

Freedom of Information Act

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Introduction

The Virginia Freedom of Information Act ("FOIA"):

[E]nsures 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.

Virginia Code § 2.2-3700(B).

FOIA requires that the meetings of a locality's boards, commissions, and committees appointed by the governing body be open to the public. *Virginia Code § 2.2-3700 et seq.* Open government is the overriding policy of FOIA. *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991). FOIA also requires that records of a public body are public records available for public inspection and copying, unless an exception prohibits their disclosure or allows the public body to not disclose some or all of a particular record.

Meetings

1. A **meeting** may exist when three members of a public body are physically assembled; if a quorum of the public body is less than three, then a meeting exists whenever a quorum is established.
2. If **three or more members** of a public body are assembled, but not for the purpose of conducting business (*e.g.*, at a dinner or a VDOT informational meeting), a meeting under FOIA is not established provided they do not transact business.
3. **Electronic communications** such as e-mail communications between three or more members of a public body may be an unlawful meeting if the communications are conducted in real time; e-mail communications where there are periods of time between each correspondence are unlikely to constitute a meeting.
4. If three or more members of a public body **continue discussions** of public business after a public meeting has adjourned, the gathering is a meeting under FOIA, even if the members are discussing the business with staff.
5. Public meetings are the rule; **closed meetings are the exception**; a closed meeting is permitted only when an express statutory exemption from the public meeting requirement applies. For example, the following discussions may be conducted in a closed meeting under Virginia Code § 2.2-3711(A):
 - a. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.
 - b. Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.
6. A meeting may be established under FOIA **even though a quorum is not established**.
7. If a **quorum is not established**, the only action the public body may take at a meeting is to adjourn the meeting.
8. The **date, time, and location** of a public meeting must be posted **3 working days prior to the meeting**.

Records

1. "Public records" are **all writings and recordings** that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, 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.
2. Many types of records are **public records**:
 - a. **Draft documents**, such as draft staff reports, which are retained.
 - b. **Previously unreleased documents**, such as final staff reports that will be provided to a public body.
 - c. **Handwritten notes** that pertain to the transaction of public business and which are retained. 1983-84 Va. Op. Atty. Gen. 437.
 - d. Documents received from the public **in confidence** when they come into the possession of the locality. 1983-84 Va. Op. Atty. Gen. 420.
 - e. **E-mails and text messages**, included those sent and received on privately owned devices and private accounts, if their content otherwise makes them public records.
3. Any member of the public may request to inspect or obtain copies of public records. The request need not be in writing, need not refer to FOIA, and need not state the purpose for the request..
4. Most public records must be retained for specified periods of time.

Enforcement, Violation and Penalties

1. Any person may bring an action in court to compel compliance with FOIA.
2. **Willful and knowing violations** of FOIA may subject the violator to civil penalties of not less than **\$500 nor more than \$2000** for the first violation, and not less **than \$2000 nor more than \$5000** for subsequent violations
3. **A public official who violates FOIA is individually liable**. The County's insurance policy will provide a defense but it does not cover liability.