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What Every Board Member Absolutely *has* to Know about FOIA

Do not underestimate the importance of Virginia's Freedom of Information Act (FOIA). This is very serious business. These are *laws* -- not just corporate bylaws or operating protocols that you may disregard. Violations risk invalidation of board decisions and expose the organization and you personally to embarrassment, litigation, and civil penalties of up to \$5,000.¹ The greatest loss, however, is the resulting damage to public confidence in you and your organization. In fact, the Governor could publicly request your resignation.

The idea behind FOIA (which was first enacted in 1968) is that the Commonwealth's business is the people's business. FOIA ensures that citizens have the right to inspect and copy public records and to attend public meetings.²

FOIA governs many aspects of the operation of public boards, and has wide application to conduct of members, even when they are not at meetings. All members must be aware of the basic requirements of FOIA.

These FAQs are designed to give board members a basic understanding of their personal responsibilities under FOIA and to insure that you are aware that FOIA compliance is your responsibility. This material is not comprehensive. It does not cover all aspects of FOIA. Whenever you have any concerns, questions, or uncertainties about FOIA or its application, you should contact your legal counsel.

¹ § 2.2-3714

² § 2.2-3700(B) states "By enacting this chapter, the General Assembly 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. The 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. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked."

Virginia's Freedom of Information Act: Synopsis

Documents and Email

- FOIA broadly guarantees public access to public records, including your notes and correspondence concerning your organization's business. This includes e-mail, digital documents (such as texts stored on your personal cell phone or documents on the cloud), and even preliminary drafts of documents.³ There are numerous exemptions, which are all fact-specific.⁴ Always be sensitive to the potential for public disclosure of your written communications. Any request by the press or any person to inspect your documents should be brought immediately to the organization's attention to ensure a timely and proper reply. Oral and informal requests to you are FOIA requests. Any request for records, regardless of the nature of the request, is a FOIA request.

Meetings

- Unlike the private sector, the public (including employees of the institution) and press have a right to be present at your board and committee meetings.⁵
- All meetings of your board, including its committees and subcommittees plus any other group or entity appointed by the board to advise it or exercise delegated power, must be conducted in public session with at least three working days advance public notice of meeting time and location.⁶ It does not matter that a meeting involves no actual voting or transaction of business, such as, for example, retreats.⁷ A meeting exists in the eyes of the law whenever three or more board members meet and discuss any matter related to your organization.⁸ Voting on any action must always be conducted in public session.⁹ Voting by secret ballot or proxy is always prohibited.¹⁰
- Once properly convened and in open session, discussions regarding certain limited topics can be held in closed session.¹¹ The justification for closed session does not depend on whether a subject may be very sensitive or delicate or political, or that a confidential setting might better encourage candid exchanges.¹² Closed sessions must be specifically authorized by FOIA.¹³ This can be a difficult adjustment for those more accustomed to the corporate boardroom.

³ 2.2-3701

⁴ See § 2.2-3705.1-3705.8.

⁵ § 2.2-3700

⁶ § 2.2-3707

⁷ § 2.2-3701 "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."

⁸ § 2.2-3701

⁹ § 2.2-3711(B)

¹⁰ § 2.2-3710 (A) "Unless otherwise specifically provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter. No public body shall vote by secret or written ballot, and unless expressly provided by this chapter, no public body shall vote by telephone or other electronic communication means."

¹¹ § 2.2-3711

¹² § 2.2-3712

¹³ § 2.2-3712

- Also, to go into closed session, certain specific procedural steps must be taken, including:¹⁴
 - Advance public notice for the meeting must have been given.
 - During the meeting in public session, the board must vote on a motion authorizing closed session. This public motion must reasonably identify both the purpose for the closed session and the subject for discussion.¹⁵
 - While in closed session, the discussion must be related only to the topic identified in the public motion. Take care not to digress into any unrelated areas or other subjects, even if those topics would be eligible for closed session with a proper motion. It is your responsibility both as a matter of law and common sense that you stick to the subject matter described in the motion authorizing the closed session.¹⁶
 - Any action the board wishes to take as a result of discussions in closed session must be voted on in public session.
 - When discussion in closed session is adjourned, the chair of the meeting should immediately direct the opening of doors and inviting public/staff into the room for open session.
 - Once back in open session, each member of the board will then be required to publicly certify that his or her discussion in closed session was proper and related to the permitted subject set forth in the motion convening the closed session.¹⁷
 - Public colleges and universities are required by law to invite a representative from the Office of the Attorney General to all board meetings, including closed sessions. This is good practice for all public meetings and protects the board in the event the discussion in closed session is questioned.

- Some board members may participate by phone *provided* (1) there is a quorum of the board or committee physically convened at the main location. (2) all locations are announced ahead of time as places the public and press may participate (3) all locations are equipped with speakerphones, and (4) there is no interruption in communication between or among locations.¹⁸ There is a limited exception for personal or medical matters. In order to use this exception, the Board must have previously adopted a policy permitting its members to participate electronically due to personal or medical matters.¹⁹

¹⁴ For "closed session" procedures see: § 2.2-3712.

