4
3/24/2011

Local Government Officials' Guide to the

Virginia Freedom of Information Act

By Roger C. Wiley

January 2007

WELDON COOPER CENTER FOR PUBLIC SERVICE
University of Virginia

P.O. Box 400206
Charlottesville, VA 22904-4206
(434) 982-5704

Local Government Attorneys of Virginia, Inc.
c/o Weldon Cooper Center for Public Service
University of Virginia
700 East Franklin Street, Suite 700
Richmond, VA 23219-2328
(804) 371-0202
email: LGA@mallinstitute.virginia.edu

About the Author

Roger C. Wiley is a principal with the Richmond law firm of Hefty & Wiley, PC, which concentrates its practice in legal representation of local governments and other public bodies in Virginia. His professional experience makes him a recognized authority on the Freedom of Information Act (FOIA) and the ideal person to write this guide. He served nearly 14 years as Charlottesville's full-time city attorney and spent almost 5 years in state government as Senior Assistant Attorney General for Opinions and Local Government. In that position he was the attorney general's principal contact with local governments and supervised the preparation of all official legal opinions, including those on FOIA. He has lectured extensively on Virginia's Conflict of Interest and Freedom of Information acts. He has served as a former president and founding member of the Local Government Attorneys of Virginia, Inc., a member of the Virginia Code Commission's Task Force on the Revision of Title 15.1, and a past member on the board of governors of the Local Government Law Section of the Virginia State Bar. In 1997 he was appointed as a citizen member of the General Assembly's House and Senate joint subcommittee studying the Virginia Freedom of Information Act. Since 2000, when the Virginia Freedom of Information Advisory Council was created, he has served as a Senate appointee on that body.

Contents

Foreword

The Weldon Cooper Center for Public Service at the University of Virginia is pleased to publish a completely revised edition of this popular guide, in collaboration with the Local Government Attorneys of Virginia, Inc. (LGA). The guide, first issued in 1996, has been rewritten and expanded to include all of the changes to the act effective July 1, 2006. It explains the Virginia Freedom of Information Act in a clear, readable format of over 100 questions and answers, arranged under six broad categories. Author Roger C. Wiley, a Richmond attorney, is a Virginia Senate appointee to the Virginia Freedom of Information Advisory Council. He has been advising Virginia local governments on legal matters for over 35 years.

This guide could not have been completed without the contributions of many individuals. The LGA's board of directors, led by Newport News City Attorney Stuart E. Katz, enthusiastically endorsed and supported the project. LGA administrative director Sandra H. Wiley served as the guide's editor. Jayne Weber and Dave Borszich of the Weldon Cooper Center for Public Service Publications Department designed the cover and layout. Our appreciation and thanks to them.

The Cooper Center and the LGA welcome feedback from the guide's users. Your comments will help us as we prepare future editions.

John P. Thomas, Director
Weldon Cooper Center for Public Service
University of Virginia

January 2007

Preface

When this guide was first published in 1996, the only readily available explanation of the Virginia Freedom of Information Act was a handbook for reporters published by the Virginia Press Association. The leadership of the Weldon Cooper Center for Public Service at the University of Virginia and the Local Government Attorneys of Virginia, Inc. (LGA) recognized the need for a plain-English explanation of the act written from a local government perspective.

In 1997 a joint subcommittee of the Virginia General Assembly, chaired by Delegate Clifton A. Woodrum of Roanoke, undertook an two-year review of the act that resulted in some fairly extensive changes, effective in July 1999. Those changes created the need for a second edition of this guide, published later that year.

A third edition followed in 2003, incorporating further significant legislative changes, including some to address security concerns after the September 11, 2001 terrorist attacks, one of which, of course, had occurred in Virginia. That edition also highlighted the creation, in 2000, of the Virginia Freedom of Information advisory council.

Now in its sixth year under the able chairmanship of Senator R. Edward Houck of Spotsylvania, the advisory council has matured into the resource for interpreting and encouraging compliance with the act that the General Assembly intended it to be. Most of the credit for the advisory council's success is due to the professional guidance of its executive director, Maria J.K. Everett, and staff attorney, Alan Gernhardt.

In addition to responding to thousands of inquiries about the act, and conducting training sessions for hundreds of state and local officials, the advisory council's staff has produced a growing body of written advisory opinions interpreting and applying the act in specific factual situations.

On occasion I have disagreed with these advisory opinions, but collectively they are both reasoned and reasonable. Like opinions of the attorney general, they are not binding, but I believe that courts will increasingly view them as authoritative interpretations of the act. I have cited a number of these opinions in this fourth edition of the guide, in addition to including some legislative changes and court decisions that have occurred during the past three years.

Over the past several years, the advisory council has begun to perform another, less expected but valuable function—that of reviewing proposed amendments to the Act between sessions of the General Assembly. In some cases the legislature itself

has referred FOIA bills to the council, but as it has become apparent that the council's endorsement makes passage of a change in the act much more likely, other interested parties have begun to seek advisory council review before introducing proposed legislation.

Now approaching forty years old, the act continues to be both a valued guarantee of openness in government and, at times, a source of legitimate frustration for local government officials. For example, some of them have told me of repetitive and abusive requests for records, coming more often from political opponents than from the media, that I think are a valid cause for concern. But I also can cite instances in which record requests have shed needed light on governmental actions, including a well-publicized case in Nelson County, where a polite but determined citizen uncovered very real misuses of public funds and brought about the resignations of the top officials in a state agency.

My hope is that this guide will continue to raise local officials' awareness of their responsibilities to maintain the openness required by the act, but that it also will assist them in applying its provisions to maintain confidentiality when there is a legitimate public purpose in doing so.

