chapter shall:

1. Allow public access to their meetings through electronic communication means, including videoconferencing if already used by the state public body;

2. Provide the public with the opportunity to comment through the use of such electronic communication means at such meetings at the point when public comment is customarily received; and

3. Otherwise comply with the provisions of this chapter.

C. No meeting shall be conducted through telephonic, video, electronic, or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in §§ 2.2-3708.2 and 2.2-3708.3 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

D. Every public body shall give notice of the date, time, and location, and remote location, if required, 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.

E. 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.

F. 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.

G. At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

H. Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting to prevent interference with the proceedings, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

I. Minutes shall be taken at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim

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59 study commissions and committees, including the Virginia Code Commission; (iii) study committees or
 60 commissions appointed by the Governor; or (iv) study commissions or study committees, or any other
 61 committees or subcommittees appointed by the governing bodies or school boards of counties, cities, and
 62 towns, except where the membership of any such commission, committee, or subcommittee includes a
 63 majority of the governing body of the county, city, or town or school board.

64 Minutes, including draft minutes, and all other records of open meetings, including audio or
 65 audio/visual records shall be deemed public records and subject to the provisions of this chapter.

66 Minutes shall be in writing and shall include (a) the date, time, and location of the meeting; (b) the
 67 members of the public body recorded as present and absent; and (c) a summary of the discussion on
 68 matters proposed, deliberated, or decided, and a record of any votes taken. In addition, for electronic
 69 communication meetings conducted in accordance with § 2.2-3708.2 or 2.2-3708.3, minutes shall include
 70 (1) the identity of the members of the public body who participated in the meeting through electronic
 71 communication means, (2) the identity of the members of the public body who were physically
 72 assembled at one physical location, and (3) the identity of the members of the public body who were
 73 not present at the location identified in clause (2) but who monitored such meeting through electronic
 74 communication means.

75 **§ 2.2-3707.2. Posting of minutes for local public bodies.**

76 Except as provided in subsection H I of § 2.2-3707, any local public body subject to the provisions
 77 of this chapter shall post minutes of its meetings on its official public government website, if any,
 78 within seven working days of final approval of the minutes.

79 If a local public body does not own or maintain an official public government website, such public
 80 body shall make copies of all meeting minutes available no later than seven working days after final
 81 approval of the minutes (i) at a prominent public location in which meeting notices are regularly posted
 82 pursuant to subdivision E D 2 of § 2.2-3707; (ii) at the office of the clerk of the public body; or (iii) in
 83 the case of a public body that has no clerk, at the office of the chief administrator.

84 **§ 2.2-3708.3. Meetings held through electronic communication means; situations other than**
 85 **declared states of emergency.**

86 A. *Public Local public* bodies are encouraged to (i) provide public access, both in person and
 87 through electronic communication means, to public meetings and (ii) provide avenues for public
 88 comment at public meetings when public comment is customarily received, which may include public
 89 comments made in person or by electronic communication means or other methods.

90 B. Individual members of a public body may use remote participation instead of attending a public
 91 meeting in person if, in advance of the public meeting, the public body has adopted a policy as
 92 described in subsection D and the member notifies the public body chair that:

93 1. The member has a temporary or permanent disability or other medical condition that prevents the
 94 member's physical attendance;

95 2. A medical condition of a member of the member's family requires the member to provide care
 96 that prevents the member's physical attendance;

97 3. The member's principal residence is more than 60 miles from the meeting location identified in the
 98 required notice for such meeting; or

99 4. The member is unable to attend the meeting due to a personal matter and identifies with
 100 specificity the nature of the personal matter. However, the member may not use remote participation due
 101 to personal matters more than two meetings per calendar year or 25 percent of the meetings held per
 102 calendar year rounded up to the next whole number, whichever is greater.