¹⁵ § 2.2-3712(A)

¹⁶ § 2.2-3712(C)

¹⁷ § 2.2-3712(D)

¹⁸ § 2.2-3708(B)

¹⁹ § 2.2-3708.1

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FOIA GENERALLY

What does FOIA do?

In general terms, FOIA defines what a meeting is and requires that all meetings be open to the public.²⁰ It also prohibits discussion of public business among members outside of meetings.²¹ There are, however, exceptions to these general meeting requirements that each member should be familiar with.²²

FOIA also requires that all public records (with some limited exceptions) be made available upon request to members of the public for inspection and copying.²³

All public records and meetings are *presumed* open. The BOV and the institution have the burden of proving that there was a legitimate reason for closing meetings or withholding records.²⁴

FOIA also requires that its open government provisions be liberally construed, and its exemptions be narrowly construed. This means that you should always err on the side of leaving meetings open rather than closing them, and releasing documents rather than withholding them.²⁵

Whenever you have specific questions about FOIA or its requirements, please do not hesitate to contact your counsel with the Attorney General's Office.

FOIA requires that some records be withheld and some meetings be closed, right?

Wrong. The exemptions to disclosure of records and for closed sessions are discretionary, not mandatory. There is no penalty for *releasing* records that *could* be withheld under a FOIA exemption. There is also nothing that says a meeting *must* be closed just because it *could* be closed under a meetings exemption under FOIA. Please contact counsel if you have concerns about federal or state law that might prohibit release of information.

Who does FOIA apply to?

FOIA applies to all public bodies. It also applies to the operations of the board itself together with all of its committees and subcommittees plus any other groups or entities appointed by the board to advise or exercise delegated functions. For example, an executive search committee set up to make recommendations to the board is subject to FOIA.

²⁰ § 2.2-3700

²¹ § 2.2-3707

²² §§ 2.2-3707.01 and 2.2-3711

²³ § 2.2-3704

²⁴ § 2.2-3700(B)

²⁵ § 2.2-3700(B)

MEETINGS

Meetings Generally

Can we meet without telling anyone?²⁶

FOIA requires that all meetings of the board or any committee or subcommittee be advertised to the public for at least three working days prior to the meeting. The notice requirements of FOIA are very specific. The secretary to the board will handle the details of complying with these. Members of the board, however, should be aware that any meeting called must be far enough in advance that the secretary has time to properly prepare the notice and advertise the meeting for three work days. Also, any materials supplied to board members before the meeting must also be made available for public inspection at the same time the materials are provided, with the exception of documents that are specifically exempt under FOIA from disclosure.²⁷ This includes any materials one board member sends to all other members!

If your bylaws call for more notice for meetings than FOIA does, you must comply with the stricter provisions of the bylaws.

Can less than a quorum of the board – say three or four members – get together informally to discuss affairs of the organization?

No. A gathering of three or more members of the board where business is discussed is illegal, unless the gathering has been properly posted at least three working days prior to the meeting. It does not matter that a quorum was not present.²⁸ It does not matter that the members took no official action. If more than two board members serve on an organization-related foundation's board, FOIA will likely be violated.

This prohibition is generally against *three or more* members discussing public business. *Two* members may discuss public business in person, on the phone, or otherwise, with one notable exception. The exemption exists where two members constitute either the entirety or a quorum of a committee or subcommittee, or other group that has been designated by the board to advise the board or has been delegated some responsibility by the board, then any discussions between them must be properly advertised as a meeting. Otherwise, the gathering is an illegal “meeting” under FOIA.²⁹

Can't I even go to a cocktail party or dinner with two (or more) other BOV members?

Yes, of course you can. While there, you may even discuss business with *one other* member at a time.

Three members, however, may *not* jointly discuss public business. Nor may a third member be listening to the conversation.

²⁶ For details see: § 2.2-3707.

²⁷ § 2.2-3707F

²⁸ § 2.2-3707

²⁹ § 2.2-3701

Please keep in mind that this prohibition applies at *all* times and in *all* places – including, for example, lunches, dinners, and social occasions held in conjunction with BOV meetings or at annual professional conferences. For example, if a BOV holds a luncheon between the morning and afternoon sessions of a meeting, the BOV must, both advertise the luncheon as a meeting and have the luncheon open to members of the public, or ensure that no public business is discussed. That's a difficult task, but a mandatory one.³⁰

The board wants to take a bus tour of our new facilities during a break at our board meeting. Any problem with this?

No, no problem – *provided* arrangements are made also for members of the press and public to be present whenever any institutional business is discussed. That means you might need a big bus if any discussions will take place on the bus. ³¹

Who can come to our meetings?

Anybody who wants to. All meetings must be open to the public. Any member of the public (including, of course, press, and employees) has a right to attend, to listen, and to make a video or audio recording of any meeting. The BOV can put reasonable restrictions on recording to ensure that actions of the press or public do not disrupt the meeting.