I continue to be indebted to the staff of the Weldon Cooper Center, including Director John Thomas, Jeanne Cushman, and Jayne Weber for their interest and support in the publication and distribution of the guide, and to the board of directors of the LGA for their continuing endorsement of it. I am also grateful to my wife, Sandra Hutto Wiley, who was the original inspiration and editor for the guide when she worked at the Weldon Cooper Center, and who continues to be both my best supporter and most astute critic.

Roger C. Wiley
Richmond

January 2007

Introduction

Of all the state laws and regulations with which Virginia's local governments must comply, perhaps none is more misunderstood than the Virginia Freedom of Information Act. In my 25 years of advising local and state public officials, I have certainly answered more questions about this law than any other.

My answers often have produced surprise, then dismay, then usually a grudging acceptance. It is no secret that public officials often resent the restrictions that the act imposes on closed meetings and the obligation they have under the act to produce documents for citizens to inspect. Many of them would argue that, by forcing premature public discussions, the act frustrates their efforts to solve problems. Others would claim that the news media use document requests to "stir up trouble" and fish for items that will cause controversy.

To be sure, the public meeting requirements sometimes seem inconvenient, and on a few occasions I have seen reporters or others make document requests that approached harassment. At least as often, however, public discussion of a sensitive issue has proven less damaging than expected, and some document requests have revealed matters of legitimate public concern.

In reality, the act strikes a fairly reasonable balance between the public's right to know and the legitimate needs of state and local officials to keep some matters confidential. The Virginia General Assembly has established strong general policies that meetings should be open to the public and documents should be subject to inspection. But the legislature has also been receptive to creating exceptions when a valid governmental reason exists to do so.

Understanding these exceptions is the key to having the act achieve its stated purpose without allowing it to damage legitimate governmental interests. My goal in this guide has been to present the act in "plain English," and to answer the most frequently asked questions about how the act applies at the local government level.

This guide is primarily a reference for non-lawyers. Local government attorneys may find, however, that it is a useful tool for explaining the act to their clients. Statutory references and some case citations have been included to aid lawyers in their own interpretation and application of this statute. Readers' comments are welcome, as well as suggestions for significant issues that should be addressed in future editions.

General Information

What is the Virginia Freedom of Information Act?

The act is the primary state law governing citizen access to records of public entities and to their meetings.
ref: Code of Virginia (Code) §§2.2-3700 through 2.2-3714.

How long has the act been in effect?

The General Assembly first adopted the act in 1968. Almost every year the Assembly makes minor amendments. Major revisions occurred in 1989 and 1999. The sections of the act were renumbered as part of a general recodification of Title 2.1 of the Virginia Code in 2001. In 2004, the single section of the act containing more than 85 exclusions of specific types of public records from mandatory disclosure was divided into seven sections grouping those specific exclusions into functional categories.
ref: 1968 Va. Acts, Ch. 479; 1989 Va. Acts, Ch. 358; 1999 Va. Acts, chs. 703 and 726; 2001 Va. Acts, Ch. 844; 2004 Va. Acts, Ch. 690.

What general policies does the act establish?

The act begins with the general principles that all meetings of public bodies should be open to the public and that all public records should be open to citizen inspection. Although the act then creates a number of specific exemptions from these general rules of openness, it requires those exemptions to be construed and applied narrowly.

The act puts the burden on the public body in every instance to demonstrate why a meeting should be closed or a record should be withheld from disclosure. All public meetings and records are presumed open unless an exemption is properly invoked.
ref: Code §2.2-3700(B); City of Danville v. Laird, 223 Va. 271, 288 S.E.2d 429 (1982).

WHO IS COVERED

What local government entities ("public bodies") does the act cover?

- City and town councils
- County boards of supervisors
- Planning commissions and boards of zoning appeals
- School boards and student government entities created or funded by school boards
- Special purpose authorities (water and sewer, industrial development, housing and redevelopment, regional jails, airports)

- Committees or subcommittees of any of the above entities
- Other agencies of local government, including elected constitutional officers
- Any corporation or organization supported wholly or principally by public funds

ref: Code §2.2-3701 (definition of "public body"); Opinions of the Virginia Attorney General (OAG), 1990, p. 8 and 1987-88, p. 23 (committees of governing bodies); 1985-86, p. 103 and 1973-74, p. 451 (boards of zoning appeals); 1984-85, p. 427 (planning commissions).

How does the act apply to locally elected constitutional officers—treasurers, commissioners of the revenue, sheriffs, commonwealth's attorneys, and circuit court clerks?

This has been the source of some confusion. Since the original adoption of the act, opinions of the attorney general and of the Virginia Supreme Court have applied the act's open-records requirements to constitutional officers without specifically considering whether those officers fit the act's definition of a public body. In a 2001 decision, however, the Supreme Court held that a commonwealth's attorney did not have to disclose certain criminal incident information in response to a records request from a defendant's attorney, because the commonwealth's attorney was not a "public body" as defined by the act.

At its 2002 session the Virginia General Assembly addressed that ruling by the Virginia Supreme Court, with an amendment to the "public body" definition in §2.2-3701 stating that constitutional officers shall be considered public bodies for purposes of the records provisions of the act. Constitutional officers thus now have the same obligations to respond to records requests as other custodians of public records, except as otherwise expressly provided by law.

ref: OAG, 1993, p. 217 (applying act to commissioners of revenue); 1984-85, p. 313 (treasurers); 1972-73, p. 192 (circuit court clerks); 1974-75, p. 583 (sheriffs); Associated Tax Serv., Inc. v. Fitzpatrick, 236 Va. 181, 372 S.E.2d 625 (1988) (applying to city treasurer); Tull v. Brown, 255 Va. 177, 494 S.E.2d 855 (1998) (applying act to sheriff's records); Connell v. Kersey, 262 Va. 154, 547 S.E.2d 228 (2001); 2002 Va. Acts, Ch. 393 (amending Code §2.2-3701 to address ruling in Connell).