103 If participation by a member through electronic communication means is approved pursuant to this
 104 subsection, the public body holding the meeting shall record in its minutes the remote location from
 105 which the member participated; however, the remote location need not be open to the public and may be
 106 identified in the minutes by a general description. If participation is approved pursuant to subdivision 1
 107 or 2, the public body shall also include in its minutes the fact that the member participated through
 108 electronic communication means due to a (i) temporary or permanent disability or other medical
 109 condition that prevented the member's physical attendance or (ii) family member's medical condition that
 110 required the member to provide care for such family member, thereby preventing the member's physical
 111 attendance. If participation is approved pursuant to subdivision 3, the public body shall also include in
 112 its minutes the fact that the member participated through electronic communication means due to the
 113 distance between the member's principal residence and the meeting location. If participation is approved
 114 pursuant to subdivision 4, the public body shall also include in its minutes the specific nature of the
 115 personal matter cited by the member.

116 If a member's participation from a remote location pursuant to this subsection is disapproved because
 117 such participation would violate the policy adopted pursuant to subsection D, such disapproval shall be
 118 recorded in the minutes with specificity.

119 C. With the exception of local governing bodies, local school boards, planning commissions,
 120 architectural review boards, zoning appeals boards, and boards with the authority to deny, revoke, or

121 suspend a professional or occupational license, any public body may hold all-virtual public meetings,
122 provided that the public body follows the other requirements in this chapter for meetings, the public
123 body has adopted a policy as described in subsection D, and:

124 1. An indication of whether the meeting will be an in-person or all-virtual public meeting is included
125 in the required meeting notice along with a statement notifying the public that the method by which a
126 public body chooses to meet shall not be changed unless the public body provides a new meeting notice
127 in accordance with the provisions of § 2.2-3707;

128 2. Public access to the all-virtual public meeting is provided via electronic communication means;

129 3. The electronic communication means used allows the public to hear all members of the public
130 body participating in the all-virtual public meeting and, when audio-visual technology is available, to see
131 the members of the public body as well;

132 4. A phone number or other live contact information is provided to alert the public body if the audio
133 or video transmission of the meeting provided by the public body fails, the public body monitors such
134 designated means of communication during the meeting, and the public body takes a recess until public
135 access is restored if the transmission fails for the public;

136 5. A copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished
137 to members of a public body for a meeting is made available to the public in electronic format at the
138 same time that such materials are provided to members of the public body;

139 6. The public is afforded the opportunity to comment through electronic means, including by way of
140 written comments, at those public meetings when public comment is customarily received;

141 7. No more than two members of the public body are together in any one remote location unless that
142 remote location is open to the public to physically access it;

143 8. If a closed session is held during an all-virtual public meeting, transmission of the meeting to the
144 public resumes before the public body votes to certify the closed meeting as required by subsection D of
145 § 2.2-3712;

146 9. The public body does not convene an all-virtual public meeting (i) more than two times per
147 calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole
148 number, whichever is greater, or (ii) consecutively with another all-virtual public meeting; and

149 10. Minutes of all-virtual public meetings held by electronic communication means are taken as
150 required by § 2.2-3707 and include the fact that the meeting was held by electronic communication
151 means and the type of electronic communication means by which the meeting was held. If a member's
152 participation from a remote location pursuant to this subsection is disapproved because such participation
153 would violate the policy adopted pursuant to subsection D, such disapproval shall be recorded in the
154 minutes with specificity.

155 D. Before a public body uses all-virtual public meetings as described in subsection C or allows
156 members to use remote participation as described in subsection B, the public body shall first adopt a
157 policy, by recorded vote at a public meeting, that shall be applied strictly and uniformly, without
158 exception, to the entire membership and without regard to the identity of the member requesting remote
159 participation or the matters that will be considered or voted on at the meeting. The policy shall:

160 1. Describe the circumstances under which an all-virtual public meeting and remote participation will
161 be allowed and the process the public body will use for making requests to use remote participation,
162 approving or denying such requests, and creating a record of such requests; and

163 2. Fix the number of times remote participation for personal matters or all-virtual public meetings
164 can be used per calendar year, not to exceed the limitations set forth in subdivisions B 4 and C 9.

