

OP. NO. 03-063

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Discussion of expected votes on matters pending before General Assembly constitutes discussion or transaction of public business. Informal assemblage of 3 or more legislators at meeting prearranged or called to discuss expected votes on matters pending before General Assembly constitutes 'meeting' under Act required to be open to public. Instances in which such assemblage is not required to be open to public. Legislative caucus is not 'public body' subject to Act's notice and open meeting requirements.

The Honorable Clifton A. Woodrum
Member, House of Delegates
January 6, 2004

Issues Presented

You ask whether a legislative caucus is a "public body" as that term is defined in The Virginia Freedom of Information Act. You next ask whether the notice and open meeting requirements for public meetings set forth in the Act apply to meetings of legislative caucuses. Finally, you ask whether the discussion of expected votes on matters pending before the General Assembly constitutes "the discussion or transaction of any public business" as that phrase is used in § 2.2-3707(G) of the Act.

Response

It is my opinion that the discussion of expected votes on matters pending before the General Assembly constitutes the discussion or transaction of public business. Consequently, it is my opinion that an informal assemblage of three or more legislators at a meeting prearranged or called for the purpose of discussing expected votes on matters pending before the General Assembly constitutes a meeting under The Virginia Freedom of Information Act, requiring that such a meeting be open to the public. I note, however, that an informal assemblage of three or more legislators under certain circumstances, as discussed in this opinion, does not require such an assemblage to be open to the public. It is further my opinion that a legislative caucus is not a "public body" as that term is defined in § 2.2-3701 of the Act.¹ It is also my opinion that since a legislative caucus is not a public body, the notice and open meeting requirements of the Act do not apply to such organizations.

Applicable Law and Discussion

Enacted in 1968, The Virginia Freedom of Information Act² "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted."³ Section 2.2-3700(B) of the Act states the policy of the Commonwealth that "[t]he affairs of government

are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Moreover, the Act

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. Any exemption from public access to ... meetings shall be narrowly construed and no ... meeting closed to the public unless specifically made exempt pursuant to [the Act] or other specific provision of law.^[4]

You ask three questions concerning the application of The Virginia Freedom of Information Act to legislative caucuses organized by the Republican and Democratic members of the General Assembly. I find no prior opinions of this Office directly answering these questions. Since the Act was enacted thirty-six years ago, it is surprising this specific issue has not previously been addressed.

I note that in June 2002, the executive director of the Virginia Freedom of Information Advisory Council,⁵ which you formerly chaired, provided members of the Council a memorandum outlining the issues involved regarding the application of the Act to legislative caucuses. The memorandum indicates that "this is a very complex issue and one that should not be decided without considerable deliberation."⁶ Unfortunately, you do not provide facts with your request that may be applied to the statutory requirements of the Act. Consequently, I am required to make certain assumptions based upon my own knowledge of the legislative process and organization of the Republican and Democratic caucuses.

You ask whether a legislative caucus is a "public body" as that term is defined in The Virginia Freedom of Information Act. Section 2.2-3701 of the Act defines "public body" to mean

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth ...; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include ... 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.

A private entity may be considered a public body if it receives substantial support from public funds.⁷ Although you indicate that the Republican and Democratic caucuses regularly meet during the legislative session and occasionally throughout the year, you do not provide specifics concerning their organization, funding, or the purposes of such meetings. I do not find where either caucus is wholly or principally supported by public funds. Additionally, neither caucus is created by a public body, e.g., the General Assembly. A legislative caucus does not perform a delegated function of, nor does it officially advise, a public body.

The Virginia Freedom of Information Act is "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."⁸ The purpose of the Act is to promote the public policy of conducting the business of government in the public eye. Certain functions of a legislative caucus, however, are unrelated to matters pending before the General Assembly.