Is every private charity or other organization that receives funding from a local government subject to the act?

No. The act's definition of a "public body" includes "other organizations supported wholly or principally by public funds." An advisory opinion of the Virginia Freedom of Information Advisory Council (FOI Advisory Council) suggests that "principally supported" implies that if two-thirds of the organization's operating budget comes from public funds, it should be subject to the act. A circuit court decision and an opinion of the attorney general both conclude, however, that public funding is not the sole test. To be a public body, the organization must also be similar to those listed in the definition in Code §2.2-3701 (e.g., a legislative body, board, commission, bureau, or agency) and be charged by law with some public, governmental or quasi-governmental function. If a private organization or business merely receives public funds as payment for services rendered to public bodies in the ordinary course of its business, the source of its revenues alone does not make it subject to the act.

ref: Code §2.2-3701 (definition of "public body"); Virginia Freedom of Information Advisory Council Advisory Opinion (AO) 36-01; AO-28-04; Students for Animals v. Univ. of Virginia, 12 Va. Cir. 247 (City of Richmond 1988).

Who is guaranteed rights under the act?

The act gives any Virginia citizen and any non-resident representative of a newspaper, radio station, or television station that is circulated in or broadcasts in Virginia the rights to have access to public meetings and to inspect and copy public documents. Incarcerated persons are not entitled to assert rights under the act.

ref: Code §§2.2-3700(B); 2.2-3704(A); 2.2-3705.

REQUESTS FROM NON-VIRGINIANS

Do we have to respond to a request for notice of meetings or for documents if the requester doesn't live in Virginia?

A non-Virginian (other than a reporter covering or broadcasting in Virginia) is not entitled to enforce the act's requirements in court. Because it's usually rather easy for a citizen in another state to find a Virginian to make the request, however, you may decide to go ahead and respond to the non-resident, especially if he or she has some obvious connection to your locality, such as owning property there.

ref: Code §§2.2-3700(b); 2.2-3704(A).

NEW OFFICIALS

Do new members of public bodies have to be informed about the act's requirements?

Yes. The administrator or legal counsel of every public body must furnish each member a copy of the act within two weeks after the member's election, reelection, appointment, or reappointment. The act obligates each member to read it and become familiar with its requirements.

ref: Code §2.2-3702.

Several of the newly elected members of our council got together privately to discuss what they planned to do after they take office. Wasn't that a violation of the act?

No. The Virginia Supreme Court has held that the act's open meeting requirements do not apply to members-elect of a public body until they actually take office.

Ref: Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004); AO-27-04 (citizen task force appointed by mayor-elect to advise him before taking office is not subject to open meeting or records requirements).

MEETINGS DEFINED

What gatherings of public bodies constitute "meetings" that must be open to the public?

Any gathering of more than two members of a public body is a meeting, if the members are discussing the public body's business. If the public body has only three or fewer members, then any discussion between two of them is a meeting covered by the act.

All meetings must be open to the public except when the body follows the spetific procedures in the act to conduct a closed meeting for one of the strictly limited reasons that the act allows.

ref: Code §§2.2-3701 (definition of "meeting"); 2.2-3707(A).

Do "work sessions," "retreats," and similar informal sessions have to be open meetings?

Yes. If the public body's business will be discussed, the act applies regardless of the form of the meeting or the label the body may give it.

Meetings must be public, even if no votes will be taken or no decisions will be made.

ref: Code §§2.1-3701 (definition of "meeting"); 2.2-3707; OAG, 1981-82, p. 442; 1977-78, p. 484; 1974-75, p. 579.

Our board members sometimes 'hang around' their meeting room after a meeting is adjourned, continuing to talk informally among themselves and with other people who were present about subjects that came up during the meeting. Is that illegal?

Although this practice may be common, it could get you in trouble. The author is personally aware of one local governing body that was sued for it. Although that case produced no written opinion, an advisory opinion of the FOI Advisory Council concludes that such extended discussions may violate the act if more than two members of the public body are present.

ref: AO-46-01.

What about social events attended by members of a public body?

The act says specifically that the gathering of two or more members of a public body at such functions is not unlawful, as long as no part of the event involves the discussion of public business, and the gathering was not planned for that purpose.

Members of a public body who see one another at social events should be very careful, however, not to discuss any matter that falls within their official responsibilities.
ref: Code §2.2-3701 (definition of "meeting"); OAG, 1984-85 p. 423; 1982-83 p. 721; 1976-77 p. 308.

Can committees or subcommittees meet privately to make recommendations to the public body that created them?

Any committee or subcommittee created by a public body becomes a public body itself, and is subject to the same requirements and restrictions on closed meetings.
ref: Code §2.2-3701 (definition of "public body"); OAG, 1990, p. 8; 1987-88, p. 236; 1981-82, p. 437.

Must staff meetings of local governments or their departments or agencies be open to the public?

Generally not. The act says clearly that gatherings of "employees" of a public body are not "meetings" covered by the act.
ref: Code §2.2-3701 (definition of "meeting").

Do the open meeting requirements apply to a meeting where members of a local public body are present but only to hear a speech or presentation by someone else, and the members do not engage in any discussion among themselves?

Perhaps not. The Virginia Supreme Court has held that a quorum of a county board of supervisors did not violate the act by having an unannounced gathering at the office of the attorney general. The purpose of the gathering was to hear a briefing by staff members of that office about the role of the county in the state environmental permitting process for a solid waste and sewage disposal facility seeking to locate in the county. The Court relied on evidence that the board members conducted no public business during the occasion and had only attended to obtain information and clarification about the respective responsibilities of the state and the county.