165 Any public body that creates a committee, subcommittee, or other entity however designated of the
166 public body to perform delegated functions of the public body or to advise the public body may also
167 adopt a policy on behalf of its committee, subcommittee, or other entity that shall apply to the
168 committee, subcommittee, or other entity's use of individual remote participation and all-virtual public
169 meetings.

170 **§ 15.2-1416. Regular meetings.**

171 A. The governing body shall assemble at a public place as the governing body may prescribe, in
172 regular session in January for counties and in July for cities and towns. Future meetings shall be held on
173 such days as may be prescribed by resolution of the governing body but in no event shall less than six
174 meetings be held in each fiscal year.

175 B. The days, times and places of regular meetings to be held during the ensuing months shall be
176 established at the first meeting which meeting may be referred to as the annual or organizational
177 meeting; however, if the governing body subsequently prescribes any public place other than the initial
178 public meeting place, or any day or time other than that initially established, as a meeting day, place or
179 time, the governing body shall pass a resolution as to such future meeting day, place or time. The
180 governing body shall cause a copy of such resolution to be posted on the door of the courthouse or the
181 initial public meeting place and inserted in a newspaper having general circulation in the county or

182 municipality at least seven days prior to the first such meeting at such other day, place or time. Should
183 the day established by the governing body as the regular meeting day fall on any legal holiday, the
184 meeting shall be held on the next following regular business day, without action of any kind by the
185 governing body.

186 At its annual meeting the governing body may fix the day or days to which a regular meeting shall
187 be continued if the chairman or mayor, or vice-chairman or vice-mayor if the chairman or mayor is
188 unable to act, finds and declares that weather or other conditions are such that it is hazardous for
189 members to attend the regular meeting. Such finding shall be communicated to the members and the
190 press as promptly as possible. All hearings and other matters previously advertised shall be conducted at
191 the continued meeting and no further advertisement is required.

192 C. Regular meetings may be adjourned from day to day or from time to time or from place to place,
193 not beyond the time fixed for the next regular meeting, until the business before the governing body is
194 completed. Notice of any regular meeting continued under this section shall be reasonable under the
195 circumstances and be given as provided in subsection *D E* of § 2.2-3707.

196 D. The governing body shall provide members of the general public with the opportunity for public
197 comment during a regular meeting at least quarterly.

198 E. Notwithstanding the provisions of this section, any city or town that holds an organizational
199 meeting in compliance with its charter or code shall be deemed to be in compliance with this section.

200 **§ 15.2-2308.1. Boards of zoning appeals, ex parte communications, proceedings.**

201 A. The non-legal staff of the governing body may have ex parte communications with a member of
202 the board prior to the hearing but may not discuss the facts or law relative to a particular case. The
203 applicant, landowner or his agent or attorney may have ex parte communications with a member of the
204 board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex
205 parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform
206 the other party as soon as practicable and advise the other party of the substance of such
207 communication. For purposes of this section, regardless of whether all parties participate, ex parte
208 communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a
209 public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney
210 are all invited.

211 B. Any materials relating to a particular case, including a staff recommendation or report furnished to
212 a member of the board, shall be made available without cost to such applicant, appellant or other person
213 aggrieved under § 15.2-2314, as soon as practicable thereafter, but in no event more than three business
214 days of providing such materials to a member of the board. If the applicant, appellant or other person
215 aggrieved under § 15.2-2314 requests additional documents or materials be provided by the locality other
216 than those materials provided to the board, such request shall be made pursuant to § 2.2-3704. Any such
217 materials furnished to a member of the board shall also be made available for public inspection pursuant
218 to subsection *F G* of § 2.2-3707.

219 C. For the purposes of this section, "non-legal staff of the governing body" means any staff who is
220 not in the office of the attorney for the locality, or for the board, or who is appointed by special law or
221 pursuant to § 15.2-1542. Nothing in this section shall preclude the board from having ex parte
222 communications with any attorney or staff of any attorney where such communication is protected by
223 the attorney-client privilege or other similar privilege or protection of confidentiality.