It is my understanding that legislative caucuses perform many functions, most of which are politically based. The basic purpose of a legislative caucus is to maintain or attain political majority status. For instance, legislative caucuses raise money to fund legislative campaigns for the House of Delegates and Senate, pay staff, and conduct other political activities. None of these functions may be interpreted to constitute a function of the General Assembly. Instead, legislative caucuses are associations of individuals, elected to either body of the General Assembly, that are organized for purely political purposes. Neither the Republican nor the Democratic caucus has the ability to conduct public business or officially advise the General Assembly. In addition, neither caucus is supported wholly or principally by public funds. Accordingly, I must conclude that such organizations are not public bodies within the meaning of § 2.2-3701.

You next ask whether the notice and open meeting requirements for public meetings set forth in The Virginia Freedom of Information Act apply to meetings of legislative caucuses. Section 2.2-3707(A) of the Act provides that "[a]ll meetings of public bodies shall be open, except as provided in § 2.2-3711."⁹ Section 2.2-3707(C) requires public bodies to "give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted." Such notices "shall be posted at least three working days prior to the meeting."¹⁰ In concluding that legislative caucuses are not public bodies, I must also conclude they are not subject to the notice and open meeting requirements of § 2.2-3707(A) and (C).

Finally, you note that § 2.2-3707(G) allows "the gathering or attendance of two or more members of a public body ... 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." You ask whether the discussion of expected votes on matters pending before the General Assembly constitutes "the discussion or transaction of any public business" as that phrase is used in § 2.2-3707(G).

Section 2.2-3701 defines "meeting" to include "sitting physically, ... as an informal assemblage of ... as many as three members ..., wherever held, with or without minutes being taken, whether or not votes are cast, of any public body." When three or more legislators are assembled formally or informally, a meeting under the definition of § 2.2-3701 occurs.

Section 2.2-3707(G) provides:

Nothing in [the Act] shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) *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 (ii) 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. *The notice provisions of [the Act] shall not apply to informal meetings or gatherings of the members of the General Assembly.* [Emphasis added.]

Section 2.2-3707(G) is often referred to as the "bump in" or "chance" meeting provision of the Act. The applicability of § 2.2-3707(G), however, does not require an informal meeting of members of a public body to be random. In essence, § 2.2-3707(G) recognizes that members of public bodies may be at the same social engagement, political event, community forum, or like events. It is an accepted principle of statutory construction that statutes be read *in pari materia* in order to give full force and effect to each provision.¹¹ A statute is construed to promote the legislative purpose.¹² Section 2.2-3707(G) must be read in conjunction with the general definition of "meeting" in § 2.2-3701. When read together, these two sections allow legislators to meet informally without implicating the definition of a "meeting" provided in § 2.2-3701 if (i) the meeting is not prearranged with the purpose of discussing or transacting public business, and (ii) there is no discussion or transaction of public business of the public body.¹³

The notice provisions of The Virginia Freedom of Information Act "shall not apply to informal meetings or gatherings of the members of the General Assembly."¹⁴ This language indicates that the General Assembly recognizes that it is subject to the Act; otherwise, there would be no need for the exception to the notice requirements.¹⁵ It appears, however, that the General Assembly may not have intended that *legislative caucus* meetings be subject to the Act. This is evidenced by the longtime practice of the Republican and Democratic legislative caucuses to not open their meetings to the public. I note that soon after becoming the minority party in the legislature, the Democratic legislative caucus voluntarily opened its meetings. In noting the long-standing practice of the two caucuses, however, it is evident that neither has operated under the belief that it was or is subject to the Act. Regardless, the plain language of the Act does not exempt General Assembly members from its provisions.

While I conclude that legislative caucuses are not public bodies under the Act, the meetings of such caucuses, under certain circumstances, are subject to the open meeting requirements of the Act. This determination is based, not on the status of the caucus as an organization, but rather upon the assemblage of three or more legislators. When three or more legislators are assembled to discuss expected votes on matters pending before the General Assembly, a "meeting" occurs under the Act.¹⁶ When three or more legislators are assembled informally, however, and "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 [General Assembly],"¹⁷ such informal assemblages do not implicate the open meeting requirements of the Act.