In a more recent case, the Supreme Court decided that an unadvertised informal gathering of citizens and city officials on a public street to discuss placement of a stoplight did not become an unlawful meeting when three city council members appeared and listened to the discussion, but the three did not discuss among themselves any action to be taken by the city council.

Despite these rulings, members of a public body attending such meetings or gatherings convened or conducted by someone else should be extremely careful not to engage in any discussion among themselves that could be interpreted as transacting the business of their public body.
ref: Nageotte v. King George County, 223 Va. 259, 288 S.E.2d 423 (1982); Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004).

Do meetings of local political party committees or their caucuses have to be open to the public?

Although they certainly play a role in local government in some parts of Virginia, political parties are not government agencies and are not wholly or principally supported by public funds. Their own rules may require some of their committee meetings or caucuses to be open to the public, but they are not subject to the act.
ref: Code §2.2-3701 (definition of "public body").

CAMERAS & RECORDING

May we prohibit cameras or recording devices at our meetings?

No. The act guarantees any person the right to record, photograph, or film any part of a meeting required to be open to the public.
ref: Code §2.2-3701.

What can we do about radio or television crews disrupting our meetings?

The act allows a public body to adopt reasonable rules about the placement and use of cameras, recorders, and broadcasting equipment to keep them from being too disruptive. You may not, however, exclude them from any part of your meeting except a lawfully convened closed session.
ref: Code §2.2-3707(H).

Are we required to make audio or video tapes of our own meetings?

No. Although most public bodies do tape their meetings, the act does not require local bodies to do that. If you do make such tapes, however, they are subject to disclosure on request, just like any other public record.
ref: Code §2.2-3707(I).

SECRET BALLOTS

May we use secret ballots to elect officers or choose our appointees to other boards or commissions?

No. The act explicitly prohibits any voting by written or secret ballot.
ref: Code §2.2-3710(A); OAG, 1987-88, p. 34; 1985-86, p. 333; 1982-83, p. 723.

MINUTES

When do minutes have to be kept of meetings?

The act requires written minutes for every public meeting of a public body. Work sessions and other informal meetings require minutes, even if no formal action occurs.

The only exception is for committees, subcommittees, and study commissions appointed by local governing bodies or school boards. These do not have to keep minutes unless the committee's membership includes a majority of the members of the governing body or school board.

Until 2004, the form, content, and amount of detail in minutes were left entirely to the public body's discretion, but an amendment to the act has now imposed some minimum requirements. Minutes must now include at least:

1. Date, time and location of the meeting.
2. Members of the public body who are present and absent.
3. A summary of the discussion on each matter proposed, discussed, or decided.
4. A record of any votes taken.

Minutes of public meetings are always subject to disclosure, even while in draft form before the public body approves them.

Minutes are not required for lawfully conducted closed sessions. Specific matters that must be included in the minutes of a public meeting when the body votes to hold a closed session are discussed below.
ref: Code §2.2-3707(I); OAG, 1977-78, p. 485; AO-01-06.

Do we have to post our minutes on our website?

Although public bodies in state government are now required to make their minutes available on the Internet, this requirement does not yet apply to local or regional public bodies. Nevertheless, if a public body has a website, making its meeting minutes available there is an excellent idea.
Ref: Code §2.2-3707.1.

TELEPHONE & ELECTRONIC MEETINGS

May we conduct meetings by conference telephone calls, video-conferencing, or other electronic communications, or allow some people to attend a meeting by those methods?

Public bodies in local government may never meet, or permit individual members of the body to attend a meeting, by telephone or electronic means. In contrast, state-level public bodies, because of the greater geographic distribution of their members, may allow some members to attend by telephone as long as they have a quorum physically present at one location, give 30 days' notice for the meeting, meet certain other conditions to ensure public access, and a keep a full record of the entire meeting.

However, nothing in the act requires staff, consultants, or other nonmember participants to be physically present at the meeting of a local public body. These nonmembers may attend and communicate with the body during the meeting by telephone or electronically. The act also encourages local public bodies to use interactive audio or video methods to expand public participation in their meetings.
ref: Code, §2.2-3708.

Our presiding officer appointed two members of our board to serve as a committee to study a controversial issue. Since there weren't three members of the governing body involved, wasn't it all right for them to discuss the matter by telephone?

No. Ordinarily, two members of a larger public body may discuss public business outside of a public meeting. Once two members are officially designated as a committee, however, that committee becomes a separate public body, bound by all the act's restrictions, including the restrictions on telephone meetings.
ref: Code, §2.2-3701 (definition of "public body"); 2.2-3707(B); OAG, 1980-81, p. 384; AO-20-01; AO-20-04.

Members of our board have been communicating with one another by email, but some people have said this is an illegal meeting. What are they talking about?

There is increasing debate about the propriety of members of public bodies using email to discuss public business. This is a complicated issue, and one about which there is much disagreement.

It has always been permissible for members of public bodies to exchange letters or memorandums about issues that will be coming to the public body for decision. In 1999, responding to an inquiry about the use of email for such purposes, the attorney general concluded that such email messages were public records, but declined to conclude that the sequential exchange of those messages by members of the same public body constituted a meeting.

More recently, The Virginia Supreme Court rejected a lower court finding that a series of email messages about pending business, exchanged by members of a city council over a period of several days, constituted an unlawful electronic "meeting."

The Court was careful to point out, however, that the exchange of emails in that case did not involve "virtually simultaneous interaction" among the council members. The Court strongly suggested, however, that a more nearly simultaneous exchange, using technology such as a "chat room" or "instant messaging" would be an unlawful electronic meeting.

In light of this decision, members of public bodies should use great caution when communicating about public business by email. Any simultaneous or nearly simultaneous exchange of emails, particularly if it produces agreement on some action to be taken by the body, may be subject to challenge. Group emails are fine for handling logistical matters, such as comparing schedules and selecting meeting dates, but they should not be used to avoid public debate on genuine issues or to turn public meetings into merely perfunctory exercises.

ref: OAG, 1999, p. 12; AO-01-01; Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004).

