

The Virginia Freedom of Information Act (“FOIA”) for School Board Members

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Agenda

Overview of Virginia Freedom of Information Act (VFOIA)

- What records are subject to FOIA?
- Records retention requirements of the Virginia Public Records Act
- Public meeting requirements
- How is FOIA enforced? What are the penalties for noncompliance?

Suggested Practices

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Enforcement & Penalties

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Application & Scope

- Ensure “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”
- Therefore “every meeting shall be open to the public and all public records shall be available for inspection and copying upon request”
- FOIA 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 records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt. . . .”

What does this mean?



**IF IN DOUBT, THE MEETING
IS OPEN**



**IF IN DOUBT, THE
DOCUMENT IS PUBLIC**

Application & Scope

- Public Bodies
- Committees/subcommittees of a Public Body
 - “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”
 - Superintendent’s committees?

Additional FOIA Requirements

Public posting of rights and policies on division website

Designate a FOIA Officer

Ongoing training requirements

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Public Records

Va. Code § 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, photostatting, 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.**

Public Records

What is the
“transaction of public
business”?



Transaction of Public Business

2024 Acts of Assembly Ch. 756

For purposes of this definition of "meeting" only, the term "public business" means any activity a public body has undertaken or proposes to undertake on behalf of the people it represents.

§ 2.2-3701

Gloss v. Wheeler, 302 Va. 258 (2023)

“Accordingly, ‘public business’ in Code § 2.2-3701 means business that is on a public body’s agenda or is likely to come before the public body in the foreseeable future.”

Transaction of Public Business

- Not about public *interest* (prepared or used in transaction of public business)
- Content counts; appearance not dispositive

Records

Minutes	Reports	Notes
Videos	Calendars	Drafts
Emails	Photos	Maps
Spreadsheets	Drawings	Texts

...if used in the transaction of public business

Transaction of Public Business

- Not about public *interest* (prepared or used in transaction of public business)
- Content counts; appearance not dispositive

Not Records

Grocery lists

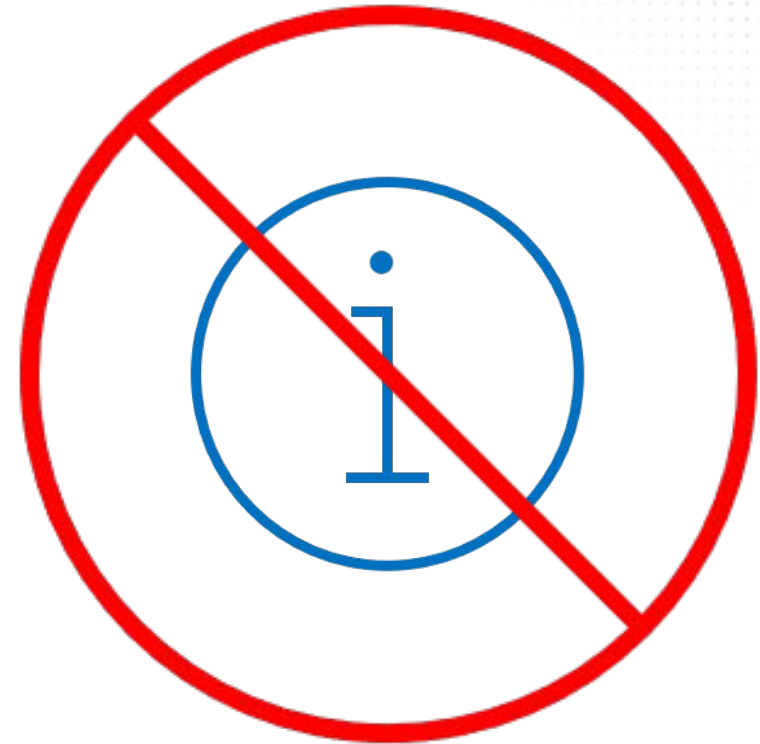
Doctor's appointments

Chain emails

Kid's drawings

Information ≠ Record

- **FOIA governs public records -- something physical (or digital)!**
 - It is not what is in your head or a freestanding request for information.
 - You cannot be FOIA-ed for the contents of your phone call or what you said at a meeting.
 - If, however, you took notes of the phone call or recorded the meeting on your iPhone, then those may be FOIA-ed.