As indicated, not every assemblage of three or more legislators is subject to the open meeting requirements of the Act. Certain caucus meetings may be prearranged and called for purposes other than discussing expected votes on matters before the General Assembly. The determination in any particular circumstance is fact dependent. Your question assumes a bright line test that may be applied in any given circumstance without providing any supporting factual information upon which to draw a conclusion.

For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.¹⁸ I may provide, however, a broad outline of the spectrum of situations that do and do not implicate the open meeting requirements of the Act. The Attorney General previously determined that a conference to prepare for litigation held by three members of a city council and the attorney representing the city did not constitute a public meeting, because the members were not gathered as an entity or even informal assemblage, and because of the absence of the deliberation of policy and the absence of preparation for the taking of action *by the city council*.¹⁹ When public business before the body upon which the public official serves is discussed by three or more members of the public body at an informal assemblage, then the open meeting requirements of the Act are implicated. Consequently, I must conclude that the discussion of expected votes by legislators in a caucus meeting attended by three or more legislators on matters pending before the General Assembly constitutes the deliberation of policy and the preparation for the taking of action by the General Assembly.

A gathering of caucus members, however, to discuss purely political considerations may not, in some instances, implicate the discussion of expected votes on matters pending before the General Assembly.²⁰ Although a legislator is a member of a legislative caucus by virtue of his election to the General Assembly, his membership in such caucus, at times, is distinct from his role as a legislator. As indicated earlier, a legislative caucus does not exist to transact public business. It cannot bind the entire legislature nor can it conduct public business. A legislative caucus exists to maintain or attain political majority status. This is accomplished through several methods. Chief among those methods is advocating the election of other like-minded individuals to the General Assembly.

There may be occasions where legislators meet to discuss purely political issues, such as how to expend the privately raised funds of the caucus. On other occasions, a caucus may meet to discuss personnel issues or to select the officers of the organization. In each of these instances, it cannot be said that there is the discussion of public business that is before the General Assembly.

There are many scenarios, however, that fall into a gray area that is fact dependent. As you can see from this discussion, and as acknowledged by the Virginia Freedom of Information Advisory Council,²¹ the considerations involved in this issue are numerous and complex. The issue is not as clear cut as some assert. In each instance, whether an informal assemblage of legislators under the auspices of a "caucus" meeting is required to be open is fact dependent. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.²² As such, I am unable to opine as a general matter, given the lack of specifics with your request. Absent clarifying legislation, this opinion is meant to offer at least a broad outline of the considerations involved in determining whether certain meetings or assemblages of legislators are required to be open to the public. Ultimately, whether any specific assemblage or meeting of three or more legislators is required to be open to the public will turn on the facts surrounding each such event.

Conclusion

Accordingly, it is my opinion that the discussion of expected votes on matters pending before the General Assembly constitutes the discussion or transaction of

public business. Consequently, it is my opinion that an informal assemblage of three or more legislators at a meeting prearranged or called for the purpose of discussing expected votes on matters pending before the General Assembly constitutes a meeting under The Virginia Freedom of Information Act, requiring that such a meeting be open to the public. I note, however, that an informal assemblage of three or more legislators under certain circumstances, as discussed in this opinion, does not require such an assemblage to be open to the public. It is further my opinion that a legislative caucus is not a "public body" as that term is defined in § 2.2-3701 of the Act.²³ It is also my opinion that since a legislative caucus is not a public body, the notice and open meeting requirements of the Act do not apply to such organizations.

¹Please note that this opinion is based on certain assumptions as detailed herein. Additionally, when using the phrase "legislative caucus," I am referring only to those entities organized by members of the General Assembly.

²See 1968 Va. Acts. ch. 479, at 690 (enacting The Virginia Freedom of Information Act, codified as amended at Va. Code Ann. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (LexisNexis Repl. Vol. 2001 & Supp. 2003)).