MEETING NOTICES

What are the act's requirements for publishing notice of meetings?

The public body must post a notice at least three days before every meeting in a prominent public location and at the office of the public body's clerk or, if there is no clerk, at the office of its chief administrator. Electronic posting is also encouraged.

The act itself does not require newspaper publication. Many other statutes, however, require newspaper publication of scheduled public hearings or specific proposed actions of local governing bodies, planning commissions, authorities, and other public bodies. As long as the individuals who have requested notice of meetings are notified, the public body has complied with the act.

ref: Code §2.2-3707(C); OAG, 1985-86, p. 250.

Do we have to notify the press and citizens individually of every meeting?

The act requires a public body to give written notice of every meeting to any citizen, including any news media representative, who has made a written request to receive notice. The public body may require these requests to be updated annually. If the requester has an email address, the notices may be sent in that manner unless the requester objects.

ref: Code §2.2-3707(E); OAG, 1971-72, p. 467.

We publish notice of all our meetings in the local newspaper. Isn't that sufficient?

No. The act requires public bodies to give individual notice to those citizens who ask to receive it.

ref: Code §2.2-3707(E); OAG, 1972-73, p. 494; 1971-72, p. 467; 1968-69, p. 261.

Our regular meetings are always held on the same day of every month (e.g., the third Monday). Do we still have to give written notice of these meetings?

Although the act does not expressly address this question, an opinion of the attorney general concludes that annual written notice of such regular meeting dates is enough to comply with the act, as long as the public body also gives written notice of any special meetings.

ref: OAG, 1991, p.5.

If we notify requesting citizens of a meeting, and that meeting convenes as scheduled but is later adjourned to another time and place, do we have to send out new notices?

Opinions of the attorney general conclude that the act does not require new notices to be sent in that situation. Public bodies often use this procedure if attendance at a public hearing proves too large for the meeting place or the time available and the body decides to adjourn and reconvene at a larger place or later time. If time and resources permit, however, it may be desirable to send out new notices.

ref: OAG, 1991, p. 5; 1972-73, p. 489.

EMERGENCY MEETINGS

What do we do about complying with the act if we have to hold an emergency meeting on short notice?

The act defines an emergency as an unforeseen circumstance requiring immediate action that makes it impossible or impracticable to comply with the act's regular notice requirements. In such a situation, you should notify the individuals who have asked to be notified of your meetings at the same time that you notify the members of the public body. This notice must be "reasonable under the circumstances." Obviously, therefore, if you are notifying the members by phone or email because regular mail will not arrive in time, it is not adequate to mail notice to the requesting citizens. You must make a reasonable effort to reach them by phone or email as well.

ref: Code §§2.2-3701 (definition of "emergency") and 2.2-3707(D).

AGENDAS

What other requirements must be met before holding a public meeting?

At least one copy of all "agenda packets and materials distributed to members of a public body" before a meeting must be made available for public inspection at the same time as they are distributed to the members. This requirement covers all supporting documents distributed to members with the agenda "unless exempt." Thus, if the members' agenda packets include copies of a personnel record, written advice of legal counsel, or some other documents exempt from disclosure under the records portion of the act, those documents do not have to be made available to the public. The public body may not, however, claim exemption for the agenda packets under §2.2-3705.7(2) as "working papers of the chief executive."

ref: Code §§2.2-3705.7(2) and 2.2-3707(F).

May we discuss a subject in a public meeting that is not on the agenda distributed before the meeting?

Neither FOIA nor any other general requirement of state law requires a public body to limit its discussion in an open meeting to subjects on a predetermined agenda. Occasionally, however, a local charter or a public body's own bylaws may contain that type of restriction.

ref: Wilson v. City of Salem and Munley v. City of Salem, 55 Va. Cir. 270 (Salem Cir. Ct., 2001).

PUBLIC RIGHT TO SPEAK

Our chairman ruled that members of the public could not speak on a matter that our board discussed at a recent meeting. Didn't that violate the act?

No. The act does not guarantee that the public be allowed to speak on every subject discussed at every public meeting. It only guarantees the public's right to be present.

Many other statutes, however, require public bodies to hold "public hearings" on specific matters, and a body may choose to hold public hearings on other topics. During such advertised public hearings, citizens must, of course, be given a reasonable opportunity to speak. The body or its presiding officer may, however, place reasonable time limits on speakers, and declare speakers out of order if they do not observe those limits or stray from the subject being discussed.

INFORMAL POLLING

May the presiding officer, a manager, or a staff member of a public body poll the members of the body individually, by telephone, email, or in person, to determine their views on a matter?

Yes. The act specifically permits individual conversations or contacts in person or by telephone or email with members of a public body to determine their position on a matter of public business. But because the act requires all public business to be transacted in public meetings, this type of informal poll cannot authorize any official action requiring a vote of the public body. That can only be done at a public meeting.

ref: Code §2.2-3710(b); OAG, 1981-82, p. 434.

Permissible Closed Meetings

CLOSED MEETINGS ALLOWED

When may a public body hold a closed meeting from which media representatives and other citizens are excluded?

A closed meeting, sometimes referred to as an "executive session," may be held only if certain procedures are strictly followed, and only for one of the 26 specific, limited exempt purposes listed in the act.
ref: Code §2.2-3711.

Which exemptions for closed meetings are used most frequently by local public bodies?