You will, at times, have outside consultants present at your meetings. They will not be familiar with FOIA and may expect or request confidentiality that FOIA does not permit. The board and staff should provide these consultants with information that will reduce the conflict between their expectations and what FOIA requires.

Do we have to tape record our meetings?

No. Recording meetings is not required. However, proper minutes must be taken and draft minutes, and later final minutes, must be posted to the web. The secretary to the board will ordinarily have this responsibility.³²

Do we have to have minutes taken?

Yes. FOIA requires that minutes be taken of every meeting, including retreats or work sessions. Also, draft minutes that fairly reflect actions taken must be posted on the web within 10 days following the meeting. Final approved meeting minutes must be posted within three working days of final approval of the minutes.³³

Closed Meetings

What are the exceptions to open meetings? When can we hold a closed meeting?³⁴

³⁰ § 2.2-3701

³¹ § 2.2-3700 ensures "free entry to meetings of public bodies wherein the business of the people is being conducted."

³² § 2.2-3707

³³ § 2.2-3701.1

³⁴ For full list of exceptions see: § 2.2-3711(A). The Statute does refer to the exemptions for "closed meetings" but as will be discussed, a more accurate description is that they are a 'closed session' within a meeting. The terminology "closed session" will be used in these FAQs.

FOIA has 48 exceptions to the open meetings requirement, with more proposed by the General Assembly each year. The exceptions most likely to be utilized by BOVs to justify closed sessions are:

- (1) *the personnel exception*: discussion, consideration, or interviewing of prospective candidates for employment; or the discussion of assignment, appointment, promotion, performance, demotion, salaries, discipline, or resignation of *specific* employees. This exception does *not* apply to discussion of members of the BOV themselves. BOV members may not go into closed session to discuss the performance of individual board members or the election of BOV officers. The personnel exception is also inapplicable to discussions of general school policy or operations – for example, reorganization – that would refer to reassignment or laying off of employees – unless the discussion centers upon *specific* employee(s).
- (2) *the scholastic record exception*: discussions or consideration of admission or disciplinary matters, or other matters that would involve disclosure of information in scholastic records (as defined in the act) of specific student(s). Generally speaking, however, the student or his lawyer is entitled to attend those closed sessions.
- (3) *the real property exception*: discussion or consideration of the acquisition or disposition of real property where open discussion would adversely affect the bargaining position or negotiating strategy of the institution. This exception does not apply once the real property has been acquired or disposed of, and does not include potential use of real property.
- (4) *the investment exception*: discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the institution would be adversely affected. This exception might occasionally be invoked during discussion of endowment funds investment.
- (5) *the legal advice exception*: consultation with legal counsel for legal advice on specific matters, and briefings by staff members or consultants pertaining to actual or probable litigation.
- (6) *the development exception*: discussion or consideration of matters related to specific gifts, bequests, and grants from private sources³⁵ and contracts for services or work to be performed by the organization.
- (7) *the honorary degree exception*: the discussion or consideration of honorary degrees or special awards.
- (8) *the terrorism exception*: the discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities.
- (9) *the contract exception*: the discussion of the award of a public contract involving the expenditure of public funds where discussion in open session would adversely affect the bargaining position or negotiating strategy of the institution. Foundation contracts do not involve the expenditure of public funds and are not appropriate for closed meetings.

You should *always* consult with legal counsel well in advance of going into any closed meeting. The above are brief descriptions of exceptions for going into closed sessions – the “basics”. In each case, there are additional, specific legal criteria or requirements to be considered.

When are we *required* to go into closed session?

³⁵ Closed meetings for consideration of specific gifts, bequests and grants is limited to the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation and the Science Museum of Virginia.

You are never required by law to go into closed session. FOIA gives the board the option of doing so when the topic of discussion falls within a FOIA open meetings exception.

What must we do to go in order to into closed session?

First, all meetings must have been properly noticed (discussed above). FOIA does not really permit a "closed meeting." All meetings are open, but for limited purposes, you may go into a "closed session." This is the case even if the only subject of the meeting is proper for closed session. A closed session may be held as a small part of a larger, open meeting, or a meeting may be called and noticed specifically for the purpose of having a closed session. But in any event, all meetings must first be convened as an open meeting, and then proper procedures must be followed to go into closed session. Closed sessions must be followed by an open session certification that the closed meeting was proper.

A detailed motion must be made to go into closed session. That motion, which must be included in the open meeting's minutes, must identify: (1) the closed session's specific subject matter; (2) the closed session's specific purpose; and (3) the specific exemption under §2.2-3711(A) that applies. General references to FOIA or to the subject matter of the meeting do not suffice.³⁶

Your counsel can provide a "script" to use for going into closed session.

What if we are in open session with only the board in attendance, and we want to discuss something that we would ordinarily discuss in closed session. Can't we do that without going through the formalities since there is no one we need to exclude?

You certainly may hold the discussion without going into closed session, but there are some shortcomings to that approach, including that minutes would have to be taken, whereas minutes would not be mandated in closed session.³⁷

What can we discuss in closed sessions?