³Section 2.2-3700(B) (LexisNexis Supp. 2003).

⁴*Id.*

⁵See Va. Code Ann. §§ 30-178 to 30-181 (Michie Repl. Vol. 2001 & LexisNexis Supp. 2003) (creating Virginia Freedom of Information Advisory Council). The 2002 Session of the General Assembly repealed the second enactment clause of Chapters 917 and 987 of the 2000 Acts of Assembly, which provided a sunset date of July 1, 2002, relating to the Freedom of Information Advisory Council. *Compare* 2002 Va. Acts chs. 26, 75, at 26, 78, respectively, *and* 2000 Va. Acts. chs. 917, 987, at 1966, 1968, 2192, 2193, respectively (providing in clause 2 that "the provisions of this act shall expire on July 1, 2002").

⁶See memorandum from Maria J.K. Everett, Executive Director, to Members of the Virginia Freedom of Information Advisory Council (June 4, 2002) (on file with Council).

⁷See 1983-1984 Op. Va. Att'y Gen. 439, 440 (interpreting § 2.1-341, predecessor to § 2.2-3701).

⁸Section 2.2-3700(B).

⁹Section 2.2-3711(A) lists thirty-one purposes for which a public body may hold a closed meeting.

¹⁰Section 2.2-3707(C) (LexisNexis Repl. Vol. 2001).

¹¹See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); 1983-1984 Op. Va. Att'y Gen. 314, 315: *see also* 1996 Op. Va. Att'y Gen. 134, 135. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." Black's Law Dictionary 794 (7th ed. 1999).

¹² See 1980-1981 Op. Va. Att'y Gen. 265, 266 (citing *Dowdy v. Franklin*, 203 Va. 7, 121 S.E.2d 817 (1961)).

¹³ See Op. Va. Freedom of Info. Advisory Council AO-02-02, at 2 (Mar. 1, 2002) ("Whether the three members of the public body may gather at a private meeting without the private meeting becoming a meeting under FOIA hinges on whether the members of the public body 'discussed' or 'transacted' public business and whether such gathering was prearranged to discuss or transact public business."), at http://dls.state.va.us/groups/foiacouncil/ops/02/AO_02.htm; see also Op. Va. Freedom of Info. Advisory Council: AO-46-01, at 2 (Oct. 5, 2001) ("[T]he procedural requirements for conducting a meeting would not be invoked if three or more members attended a function that was not arranged for the purpose of discussing or transacting public business, so long as no public business is actually discussed."), at http://dls.state.va.us/groups/foiacouncil/ops/01/AO_46.htm; AO-40-01, at 1 (Aug. 23, 2001) ("FOIA does allow members of a public body to gather and discuss issues not related to the public business without invoking the requirements of FOIA."), at http://dls.state.va.us/groups/foiacouncil/ops/01/AO_40.htm.

¹⁴ Section 2.2-3707(G).

¹⁵ In addition, § 2.2-3707(I) provides that "[m]inutes shall be recorded 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."

¹⁶ Section 2.2-3701 (LexisNexis Supp. 2003) (defining "meeting"). *But see* § 2.2-3707(G).

¹⁷ Section 2.2-3707(G).

¹⁸ See 1986-1987 Op. Va. Att'y Gen. 1, 6 (citing § 2.1-118, predecessor to § 2.2-505); see also 1991 Op. Va. Att'y Gen. 122, 124.

¹⁹ 1984-1985 Op. Va. Att'y Gen. 426, 427.

²⁰ The discussion of political strategy, i.e., where to position the opposition during a legislative session or how to extract partisan gain on an issue, may not, under certain circumstances constitute the discussion or transaction of public business as contemplated by the Act. Any such determination, however, is fact dependent as previously noted in this opinion.

²¹ See *supra* note 6 and accompanying text.

²² See 1991 Op. Va. Att'y Gen., *supra* note 18, at 124.

²³ See *supra* note 1.

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