In a nutshell:

- Under the Virginia Freedom of Information Act (FOIA), any time three* or more members of a public body gather to discuss public business, that’s a public meeting.
- All public meetings have to be open to the public, unless there’s some well-defined reason for having a closed meeting. The statute identifies a specific list of such reasons (e.g., personnel actions).
- A meeting of two members of a public body is not a public meeting. It has to be three or more.

* Or, if a quorum is fewer than three. So if there’s a two-person subcommittee, if those two people meet to discuss public business, that’s a public meeting.

OK, now think like a bureaucrat. How do you dodge the clear intent of the Virginia FOIA, and manage to hold a meeting of (e.g.) seven members of the Town Council, but bar the public?

Simple: You break your meeting up into little pieces, where each piece only has two Town Council members present. Let me term each such piece of the overall meeting a “meetinglet”.

A single meetinglet, by itself, is more-or-less useless. But now, instead of one meeting with all seven present, you hold a coordinated series of meetinglets, one after the other, with Town Staff providing information on what has been said in all prior discussions. For legal purposes, instead of that being treated as one meeting of seven people that has been broken up into meetinglets, the law treats each meetinglet separately.

Hence, “Noah’s Ark” meeting, because you bring in the Town Council two-by-two. You break the seven-person meeting into a series of two-person meetinglets, and presto, it’s
Is that really legal?
I understand that a (one) meeting between two members of a public body is not a “public meeting” under the Virginia FOIA. But I was appalled to see that, apparently, an entire series of such meetings, carefully coordinated, doesn’t count as “a public meeting” either. Apparently, it’s perfectly legal to break up a seven-person meeting into a series of closely-coordinated two-person meetinglets, and thereby dodge Virginia FOIA open meeting laws.

I was so appalled by this that I went to the source to check this out. The source being the Virginia Freedom of Information Advisory Council. And I got a refreshingly clear response: Yes, that’s legal.

"Many access advocates have written in opposition to such practices for reasons similar to those you described, but the law has remained unchanged and so the practice continues to be allowed under FOIA."

Let’s kick it up a notch: Bringing Noah’s Ark into the 21st century.
Chat rooms, closed-circuit TV, and other, more efficient ways to dodge the Virginia FOIA open-meeting requirements.

Right now, the Town Council’s plan appears to be to develop the ground rules for rewriting all of Vienna zoning using a 20th century Noah’s Ark meeting. That is, literally bring Town Council members into a room, two-by-two, to meet with Town staff. (Any number of Town staff may be present — Virginia FOIA open-meeting laws only apply to the folks who, in theory, run the show — elected and appointed officials.)
But in addition, this 20th century Noah’s Ark meeting has one serious drawback: Town staff have considerable control of the flow of information across the meetinglets. Town Council members, in their own meetinglet, don’t know what was actually said and done in all prior meetinglets in the overall Noah’s Ark meeting. They only know what Town staff tell them was said and done. This provides Town staff with an extraordinary, and in my opinion, wholly unnecessary degree of control over the meeting as a whole.

In the modern world, this seems quaint. Have they not heard of Skype? Is Town Council really ceding that much control over the entire meeting merely because they are sticking with obsolete last-century tech?

Well, if the Noah’s Ark meeting is legal, let’s amp that up. Let’s see what we can do with cheap, readily-available 21st century technology to gut an open meeting law whose roots are firmly in the last century. And in the process, reduce the amount of control that Town staff have over the information flow in the overall Noah’s Ark meeting.

When I wrote to the Virginia Freedom of Information Advisory Council, I tested out a few ways in which modern technology would make it much more convenient to gut the open public meeting clauses of Virginia FOIA. Like any good lawyer, the Virginia FOIA Council respondent didn’t explicitly say these were legal. But he didn’t explicitly say these were illegal, either. So in that spirit, here are a few 21st century work-arounds for avoiding the open-public-meeting requirements of the Virginia FOIA.