Responding to Requests (§2.2-3704)

- CCS has five working days to respond
 - First day to respond is the day after the request is received
 - “Working days” do not count weekends, legal holidays, or days when HRSD is closed
- Creation of new records not required, but may abstract or summarize by agreement
- Make reasonable efforts to agree with requester on the production of records (what and when)
- Only required to respond based on the precise language of the request

FIVE possible responses to FOIA request

1. We will give you **all the documents you want**.
2. The requested records are being **entirely withheld**. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
3. The requested records are being **provided in part and are being withheld in part**. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. (*Note this response applies if any records are redacted.*)

4. The requested records **could not be found or do not exist**. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

5. It is not practically possible to provide the requested records or to determine **whether they are available within the five-work-day period**. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

Exemptions

- 100+ exemptions
- Must affirmatively identify exemption, construe it narrowly
- Common exemptions:
 - Scholastic records
 - Personnel information
 - Personal contact information

Virginia Public Records Act



Va. Code § 42.1-86.1

“No agency shall destroy or discard a public record unless...the record appears on a records retention and disposition schedule...and the record's retention period has expired...”

Virginia Public Records Act



LIBRARY OF VIRGINIA

Government Records Services
800 E. Broad St., Richmond VA 23219
(804) 692-3600

RECORDS RETENTION AND DISPOSITION SCHEDULE

GENERAL SCHEDULE NO. GS-19

COUNTY AND MUNICIPAL GOVERNMENTS

Administrative Records

EFFECTIVE SCHEDULE DATE: 3/28/2024

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Presentation Materials</u> This series documents presentations given by locality employees. This series may include, but is not limited to: slides, overheads, flip charts, and handouts.	010079	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Proclamations</u> This series documents the honoring of specific groups, associations, or people by the Mayor or Board of Supervisors. The series consists may include, but is not limited to: formal proclamation signed by the Mayor or Board of Supervisors.	101211	2 Years after end of calendar year	Non-confidential Destruction
<u>Program and Event Registration</u> This series documents registration and attendance for events, workshops, conferences, and programs offered by an agency. This series may include, but is not limited to: applications, registration and payment information, release forms, and attendance records.	200564	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Project Documentation Files</u> This series documents the design, development, control, or monitoring of a specific project or group of projects.	010082	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Public Hearing Notices</u> This series documents issuance and publication of notices of public hearings, other than board of supervisors or city/town council meetings. COV 2.2-3707	010019	1 Year after last action	Non-confidential Destruction
<u>Public Relations Files: Historically Significant</u> This series documents information provided to the public at large or specific elements of the public, business, or government communities. This series may include, but is not limited to: pamphlets, speeches, visual aids, news releases and clippings, and publications.	010083		Permanent, In Agency

Virginia Public Records Act

The
Library
of
Virginia:

“Retention is based on
content, not format.”

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Meetings

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Enforcement & Penalties

Definition of “Meeting”

Any assemblage of three or more members of a public body (or two members, if two is a quorum) is a “meeting” for the purposes of the FOIA. This is a LONG statutory definition (2.2-3701), but generally:

- Committees/Subcommittees. If the public body has delegated functions or advisory duties to a committee or subcommittee, then a gathering of that group is also a “meeting” for the purposes of the Act.
- Work sessions/Informal meetings. Work sessions and “informal” meetings are subject to the Act.
- Social Meetings. Social meetings at which public business is not discussed is not a “meeting” for the purposes of the Act.

Meeting Details

- What makes a meeting?
 - Anytime there are three members (or a quorum, whichever is less) together and there is the discussion of public business, there is a MEETING. This may include a telephone discussion, instant messaging, and maybe e-mails.
 - Every meeting should have an AGENDA.
 - Every meeting must have MINUTES.
 - Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open; however, the public body can adopt rules to prevent interference with proceedings of the meeting.

E-mail meetings

E-Mail Meetings. E-mail exchanges generally do not constitute a meeting, because they do not have the “simultaneity inherent in the term 'assemblage' of members.”

- What if the members all immediately respond to the e-mail via the “respond all” button?
- What if the members participate in a series of text messages?