Once the board properly goes into closed session, you may discuss only those specific matters identified in the motion to go into closed session. For example, if the board went into closed session to discuss "personnel matters – specifically the salary of the director," the board could not discuss any other matter, not even a different personnel matter, even if that other matter might have been the proper subject of a closed session had it been included in the motion.³⁸

It's easy to stray from the topic identified in the motion for closed session. One responsibility of your counsel is to watch closely and call any deviation to your attention. Ultimately, however, it is the board's responsibility to police itself and stick to the topic stated in the motion to go into closed session.

Who is permitted to go into a closed session with the board?

³⁶ § 2.2-3712

³⁷ § 2.2-3712(D)

³⁸ § 2.2-3712

Just because the board goes into closed session, it does not mean that everyone else must be excluded. The board can allow any persons to attend that it feels are necessary to the discussion. That said, it is best to *only* allow those who are necessary to the discussion

Who decides when closed session is appropriate?

The board as a whole is responsible for deciding whether to go into closed session and who should be included and excluded. The board decides to go into closed session through passage of the motion to do so. As a matter of governance, the board as a whole should also actively decide who should participate in closed session.³⁹

Can we vote in closed session?

No. Any action that is required as a result of discussions in closed session must be taken after going back into *open meeting*. The board may, however, take non-binding votes in closed session – straw-polls, of sorts – to get a sense of how a public vote will go. Members are not legally bound to vote in open meeting as they indicated they would in closed session.

What do we do when we have finished our closed session discussions?

The board must reconvene, by motion, in open session following closed session, even if they have no more business to conduct. After the room is opened and visitors are informed that the meeting is now open, each member of the body must affirm by roll call or recorded vote that only those matters identified in the motion to close the meeting were discussed. Any member who believes matters outside the scope of the motion were discussed is to say so prior to the vote.

Failure to certify that the meeting was properly held does not affect the validity or confidentiality of matters discussed in the closed session or action taken on those matters later in open session. Deviation from the proper subject of the closed session and failure of a unanimous certification vote could, however, subject the board to harsh public criticism and individual members to monetary penalties.⁴⁰

May board members talk with other people about matters that were discussed in closed session?

There is no *legal* prohibition against board members revealing discussions held in closed sessions; nor may the board itself prohibit such. Board members are officers of the Commonwealth, and within legal parameters, each must decide how to best execute their responsibilities to the Commonwealth and the institution. Common sense, professional norms, and individual consciences must dictate board members' actions. Other privacy requirements outside of FOIA may exist under federal and state law. Please consult counsel if you have questions.

Are we required to take minutes in closed session?

No. There is no requirement that minutes be taken in closed session.⁴¹

³⁹ § 2.2-3712

⁴⁰ § 2.2-3712(D), (E)

⁴¹ § 2.2-3712(H)

We hold an annual retreat. This is a very informal work/training session. No business is conducted and no action is taken. Do we have to advertise this meeting and allow the press and members of the public to attend?

Absolutely. Any get-together of three or more members at which the business or operations of the institution are discussed is a "meeting" under FOIA. Retreats, dinners and work sessions are no exception. They must be properly advertised, and must be open unless an exemption applies to a specific matter under discussion.⁴²

What is an executive session?

The term executive session no longer has any legal significance. Under FOIA there is a meeting and you are either in open session or closed session. For that reason, we strongly suggest that boards abandon using the terminology "executive session." Further, it is common for board members and others to confuse "executive session" and "executive committee."

Electronic Communication Meetings

May the entire board hold a meeting by telephone or video?

Generally, no. Under FOIA, meetings to discuss or transact public business generally may not be conducted by telephone, video, or other electronic communication means. The one, limited exception, are those instances where the Governor has declared a state of emergency.

May individual board members participate by telephone or video?

Yes, so long as the board observes a few requirements. First, a quorum of the board must be physically present at one primary meeting location. Second, the board must notice the remote location as a meeting location at least three business days prior to the meeting. Third, the remote meeting location must be open to the public just like any meeting of the board. For example, if you wish to call in from your home, you will need to open that location to the public. Finally, the board must hold at least one meeting annually where members are physically present and no members participate by electronic communication.⁴³

How much notice must be given of telephone or video meetings?

The notice required for telephone meetings is three (3) working days – the same as for other meetings.

⁴² § 2.2-3701

⁴³ § 2.2-3708

May members of the board call in from different locations?

Yes, with some limitations. First, a *quorum* of the body *must* be physically assembled at the main meeting location. If a quorum is not gathered in one place, members may not transact business. If a quorum *is* gathered in one location, other members may call in from remote locations provided the locations were advertised in the notice and other statutory requirements are met.

May a member call in from wherever he or she happens to be at the time of the meeting?

No. In order to conduct a telephone meeting, each remote location must have been determined in advance and advertised to the public as a remote location of the meeting. Further, each and every location from which any member is participating in the meeting must be open to the public, and must be equipped with a speakerphone so the public can hear and participate. Any person attending the meeting at any of the meeting locations must be given the same opportunity to address the board as persons attending the primary location where the quorum is located.

If a remote location is noticed for the convenience of a member, then the member decides to attend at another location, may we then omit the original location?