Private chat room: All prior discussion available as text. I presume all here are familiar with the concept of an on-line “chat room”, that is, an on-line forum where members may exchange text messages in real time. Suppose I were to set up a private chat room for Town Council (whom I refer to as members A, B, ... G). I then tell members A and B to log on from 10:00 to 10:10 and discuss a specific topic. I tell members C and D to log on 10:10 to 10:20 and continue the discussion. And so on. For as long as it takes, with as many two-person combinations as it takes, to have the entire discussion. At no point are there ever more than two Town Council members engaged in chat. But because the entire history of the conversation is there for all to see, every Town Council member knows exactly what every
other Town Council member said, simply by scrolling back in the chat.

Functionally, there is no difference between the “chat room” described above, and having Town of Vienna staff maintain honest and detailed written notes of each two-Council-member meeting, making those note available to all members of the Town Council. Only two may speak at any given time, but the record of the entire conversation is instantly available at any point in the series of meetings.

In fact, it might be adequate merely to set up the chat room so that only two persons may be logged on at one time. That way, there’s no set schedule for who speaks when, and as one Town Council member logs out, after having said their piece, then next one to log in gets to speak next.

Cumulative video tape of all two-person meetinglets. For that matter, there is nothing to bar (e.g.) video-taping each two-person meeting, and playing the entire video tape recorded to that point before the start of each successive two-person meeting. At the end of that process, I maintain that what you end up with is a video tape of a seven-member Town Council meeting, with the odd restriction that only two Town Council members were allowed to speak at a time.

Take it to the extreme: Two rooms and closed-circuit TV. To push this to the extreme, what legal barrier is there to having each two-Council-member meeting shown on closed-circuit TV, with all of the other five Town Council members watching in (nearly) real time? (Let’s delay the signal by 30 seconds or so, just to be sure we don’t run afoul of any question of simultaneous interaction among all Town Council members.)

In fact, I only need two rooms: The meetinglet room (where two Town Council members talk), and the waiting room (where the remaining five Town Council members can sit and watch in silence, monitored to see that absolutely no communication occurs among them within that room (no discussion of public business). The two in the meetinglet room swap places with two from the waiting room on a pre-defined schedule.
At no point do you have more than two Town Council members in a room, discussing the public business. So, if that’s what makes the old-fashioned Noah’s Ark meeting legal, then my claim is that this near-real-time closed-circuit TV approach is also legal.

If you think about it, this is exactly identical to the cumulative video tape approach, it’s just more efficient. Instead of having to stop and wait for persons to review the tape of all prior meetinglets, they just watch the proceedings in (near) real time.

To push it further, it’s not clear to me that you need any pre-defined schedule for who is next to enter the two-person meetinglet room. As with the chat room example above, we could set it up to be first-come first-served. Plausibly, when one person has said their piece and leaves the two-person room, whoever gets to the door of the waiting room first would be next to enter the two-person meetinglet.*

* Eh, maybe give them each a Jeopardy-style buzzer, and first to hit the buzzer gets the right to speak next. That avoids having them have to make eye contact to see whom the next speaker would be. Eye contact might be construed as a form of communication, and we certainly want to keep this all strictly legal.

Again, the sole difference between this series of meetinglets and a full seven-member Town Council meeting, is that a) only two specified members may speak at any given time, and b) Town Council members see and hear the proceedings over video monitors most of the time, rather than in-person.

In summary, even if you tell me that the Vienna Town Council’s approach of two-by-two meetings is legal, I hope you can see my point. The presence of cheap, ubiquitous information processing systems makes any restriction based on physical presence in the room somewhat antiquated. Anything from a good transcriptionist, to Skype, to a live-streamed cell phone camera, to the three methods presented here makes the entire set of proceedings in a series of two-by-two meetinglets available to every participant, in near-real time. I think you’re kidding yourself if you think that my “extreme” example above is materially different from having all seven Town Council members physically present in the same room.
And the fact that the Virginia FOIA only imposes the restriction on live, real-time, present-in-the-same room meetings is, I think, outdated. Cheap modern tech lets you achieve very nearly the same effect as a simultaneous seven-person meeting using two-person meetinglets. Dodging the open-public-meeting laws is both cheap to do, and, if done efficiently, takes little more time than a full seven-person meeting would take.

So if the Town of Vienna is bound and determined to use this approach, let’s at least do it efficiently, and in a way that reduces Town staff control over the flow of information. If we’re going to conduct the public’s business in private, we might as well at least be smart about it.