At the local government level, permissible closed sessions are convened most often under the statutory exemptions for:

- Certain specific personnel matters.
- Public school student admissions or disciplinary matters, or other discussions that would reveal the contents of individual scholastic records.
- Discussion of the acquisition or disposition of public property, if disclosure would have an adverse financial impact.
- Protection of individual privacy in a personal matter not related to the public business.
- Discussion of a prospective new business or industry, or of expansion of an existing one, when the business or industry has made no previous announcement of its interest.
- Discussion of the negotiation or award of a contract involving the expenditure of public funds, when public discussion would jeopardize the public body's bargaining position.
- Investment of public funds through competition or bargaining, if disclosure would have an adverse financial impact.
- Consultation with legal counsel or briefings by staff about litigation or other specific matters requiring legal advice.
- Discussion of special awards.
- Discussion of negotiating strategy for, or the terms of, a hazardous waste facility siting agreement, if the public body first finds in an open meeting that public discussion would have an adverse impact.

- Briefings by staff or law enforcement officials about terrorist activity or plans to combat terrorism.

ref: Code §2.2-3711(A).

Are closed meetings required for any of these purposes?

No. The act never requires a closed meeting. It allows closed meetings for the stated purposes but leaves it to each public body to determine when a closed meeting is necessary for one or more of those purposes. Other laws, however, may prohibit the discussion of certain subjects in public, for example, student disciplinary matters.

PERSONNEL MATTERS

What is permitted in a closed meeting under the "personnel matters" exemption?

Under that provision a public body may discuss or interview candidates for appointment to office or employment. It may also discuss the assignment, promotion, demotion, performance, salary, disciplining, or resignation of a specific officer, appointee, or employee.
ref: Code §2.2-3711(A)(1).

Who are the "personnel" that a municipal council or county board of supervisors may discuss in closed sessions?

Historically, local public bodies have used the "personnel" exemption to discuss both employees hired and supervised directly by the public body and employees of the locality hired and supervised by the city manager, county administrator, or other administrative officials.

In 1998 and again in 2000, the attorney general issued opinions concluding that a city council could hold closed sessions to discuss only its direct appointees—for example, the city manager, city attorney, or clerk of the council.

These opinions not only ignore the broader view that has prevailed in over 25 years of local practice; they also are inconsistent with the way that "employees of a public body" has always been interpreted in the act's definition of whose records are public records.

Most local public bodies have therefore continued to use closed meetings when necessary to discuss the assignment, promotion, performance, discipline, dismissal, or resignation of any employee within the ultimate control of the public body, whether hired directly or by a subordinate. Discussion of an employee under the ultimate control of some other public body, however, is probably not permitted. For example, the city council may not be allowed to hold a closed meeting to discuss the performance of a school

superintendent or teacher, because those individuals are employees of another public body, the local school board.
ref: Code, §2.2-3711(A)(1); OAG, 1998, p. 9; 2000, p. 19.

May our board of supervisors meet in closed session to talk about which of its members will be chosen as chairman?

The "personnel" exemption allows closed meetings to discuss the appointment of "specific public officers." When a board of supervisors, municipal council, or school board selects its presiding officer (chairman or mayor), it is effectively appointing that person to a new office. Use of closed meetings to discuss that type of appointment has been a widespread local practice.

Nevertheless, a 1999 opinion of the attorney general concludes that a school board's selection of its presiding officer is not a proper topic for a closed session. This, too, seems to be an opinion many localities are choosing to disregard.
ref: Code, §2.2-3711(A)(1); OAG, 1999, p. 15.

SALARY DISCUSSIONS

Our local school board wanted to meet in closed session to discuss the percentage pay raise for teachers they would ask the board of supervisors to fund for the next fiscal year, but their attorney wouldn't let them. Wasn't that a personnel matter?

No. To be exempt from the open meeting requirements, a matter must relate to a specific individual officer or employee. Closed meetings are not allowed for discussions of general salary increases or personnel policies the public body is considering.
ref: Code §2.2-3711(A)(1); OAG, 1979-80, p. 378; 1974-75, p. 570.

STUDENT DISCIPLINE

Are there special limits on the exemption for closed meetings about student disciplinary matters?

Yes. If a school board meets in closed session involving student discipline, the student, the student's parents, and their legal counsel have the right to be present while any witnesses testify or evidence is presented. In addition, if the matter involves interaction between a teacher and a student, and the school board allows the student or the student's parents or attorney to be present, the teacher must also be allowed to attend.
ref: Code §2.2-3711(A)(2).

REAL ESTATE

What limits apply to the exemption for closed meetings about real property?

Previously, the act allowed closed sessions to discuss the "condition," "acquisition," "use," or "disposition" of public property. The 1999 amendments eliminated "condition" and "use" from this exemption. Closed meetings are now permitted only to discuss new acquisitions of property for public purposes, or the disposition of property that is already publicly held, and only if public discussion would adversely affect the bargaining position or negotiating strategy of the public body.
ref: Code, §2.2-3711(A)(3).

LEGAL MATTERS

What is the scope of the "legal matters" closed meeting exemption?

The public body may consult attorneys or staff in closed session about an actual pending lawsuit or one that has been threatened, or when there is a reasonable basis to believe that a suit will be brought by or against a known party. The closed meeting is allowed if open discussion would adversely affect the public body's position in the litigation or negotiations.

A closed meeting is not allowed merely because an attorney is present. But even if there is no actual or probable litigation, the act also permits a closed meeting for the public body to receive its attorney's advice about a specific legal matter.

Nevertheless, the "legal matter" should be one in which the public body has some direct interest. For example, one past opinion of the attorney general concludes that a local school board may not meet in closed session to discuss a proposed annexation. Even though the annexation proposal might be a legal matter, it is not one over which a school board has any jurisdiction.
ref: Code §2.2-3711(A)(7); OAG, 1986-87, p. 31; 1982-83, p. 716; 1980-81, p. 389.

Is it proper to hold a closed meeting for "legal matters" without the public body's attorney?