No. Once a location is noticed as a remote location, public access must be provided at that location unless the entire meeting is cancelled and re-noticed for at least 3 days later.

Is it sufficient to only allow public access to the 'main' meeting?

No. Every location of the meeting (that is, every location from which a member of the body participates) must be noticed as a public location and must be provided public access. The public at each location must have full access; that is, they must be able to hear (and see, in the case of video) and fully participate, including comment, to the same extent as the public at the 'main' meeting location. Also, at least one copy of the agenda and materials made available to the members of the body must at the same time be made available for public inspection; and a copy of those advance materials *and* materials distributed to the members of the body at the meeting must be made available for public inspection at *all* meeting locations.

What if I have an emergency or personal matter?

FOIA permits board members with unexpected emergencies or personal matters to participate via phone or video. In order to do so, the board must have adopted written policy permitting its members to call in due to unexpected emergencies or personal matters.⁴⁴ A quorum of the board must still be physically assembled at the main meeting location.

May we use email to communicate between meetings?

Yes. There is nothing improper or illegal about using email in and of itself. Email provides a fast, efficient means of communication for you in your public service life, just as it does for you in your personal and professional life. Nothing prohibits the use of standard email for general communication between or among members.

⁴⁴ § 2.2-3708.1

It is important to note, however, that the *nature of e-mail use* will determine the legality of its use. No *lawful* meeting may be held by email. That is to say, if three or more members of a public body (or a quorum if less than three) do communicate by *instant* e-mail (otherwise known as IM, AIM, or 'chat', or if members are present at computers to simultaneously receive and send e-mail, that may well constitute an *illegal* meeting.

Where use of e-mail more resembles traditional communication through ordinary mail, with significant delay between receipt and response, then there is no "meeting" under FOIA. Where an exchange of e-mails resembles an assemblage of members of a public body, in that e-mails are being sent and responded to in quick fashion such that there is a feature of simultaneity, then such an exchange may be a "meeting" under FOIA, albeit an unlawful meeting.

Board members should exercise *extreme caution* in the use of email. Use of distribution lists (that is, sending the same email to either the entire board or even to just two other members) could set the stage for an illegal meeting. Consider, for example, that a board member sends an email to all members of the board, and two of those members happen to be sitting at their computers - not an unlikely situation. If those two members respond to the message using function "reply all" within a short timeframe, we have an *illegal meeting*, subjecting the members to public criticism and the monetary penalties of FOIA.

Keep in mind, though, that emails are "records" under FOIA and must be produced in response to a request. (See below under "Records.") Be careful what you write!

What if a phone or video feed goes out or there is some other problem with communication during the meeting?

If, during the meeting, there is any interruption in the audio or video communication at any location - whether the primary location or a remote location - the meeting must be suspended immediately and may not be resumed until repairs are made.

May a member call in on the telephone so long as he does not vote, speak or participate?

A member may call in from a location that has not been noticed provided the member *only listens*, and does not otherwise participate in any manner. However, the more conservative, and safer, approach would be to avoid this scenario.

Emergency Meetings

What if board or the organization has an emergency? Can we meet without 3 days' notice?

Yes. Notice that is "reasonable under the circumstances" must be given. In an emergency, notice must be given to the public and to board members at the same time. While "emergency" is not defined under FOIA, an emergency is best thought of as an extremely urgent situation beyond the board's control. Delay or procrastination on the part of the board or the organization does not make for an "emergency" under FOIA.⁴⁵

⁴⁵ § 2.2-3707(D)

If we have an emergency, may we have an electronic meeting without 3 days' notice?

Yes. An "emergency" is an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable, and which requires immediate action. If an emergency telephone meeting is called, reasonable notice under the circumstances must be provided the public. Generally, that would mean providing notice to the same persons as in a non-emergency by the most expedient method possible. Notice must be given to the public contemporaneously with that given members of the body.⁴⁶

If an emergency telephone meeting is held, must public access be provided?

Yes. At an emergency telephone meeting, public access must be provided at all locations, just as in a non-emergency. Except for the requirement of the 3 days' notice, bodies must meet all other telephone meeting requirements; for example, minutes must be kept. (See above.) Further, the minutes of the meeting must state the nature of the emergency.⁴⁷

RECORDS

What does FOIA require regarding public records?

In general, FOIA requires that unless an exception applies, all records in the possession of a public employee or officer (including BOV members) that relate to public business must be made available to Virginia citizens and members of the media upon request. They are entitled to read and inspect the document and to make copies. (Generally, institutions find it easier to simply provide requestors with copies rather than requiring the requestor to make the copies.) We generally refer to a request for public records as a "FOIA request."⁴⁸

What is a "public record"?

Public records are basically anything the institution and its officials and employees use to transact public business and record data, whether produced by them or others. Records include (among other things) paper documents such as copies of letters, contracts, memos, etc. Also included are video tapes and audio tapes; digital documents on computer hard drives and servers; and text messages on cell phones - in short, anything that records or documents public business - whether written on a digitally stored or chiseled onto a rock, or anything in-between. If it's about public business, it's a public record.⁴⁹ This includes anything in a member of the board's home or work computer or otherwise in their possession.

