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HOUSE BILL NO. 1040

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on February 14, 2024)

(Patron Prior to Substitute—Delegate Bennett-Parker)

A BILL to amend and reenact §§ 2.2-3701 and 2.2-3708.3 of the Code of Virginia, relating to the Virginia Freedom of Information Act; definition of "caregiver"; remote participation in meetings by persons with disabilities and caregivers; remote voting.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3701 and 2.2-3708.3 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"All-virtual public meeting" means a public meeting (i) conducted by a public body, other than those excepted pursuant to subsection C of § 2.2-3708.3, using electronic communication means, (ii) during which all members of the public body who participate do so remotely rather than being assembled in one physical location, and (iii) to which public access is provided through electronic communication means.

"Caregiver" means an adult who provides care for a person with a disability as defined in § 51.5-40.1. A caregiver shall be either related by blood, marriage, or adoption to or the legally appointed guardian of the person with a disability for whom he is caring.

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information," as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2 or 2.2-3708.3, 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. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (b) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Official public government website" means any Internet site controlled by a public body and used, among any other purposes, to post required notices and other content pursuant to this chapter on behalf of the public body.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"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 counties, cities, and towns, 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.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose

60 public records as other custodians of public records.

61 "Public records" means all writings and recordings that consist of letters, words, or numbers, or their
62 equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse,
63 optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation,
64 however stored, and regardless of physical form or characteristics, prepared or owned by, or in the
65 possession of a public body or its officers, employees, or agents in the transaction of public business.

66 "Regional public body" means a unit of government organized as provided by law within defined
67 boundaries, as determined by the General Assembly, which unit includes two or more localities.

68 "Remote participation" means participation by an individual member of a public body by electronic
69 communication means in a public meeting where a quorum of the public body is otherwise physically
70 assembled.

71 "Scholastic records" means those records containing information directly related to a student or an
72 applicant for admission and maintained by a public body that is an educational agency or institution or
73 by a person acting for such agency or institution.

74 "Trade secret" means the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336
75 et seq.).

76 **§ 2.2-3708.3. Meetings held through electronic communication means; situations other than**
77 **declared states of emergency.**

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

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

85 1. The member has a temporary or permanent disability or other medical condition that prevents the
86 member's physical attendance. *For purposes of determining whether a quorum is physically assembled,*
87 *an individual member of a public body who is a person with a disability as defined in § 51.5-40.1 and*
88 *uses remote participation counts toward the quorum as if the individual was physically present;*

89 2. A medical condition of a member of the member's family requires the member to provide care
90 that prevents the member's physical attendance *or the member is a caregiver who must provide care for*
91 *a person with a disability at the time the public meeting is being held thereby preventing the member's*
92 *physical attendance. For purposes of determining whether a quorum is physically assembled, an*
93 *individual member of a public body who is a caregiver for a person with a disability and uses remote*
94 *participation counts toward the quorum as if the individual was physically present;*

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

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

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

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

117 C. With the exception of local governing bodies, local school boards, planning commissions,
118 architectural review boards, zoning appeals boards, and boards with the authority to deny, revoke, or
119 suspend a professional or occupational license, any public body may hold all-virtual public meetings,
120 provided that the public body follows the other requirements in this chapter for meetings, the public
121 body has adopted a policy as described in subsection D, and:

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

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

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

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

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

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

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

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

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

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

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

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

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

The policy shall not prohibit or restrict any individual member of a public body who is participating in an all-virtual meeting or who is using remote participation from voting on matters before the public body.

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