224 D. This section shall not apply to cases where an application for a special exception has been filed
225 pursuant to subdivision 6 of § 15.2-2309.

226 **§ 23.1-1303. Governing boards; duties.**

227 A. For purposes of this section, "intellectual property" means (i) a potentially patentable machine,
228 article of manufacture, composition of matter, process, or improvement in any of those; (ii) an issued
229 patent; (iii) a legal right that inheres in a patent; or (iv) anything that is copyrightable.

230 B. The governing board of each public institution of higher education shall:

231 1. Adopt and post conspicuously on its website bylaws for its own governance, including provisions
232 that (i) establish the requirement of transparency, to the extent required by law, in all board actions; (ii)
233 describe the board's obligations under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), as
234 set forth in subdivision B 10 of § 23.1-1301, including the requirements that (a) the board record
235 minutes of each open meeting and post the minutes on the board's website, in accordance with
236 subsection *H I* of § 2.2-3707 and § 2.2-3707.1, (b) discussions and actions on any topic not specifically
237 exempted by § 2.2-3711 be held in an open meeting, (c) the board give public notice of all meetings, in
238 accordance with subsection *E D* of § 2.2-3707, and (d) any action taken in a closed meeting be
239 approved in an open meeting before it can have any force or effect, in accordance with subsection B of
240 § 2.2-3711; and (iii) require that the board invite the Attorney General's appointee or representative to
241 all meetings of the board, executive committee, and board committees;

242 2. Establish and maintain on the institution's website (i) a listing of all board members, including the
243 name of the Governor who made each appointment and the date of each appointment; (ii) a listing of all

244 committees created by the board and the membership of each committee; (iii) a schedule of all
245 upcoming meetings of the full board and its committees and instructions for the public to access such
246 meetings; (iv) an archive of agendas and supporting materials for each meeting of the governing board
247 and its committees that was held; and (v) an email address or email addresses that allow board members
248 to receive public communications pertaining to board business;

249 3. Establish regulations or institution policies for the acceptance and assistance of students that
250 include provisions (i) that specify that individuals who have knowingly and willfully failed to meet the
251 federal requirement to register for the selective service are not eligible to receive any state direct student
252 assistance, (ii) that specify that the accreditation status of a public high school in the Commonwealth
253 shall not be considered in making admissions determinations for students who have earned a diploma
254 pursuant to the requirements established by the Board of Education, and (iii) relating to the admission of
255 certain graduates of comprehensive community colleges as set forth in § 23.1-907;

256 4. Assist the Council in enforcing the provisions relating to eligibility for financial aid;

257 5. Notwithstanding any other provision of state law, establish policies and procedures requiring the
258 notification of the parent of a dependent student when such student receives mental health treatment at
259 the institution's student health or counseling center and such treatment becomes part of the student's
260 educational record in accordance with the federal Health Insurance Portability and Accountability Act
261 (42 U.S.C. § 1320d et seq.) and may be disclosed without prior consent as authorized by the federal
262 Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and related regulations (34 C.F.R. Part
263 99). Such notification shall only be required if it is determined that there exists a substantial likelihood
264 that, as a result of mental illness the student will, in the near future, (i) cause serious physical harm to
265 himself or others as evidenced by recent behavior or any other relevant information or (ii) suffer serious
266 harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs.
267 However, notification may be withheld if any person licensed to diagnose and treat mental, emotional,
268 or behavioral disorders by a health regulatory board within the Department of Health Professions who is
269 treating the student has made a part of the student's record a written statement that, in the exercise of
270 his professional judgment, the notification would be reasonably likely to cause substantial harm to the
271 student or another person. No public institution of higher education or employee of a public institution
272 of higher education making a disclosure pursuant to this subsection is civilly liable for any harm
273 resulting from such disclosure unless such disclosure constitutes gross negligence or willful misconduct
274 by the institution or its employees;