Don't FOIA requests have to be in writing?

Absolutely not. Any request made for records is a FOIA request, whether made orally, by letter, by email, or by carrier pigeon. Nor does the person requesting records have to use

⁴⁶ § 2.2-3707, § 2.2-3708

⁴⁷ § 2.2-3707

⁴⁸ § 2.2-3704

⁴⁹ § 2.2-3701 ("Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photo stating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records.)

any magic words, such as “records,” or “FOIA.” The requestor is not required to tell you why he or she is asking for the records or what they intend to do with them; nor should you ask.

Whenever *anyone* asks you for *anything* related in *any way* to the business of your institution, you should report it immediately to the institution’s FOIA officer – even if you do not have any records you believe to be responsive to the request. Others within the institution may have records responsive, and the institution is under a very tight time frame within which to produce the records or object to production.⁵⁰

Are there exceptions to the requirement that we produce requested records?

Yes. In fact, there are well over a hundred exceptions. Your responsibility as a BOV member is to report any request for records to your institution’s FOIA officer or counsel. They will help you and others determine what exemptions might apply and how best to respond to the request.⁵¹ The role of the FOIA officer is to assist in document collection to be responsive. Legal questions should be directed to legal counsel.

How long do I have to produce records in response to a FOIA request?

The institution has only 5 working days to initially respond. The institution’s FOIA officer will assist you and others in gathering documents and properly responding to the request. Even if the institution invokes the permitted extension of time, a final response must be made within 12 work days of the initial request, unless other arrangements are worked out between the FOIA officer and the requestor.

Never attempt to respond to a FOIA request on your own without consulting your counsel and institution’s FOIA officer.

Would a FOIA request require me to give an account of some event I witnessed, for example, write a description of a discussion I had with another board member?

No. FOIA only requires the production of already-existing documents. FOIA does not require you to create new documents. At times, though, an institution may find it preferable for any number of reasons to create a new document rather than producing the existing documents that were requested. That’s fine, so long as the requester agrees.

What about my personal documents, including for example, handwritten notes such as those from meetings or discussions with alumni, email at home on my personal computer, etc.?

First, understand that *any* record (letter, memo, scribbled note, email, audio recording, or any other) that in any way relates to the business of the organization is *not* a personal record, it is a *public record*. This is the case no matter where it resides – whether in a board meeting, in your personal computer, in the cloud or in the glove compartment of your car. So in the event of a FOIA request to you those records must be produced if responsive to the request.⁵²

⁵⁰ § 2.2-3700

⁵¹ To view the exclusions *see*: 2.2-3705.1-2.2-3705.8.

⁵² § 2.2-3701

PENALTIES⁵³

So what if we violate FOIA? What's the big deal?

First, the big deal is that members of the board are entrusted with the public confidence, and a FOIA violation is breach of that trust. The General Assembly has determined that, with specific exceptions, the public's right to open government must not be violated. Extreme embarrassment to both the University and you personally can result from FOIA violations.

Beyond that, any citizen can file a complaint in court if he believes FOIA has been breached. It is up to the officer or employee to prove that an exception to FOIA was appropriate. If not successful, the offending officer or employee can be personally fined up to \$2000 for the first occurrence and up to \$5000 for additional occurrences.

⁵³ For violations and penalties *see*: § 2.2-3714.

**Freedom of Information Act
(FOIA) Training**

State Special Education Advisory Committee
(SSEAC)
July 20, 2017

Presented by Susan B. Williams, Assistant Attorney General

SSEAC

- Public body for purposes of FOIA
 - Establishment of committee is required by IDEA
 - Membership is prescribed by IDEA
 - Members are appointed by the Virginia Board of Education
 - Activities are governed by the Virginia Board of Education bylaws for advisory committees

FOIA in General

- Virginia Freedom of Information Act = §§ 2.2-3700 through 2.2-3714 of the Code of Virginia
- Policy (as set forth in § 2.2-3700)
 - All public records and meetings shall be **presumed open**, unless an exemption is properly invoked.
 - Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be **open to the public** and all public records shall be **available for inspection and copying** upon request.

Access to Public Meetings

- **What is a meeting under FOIA?**
 - Gathering of members 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 membership
 - Business of the public body is being discussed or transacted
 - Includes work sessions

Access to Public Meetings

- **What is NOT a meeting under FOIA?**
 - Gathering of employees of a public body
 - Gathering or attendance of two or more members of a public body where there is no discussion or transaction of public business (and not called for that purpose)
 - Gathering or attendance of two or more members of a public body at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate

Access to Public Meetings

- **Participation by members via teleconference or other electronic means**
 - Permitted under certain limited circumstances
 - State public bodies may conduct a public meeting through electronic means, provided
 - (i) a quorum of the public body is physically assembled at one primary or central meeting location
 - (ii) proper notice of the meeting has been given and
 - (iii) the remote locations are open to the public