The wording of the exemption for "legal matters" allows both "briefings by staff or consultants" and "consultation with legal counsel" in closed meetings to discuss actual or probable litigation. This suggests that the public body's attorney does not always have to be present for those discussions. It is logical that other staff members could have occasion to discuss "probable" litigation with the public body, even before legal counsel has been retained for that matter.

Closed session discussions of legal topics other than litigation, however, are limited by §2.2-3711(A)(7) to "specific legal matters requiring the provision of legal advice by the public body's attorney." Such discussions would clearly not be appropriate unless the lawyer was a participant, either in person or by telephone.
ref: Code §2.2-3711(A)(7); AO-7-00.

ANNEXATION & CONSOLIDATION

Can't a city or town council or board of supervisors discuss annexation or consolidation in a closed session?

Yes, but that authority doesn't come from the act itself. A special provision in the state statutes creating the Commission on Local Government says that the act does not apply to meetings of local governing bodies for negotiating annexation, consolidation, city reversion to town status, or other issues that will require the commission's review.
ref: Code §15.2-2907(D).

CONTRACTS

What about discussion of contracts in closed session?

A 1982 opinion of the attorney general concludes that not every subject included in a contract is a legal matter for which a closed session is allowed. A 1992 opinion, however, makes it clear that a public body may meet in closed session for discussions with its attorney or other staff members about its remedies for a breach of an existing contract, or about its strategy for negotiating a pending contract.

At the 2003 session, the General Assembly adopted a separate exemption for discussion of contracts, not tied to the definition of a legal matter. That exemption allows discussion of the award of a public contract for the expenditure of public funds, including interviews with bidders or offerors. It also permits the public body to discuss the terms and scope of a pending contract in a closed session, when open discussion would adversely affect the public body's bargaining position or strategy.

The Virginia Supreme Court recently ruled, however, that this exemption did not permit a closed meeting between a local governing body and an architect who was working under a three-party contract with the governing body and the local school board, to discuss getting the school board to agree to changes in the scope of the architect's work. The Court said that the purpose of the exemption was to permit a public body to discuss its bargaining position vis-à-vis the vendor

in a procurement transaction, which was not the purpose of the discussion in this case.
ref: OAG, 1992, p.1; 1981-82, p. 432; 2003 Va. Acts, ch. 274, adding §2.2-3711(A)(30); White Dog Publishing, Inc. v. Culpeper County Bd. (Va. Sup. Ct., Record No.052333, Sept.15, 2006).

PROTECTING INDIVIDUAL PRIVACY

What sort of matters may be discussed in a closed meeting under the exemption for "protection of the privacy of individuals in personal matters"?

This exemption may be used only to talk about matters unrelated to public business. For example, if the spouse of a member of a public body had a terminal illness, this exemption might be used so that the other members could be informed of that situation without revealing it to the general public.
ref: Code §2.2-3711(A)(4).

PROCEDURE TO CLOSE MEETINGS

What procedure must a public body follow to convene a closed meeting?

The body must first be in a properly convened public meeting. In the public meeting, the body must adopt a motion to go into closed session, by an affirmative vote, recorded in the minutes.
ref: §2.2-3712(A).

How specific does the motion for a closed meeting have to be?

The 1999 revisions attempt to clarify frequently misunderstood requirements for a motion to convene in closed session. The motion must do the following:

1. state the purpose of the closed meeting,
2. identify the subject matter, and
3. refer to the specific statutory exemption that allows the closed meeting.

A motion that does not include all three of these elements or that merely convenes the closed meeting "as permitted by the Freedom of Information Act" does not comply with the law.
ref: Code, §2.2-3712(A).

What are some examples of proper motions?

"I move that the board of supervisors convene in closed session to consider a personnel matter, specifically the appointment of members of the county planning commission, as permitted by Va. Code §2.2-3711(A)(1)."

"I move that the school board hold a closed meeting to review a disciplinary matter concerning a student at Happy Days High School, as allowed by Va. Code §2.2-3711(A)(2)."

"I move that the city council meet in closed session to discuss item 12 on its agenda, the acquisition of a site for a new city library, as allowed by Va. Code §2.2-3711(A)(3), because public discussion at this time would adversely affect the city's negotiations with the property owner."

Do we have to "name names" in these motions?

No. Past court decisions generally indicate that the motion for a closed session does not have to be so specific that it will violate the need for confidentiality that justifies the closed meeting. In some cases, it may not be necessary, for example, to identify the specific person who is the subject of a personnel matter, or the specific property to be acquired or sold.
ref: Code §2.2-3712(A); Marsh v. Richmond Newspapers, Inc., 233 Va. 245, 288 S.E.2d 415 (1982); Nageotte v. King George County, 223 Va. 259, 288 S.E.2d 423 (1982); City of Danville v. Laird, 223 Va. 271, 288 Va. 429 (1982).

Once it is in the closed session, what limits must the public body observe?

The discussion must be strictly limited to the permissible topic identified in the motion to hold the closed meeting. Even other topics that generally are permissible for closed meetings may not be discussed without going back into the public meeting and adopting a new motion.
ref: Code §2.2-3712(C).

VOTING

May the public body take a vote in a closed meeting?

An informal poll of the members taken in a closed meeting is permissible but not binding. No action of the body becomes effective until it is identified and approved by an open vote in a public meeting.
ref: Code §§2.2-3710(A); 2.2-3712(G); AO-24-04 (Dismissal of town treasurer by town manager on day after town council discussed in closed meeting not valid until council reconvened and vote for dismissal).

MINUTES

Does the public body have to keep minutes of closed sessions?

Minutes may be kept for closed meetings, but are not required. If minutes are kept for a lawfully closed meeting, they are exempt from required public inspection under the act.
ref: Code §2.2-3712(H).

RECONVENING IN PUBLIC

What procedure must the public body follow at the conclusion of a lawful closed session?