Minutes

- Must include:
 - i) the date, time, and location of the meeting;
 - (ii) the members of the public body recorded as present and absent; and
 - (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken
 - Special rules when there is participation by electronic communication means.
- As of July 1, 2022, localities must make copies of minutes available within seven working days of final approval, including by posting on the official website, if any.
- All records relating to open meetings and their minutes, including draft minutes and audio or audio/visual records are deemed public records and subject to the provisions of the Act.

Closed Meetings

Closed meetings are only authorized for limited purposes. Some more frequently used open meeting exceptions are, in general terms:

- Employment and personnel issues for specific public officers, appointees, or employees of the public body;
- Certain procurement discussions
- Specific student issues
- Consultation with legal counsel and briefings by staff members or consultants pertaining to litigation.
- Consultation with legal counsel regarding specific legal matters requiring the provision of legal advice.

And there are nearly 50 others...

Closed Meetings (cont.)

- There are very specific justifications for closed meetings
- There are very specific procedures for entering and exiting closed meetings
- A court may impose penalties on a public body for failing to certify in accordance with the Act.

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Meetings must be advertised!

Meetings may be advertised by adopting a meeting calendar at the public body's organizational meeting. That full calendar must be posted.

Other meetings require NOTICE.

- Every public body shall 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 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. The notice shall be posted at least three working days prior to the meeting.
- Notice, reasonable under the circumstance, of special, emergency, or continued meetings shall be given contemporaneously with the notice provided to the members of the public body conducting the meeting.

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Enforcement & Penalties

Enforcement; Violations and Penalties

- Failure to respond to a record request is a denial and constitutes a violation.
- FOIA enforced by petition filed in General District or Circuit Court
 - These are given priority on the docket and heard very quickly
- If petitioner substantially prevails on the merits, they are entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from CCS.
- CCS bears the burden of proof to establish an exclusion by a preponderance of the evidence.



Violations and Penalties (cont.)

The court can impose a civil penalties on an individual (not CCS) for:

Willfully and knowingly denying a request for records

- First occurrence: \$500 - \$2,000
- Second or subsequent violation: \$2,000- \$5,000

Willful and knowingly altering or destroying a record

- Civil penalty imposed on the individual (not CCS) up to \$100 per record

“Willful” and “Knowing”

The terms “willfully” and “knowingly” are separate and distinct elements that must be proved before a penalty can be imposed.

- Conduct is “willful” when it is intentional.
- Acts “knowingly” when aware of the essential facts, from which the law presumes a knowledge of the legal consequences arising therefrom.

Violations and Penalties

§ 2.2-3714(A).

In a proceeding commenced against any officer, employee, or member of a public body under § 2.2-3713 for a violation of § 2.2-3704, 2.2-3705.1 through 2.2-3705.8, 2.2-3706, 2.2-3707, 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711 or 2.2-3712, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be 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

Violations and Penalties (cont.)

§ 2.2-3714(B).

In addition to any penalties imposed pursuant to subsection A, if the court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of this chapter because such officer, employee, or member altered or destroyed the requested public records with the intent to avoid the provisions of this chapter with respect to such request prior to the expiration of the applicable record retention period set by the retention regulations promulgated pursuant to the Virginia Public Records Act (§ 42.1-76 et seq.) by the State Library Board, the court may impose upon such officer, employee, or member in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of up to \$100 per record altered or destroyed, which amount shall be paid into the Literary Fund.

Suggested Practices

Suggested Practices

Social media use

- Use clear disclaimers when using personal social media/acting in your personal capacity
- Separate your personal/Board/campaign accounts
- Turn off comments for particular posts from the beginning
- Use social media archiving software or robust retention protocols
- Adopt (and follow) policies regarding Board Member social media use

Suggested Practices (cont.)

Tips for using and managing email

- Consider what you say and formality of your email before sending it, since it will have to be retained and may be subject to release under FOIA
- Don't commingle personal and official e-mails
- Don't commingle subjects
- Consider subject line of email – will help when searching for emails in response to a request for records
- All emails are retained and searchable by IT for relevance to requests.

Sometimes it's better to pick up the phone.



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