Access to Public Meetings

- **What does FOIA require if it is a public meeting?**
 - Notice of the meeting
 - Meeting must be open to the public and
 - Minutes of the meeting must be taken and preserved

Access to Public Meetings

- **What is sufficient notice?**
 - Date, time, and location of the meeting is required
 - Helpful (but not required) to include agenda to inform the public generally of what topics will be discussed
 - If a state public body includes at least one member appointed by the Governor, notice must also indicate whether public comment will be received and approximately when

Access to Public Meetings

- **Where to post the notice?**
 - FOIA requires that all public bodies post notices in two physical locations
 - In a prominent public location at which notices are regularly posted, and
 - In the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator.
 - **AND**, a public body must also post notice on its official public government website, if any
 - **AND, state** public bodies must also post notice on a "central, publicly available electronic calendar maintained by the Commonwealth"

Access to Public Meetings

- **Who else is entitled to notice of meetings?**
 - Any person who annually files a written request for notification with a public body is entitled to receive direct notification of all meetings
 - If the person requesting notice does not object, the public body may provide the notice electronically

Access to Public Meetings

- **When to post the notice?**
 - For regular meetings:
 - at least three working days prior to the meeting.
 - For special or emergency meetings:
 - FOIA defines emergency as "an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which circumstance requires immediate action."
 - Notice must be reasonable under the circumstances and given at the same time as it is provided to members

Access to Public Meetings

- **Recording of meetings by public or media?**
 - 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

Access to Public Meetings

- **Agenda materials available to the public/media?**
 - 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 must be made available for public inspection at the same time they are furnished to the members

Access to Public Meetings

- **Are minutes required?**
 - Only at open meetings
 - Not required to be taken during closed meetings.
 - Not required to be taken at deliberations of General Assembly/legislative study committees, study committees appointed by the Governor or study committees appointed by local governments/school boards (unless committee includes a majority of the members of the governing body)

Access to Public Meetings

- **What must be included in minutes?**
 - Minutes must include: the date, time, and location of the meeting; members present and absent; summary of matters discussed; and record of any votes taken
 - Motions to enter into a closed meeting and certification after a closed meeting
 - Minutes and all other records of open meetings (including audio/video recordings) are public records and must be released upon request

Access to Public Meetings

- **When and where must minutes be posted?**
 - All boards, commissions, councils, and other public bodies created in the executive branch and subject to FOIA must post minutes of their meetings on their official public government website and on a central electronic calendar maintained by the Commonwealth
 - Draft minutes of meetings must be posted as soon as possible but no later than 10 working days after the conclusion of the meeting.
 - Final approved meeting minutes must be posted within three working days of final approval

Access to Public Meetings

- **What about voting and polling?**
 - Any and all votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting
 - A public body may not vote by secret or written ballot
 - Nothing in FOIA prohibits "polling" or separately contacting members for the purpose of ascertaining a member's position with respect to the transaction of public business
 - Such contact may be done in person, by telephone, or by electronic communication, provided that the contact does not constitute a meeting as defined in FOIA

Access to Public Meetings

- **What about closed meetings?**
 - Can take place only within the context of an open meeting, even if the closed meeting is the only agenda item
 - Public body must take an affirmative recorded vote in an open meeting approving a motion that:
 - Identifies the subject matter for the closed meeting
 - States the purpose of the closed meeting and
 - Cites the applicable exemption from the open meeting requirements
 - Public body must restrict its discussions during the closed meeting to those matters specifically exempted from the provisions of FOIA and identified in the motion

Access to Public Meetings

- **What happens at the end of a closed meeting?**
 - Public body must immediately reconvene in an open meeting to certify (by a roll call or other recorded vote) that they restricted their discussion during the closed meeting to those matters (1) specifically exempted from the provisions of FOIA and (2) identified in the motion
 - The vote must be included in the minutes of the open meeting
 - Any member who believes that there was a departure from the requirements above must state so prior to the vote and indicate the substance of the departure

Access to Public Meetings

- **When do decisions made by a public body in a closed meeting become official?**
 - When the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation, or motion agreed to in the closed meeting
- **Otherwise, no resolution, ordinance, rule, contract, regulation, or motion adopted, passed, or agreed to in the closed meeting is effective**

Access to Public Records

- **What is a public record under FOIA?**
 - Any writing or recording, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.
 - The definition of "public record" does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA

Access to Public Records

- **Who may request records under FOIA?**
 - Citizens of the Commonwealth
 - Representatives of newspapers and magazines with circulation in the Commonwealth and
 - Representatives of radio and television stations broadcasting in or into the Commonwealth

Access to Public Records

- **What does a FOIA request look like?**
 - The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response
 - Request is not required to be in writing
 - A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request
 - A public body may require a requester to provide his/her name and legal address before processing a FOIA request

Access to Public Records

- FOIA requests may be made
 - In person
 - By telephone
 - By email
 - By sending a letter
- Therefore, any time you understand that a requester wants to inspect or receive a copy of a record, IT IS A FOIA REQUEST!!!