275 6. Establish policies and procedures requiring the release of the educational record of a dependent
276 student, as defined by the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), to a
277 parent at his request;

278 7. Establish programs to seek to ensure that all graduates have the technology skills necessary to
279 compete in the twenty-first century and that all students matriculating in teacher-training programs
280 receive instruction in the effective use of educational technology;

281 8. Establish policies for the discipline of students who participate in varsity intercollegiate athletics,
282 including a provision requiring an annual report by the administration of the institution to the governing
283 board regarding enforcement actions taken pursuant to such policies;

284 9. In addition to all meetings prescribed in Chapters 14 (§ 23.1-1400 et seq.) through 29
285 (§ 23.1-2900 et seq.), meet with the chief executive officer of the institution at least once annually, in a
286 closed meeting pursuant to subdivision A 1 of § 2.2-3711 and deliver an evaluation of the chief
287 executive officer's performance. Any change to the chief executive officer's employment contract during
288 any such meeting or any other meeting of the board shall be made only by a vote of the majority of the
289 board's members;

290 10. If human research, as defined in § 32.1-162.16, is conducted at the institution, adopt regulations
291 pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) to effectuate the provisions of Chapter
292 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 for human research. Such regulations shall require the human
293 research committee to submit to the Governor, the General Assembly, and the chief executive officer of
294 the institution or his designee at least annually a report on the human research projects reviewed and
295 approved by the committee and require the committee to report any significant deviations from approved
296 proposals;

297 11. Submit and make publicly available on the institution's website the annual financial statements
298 for the fiscal year ending the preceding June 30 and the accounts and status of any ongoing capital
299 projects to the Auditor of Public Accounts for the audit of such statements pursuant to § 30-133;

300 12. No later than December 1 of each year, report to the Council and make publicly available on the
301 institution's website (i) the value of investments as reflected on the Statement of Net Position as of June
302 30 of the previous fiscal year, excluding any funds derived from endowment donations, endowment
303 income, or other private philanthropy; (ii) the cash earnings on such balances in the previous fiscal year;
304 and (iii) the use of the cash earnings on such balances. In the event that the commitment of any such

305 investment earnings spans more than one fiscal year, the report shall reflect the commitments made in
306 each future fiscal year. The reports of the Boards of Visitors of Virginia Commonwealth University and
307 the University of Virginia shall exclude the value of and earnings on any investments held by the
308 Virginia Commonwealth University Health System Authority and the University of Virginia Medical
309 Center, respectively. As used in this subdivision, "investments" includes all short-term, long-term, liquid,
310 and illiquid Statement of Net Position accounts, and subaccounts thereof, in which moneys have been
311 invested in securities;

312 13. Submit to the General Assembly and the Governor and make publicly available on the
313 institution's website an annual executive summary of its interim activity and work no later than the first
314 day of each regular session of the General Assembly. The executive summary shall be submitted as
315 provided in the procedures of the Division of Legislative Automated Systems for the processing of
316 legislative documents and reports and shall be posted on the General Assembly's website;

317 14. Make available to any interested party upon request a copy of the portion of the most recent
318 report of the Uniform Crime Reporting Section of the Department of State Police entitled "Crime in
319 Virginia" pertaining to institutions of higher education;

320 15. Adopt policies or institution regulations regarding the ownership, protection, assignment, and use
321 of intellectual property and provide a copy of such policies or institution regulations to the Governor
322 and the Joint Commission on Technology and Science. All employees, including student employees, of
323 public institutions of higher education are bound by the intellectual property policies or institution
324 regulations of the institution employing them;

325 16. Adopt policies that are supportive of the intellectual property rights of matriculated students who
326 are not employed by such institution; and

327 17. Solicit the input of representatives of the institution's faculty senate or its equivalent (i) at least
328 twice per academic year on topics of general interest to the faculty and (ii) in advance of decisions to be
329 made on the search for the institution's new chief executive officer.