Access to Public Records

- **When and how must a public body respond to a FOIA request?**
 - A public body must respond within five working days of receipt of the request with one of the five responses allowed by FOIA
 - Provide the requested records
 - Entirely withheld because release is prohibited by law or the custodian has exercised discretion to withhold in accordance with FOIA
 - Provided in part and withheld in part because release of part of the records is prohibited by law or the custodian has exercised discretion to withhold a portion in accordance with FOIA
 - Could not be found or do not exist or
 - Not practically possible to provide the requested records OR to determine whether they are available within the five-work-day period, and the public body needs an additional seven work days in which to provide one of the four preceding responses

Access to Public Records

- **What must be included in the response?**
 - If all or any part of the requested records are being withheld, the response must:
 - Be in writing
 - Identify with reasonable particularity the subject matter of withheld records and
 - Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.
 - If the records are being entirely withheld then the response must also identify with reasonable particularity the volume of the withheld records.

Access to Public Records

- If the answer is "we cannot find it" or "it does not exist" the response must:
 - Be in writing and
 - If the public body knows that another public body has the records, it must provide contact information for the other public body.
- If the answer is "we need more time" and the public body would like seven additional working days to respond the response must:
 - Be in writing and
 - Specify the conditions that make production of the records within the five-workday period impossible.

Access to Public Records

- **What about the records provided?**
 - Generally, if a record contains exempt and nonexempt information, the public body must release the record and delete or redact the exempt portion of the record.
 - Generally, no public body is required to create a new record if the requested record does not already exist.
 - When electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information (which is not considered the creation of a new record under FOIA).
 - A public body must provide electronic records in any medium identified by the requester, if that medium is used by the public body in the regular course of business.

Access to Public Records

- **How much may a public body charge for producing records?**
 - Reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.
 - A public body may not charge extraneous fees unrelated to the production of the records. [NOTE: This means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees.]
 - Charges for copies must not exceed the actual cost of duplication.
 - A citizen may request that the public body estimate the cost of supplying the requested records in advance.

Access to Public Records

- **Can a public body require payment in advance?**
 - When a public body determines in advance that the charges for supplying the requested records are likely to exceed \$200, it may require the requester to pay a deposit not to exceed the amount of the advance determination.
 - If a public body asks for a deposit, the five-working-day period to respond to the request will be tolled until the deposit is paid.
- **What if a requester does not pay for records provided under FOIA?**
 - Before responding to a new request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

Access to/Retention of Public Records

- **Is my e-mail a public record?**
 - FOIA governs access to records held by state and local government
 - The Virginia Public Records Act (PRA) governs how long a government entity must retain certain records
 - Must look at the text and substance of the communication to determine whether it is a public record

Access to/Retention of Public Records

- **Do I have to save my e-mail?**
 - Regardless of physical form, recorded information is a public record if it is produced, collected, received or retained in connection with the transaction of public business
 - Emails that relate to the public business are public records, regardless of whether you use your home or office computer, text or other forms of social media. It is the content of the record, not the equipment used, that controls
 - As such, these emails must be retained as required by PRA
- **Can the public and media access my e-mail under FOIA?**
 - An e-mail relating to public business would be accessible just like any other public record, and may be withheld from public disclosure only if a particular exemption applies to the content of the e-mail.

Access to Public Records

- ALL public records are OPEN to the public UNLESS a specific exemption in law allows the record to be withheld
- FOIA is a mandatory disclosure law
 - Unless the requested record is excluded by law, you must release it to the requester
- if a requested record is excluded, FOIA still gives you the authority to use your discretion to release the record so long as the release is not prohibited by some other law.
 - FOIA never prohibits release (but another law may)

FOIA Records Exemptions

- § 2.2-3705.1 Exclusions of general application to public bodies
- § 2.2-3705.2 Exclusions relating to public safety
- § 2.2-3705.3 Exclusions relating to administrative investigations
- § 2.2-3705.4 Exclusions relating to educational records and certain records of educational institutions
- § 2.2-3705.5 Exclusions relating to health and social services records
- § 2.2-3705.6 Exclusions relating to proprietary records and trade secrets
- § 2.2-3705.7 Exclusions relating to records of specific public bodies and certain other limited exclusions
- § 2.2-3705.8 Limitation on record exclusions
- § 2.2-3706 Disclosure of criminal records; limitations.

Enforcement of FOIA

- Any person denied the rights and privileges conferred by FOIA may file a petition for mandamus or injunction, supported by an affidavit showing good cause.
- The petition shall be heard within seven days, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing.
- If the court finds the denial to be in violation of FOIA, the petitioner is entitled to recover reasonable costs (including fees for expert witnesses and attorneys' fees) from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.
- The public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence.
- Any failure by a public body to follow the procedures established by FOIA is presumed to be a FOIA violation.

FOIA Penalties

- If the court finds that a violation was willfully and knowingly made, the court shall impose a civil penalty of not less than \$500 nor more than \$2,000
 - upon such officer, employee, or member in his individual capacity (not imposed upon the public body)
 - regardless of whether a writ of mandamus or injunctive relief is awarded
 - amount is paid into the State Literary Fund
- For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000