It must reconvene immediately in public session and adopt a motion or resolution, by a roll call vote. That certification must state that the only matters discussed during the closed session just concluded were those both lawfully exempted from the open meeting requirements and identified in the motion by which the closed session was convened. If any member of the body believes the body has violated the restrictions on what may be discussed in the closed session, and cannot vote for the certification, that member must state his or her reasons in public, and those reasons must be recorded in the minutes of the public meeting.
ref: Code §2.2-3712(D).

May a public body allow anyone other than its members and its attorney into a closed meeting?

Yes. The act allows a public body to have nonmembers present during a closed session, if their presence is necessary or helpful to the public body's discussion of the approved topic for the closed meeting.
ref: Code §2.2-3712(F).

What can be done about a member of a public body who tells the news media what other members said in a closed meeting?

Very little other than "peer pressure." The act does not guarantee secrecy or impose any penalty for revealing what takes place in a closed meeting. Most members of public bodies, however, do honor the confidentiality of such discussions. Severe or frequent violations of that confidentiality certainly can damage the mutual respect and trust among members that the body needs to perform its governmental functions effectively. Sometimes, premature revelation of matters discussed in a closed meeting could result in a serious legal or financial disadvantage to the locality. Local public officials obviously should refrain from such breaches of trust.

Public Records

PUBLIC RECORDS DEFINED

To what public records does the act apply?

The previous definition of "official records" listed specific types of records covered. The 1999 revisions substitute a new definition of "public records." That term now encompasses any compilation of letters, words, or numbers prepared, owned, or possessed by a public body, regardless of its physical form or characteristics or the manner in which it is stored. Written, printed, magnetic, and electronic records, among other forms, are all included if they have been prepared or accumulated in the transaction of public business.
ref: Code §2.2-3701 (definition of "public records").

Does the act also apply to records held by individual members of a public body?

Yes, the definition of public records includes the personal records of an individual member if they have been prepared or held by the member in the transaction of public business. This means that both paper correspondence and email messages about the business of a public body, sent or received by members of the body, are subject to public disclosure. It also means that citizens may, and sometimes do, request access to notes the individual member has taken at meetings or discussions about a particular public issue. While there is generally no requirement that members take such notes, if a member does so, the notes will be subject to public disclosure.
ref: Code §2.2-3701 (definition of "public records"); OAG, 1983-84, p. 437.

Do we have to disclose email messages when we get requests to do so?

The definition of "public records" in the act includes electronic records, so email is subject to the disclosure requirements if it has been created in the transaction of public business and if its content is not covered by one of the act's specific disclosure exemptions. Requests for officials' email messages on a particular topic, or from a specified period of time, are becoming much more common.

Unfortunately, many people are not as careful about what they write in email as they would be in a letter or memo sent by regular mail. Because of that likelihood of discovering more candid comments, requests for disclosure of email messages have become much more frequent. Local officials should be extremely conscious of the possibility that media representatives, political opponents or other citizens may ask to see their email.
ref: Code §2.2-3701 (definition of "public records"); OAG, 1999, p.12.

Can't we just delete our email messages after we send or receive them?

Not always. The act does not specify which public records may be kept and which may be destroyed. That policy is governed by another law, the Virginia Public Records Act. That law directs the Librarian of Virginia to issue regulations and schedules specifying what types of records may be discarded or destroyed and how long other types of records must be kept. There are specific schedules that apply to local government records including both paper and email correspondence. The current retention schedules for local records may be accessed through the Library of Virginia's website at

www.lva.lib.va.us/whatwedo/records/sched_local/index.htm.

Simply put, the library's regulations treat email messages just like paper correspondence or memos. The required retention period depends on the content of the message, not on whether it is on paper or in electronic form. Routine reminders about future events, courtesy copies of other peoples' correspondence, and other messages that really are not the transaction of business may be discarded once you no longer need them. More substantive email messages contemplating, discussing, or carrying out some action by a public body must be retained for periods specified in the schedules, which generally range from 30 days to 10 years, depending on the precise content and the public job or office held by the person keeping the message. The retention requirement may be satisfied by storing the message electronically, or by printing it and keeping the printed copy.
ref: Code §§42.1-76 through 42.1-91 (Va. Public Records Act).

Some members of our governing body use computers provided by the locality; others use their own computers. Their email records may contain both some personal messages and some related to public business. Does that make a difference in deciding whether they must be disclosed on request?

No. An email message that is purely personal does not meet the act's definition of a "public record" because it has not been "prepared" or "owned" "in the transaction of public business." That conclusion is not altered by the fact that the message has been sent or stored on a computer owned by a public body. Conversely, a message that does relate to the transaction of public business is still in the custody of a public official even if he or she sends or stores the message on an individually owned computer. Its status as a public record is unaffected by the ownership of that computer.
ref: Code §2.2-3701 (definition of "public records").

Are records held by a private entity ever subject to the act?

The act ordinarily applies only to public records. If records are collected or maintained by a private contractor acting as agent for a public body, however, they may be subject to the act's requirements.
ref: Code §2.2-3701 (definition of "public records"); AO-41-01.

What official records does the act permit citizens to see?

The act creates a general rule of mandatory disclosure. It permits any Virginia citizen, or representative of news media circulating or broadcasting in Virginia, to inspect or copy official records at any time during the regular office hours of the custodian of the records.
ref: Code §2.2-3704(A).

Aren't there exceptions to the disclosure requirement?

Yes, but any exception to disclosure must be specifically stated, either in the act itself or in some other Virginia or federal statute. The act further requires these exceptions to be construed narrowly. The act currently lists over 100 categories of state and local official records that the public body or official may choose not to disclose.
refs: Code §§2.2-3700(B); 2.2-3705.1 through 2.2-3705.7.

Aren't there exceptions in the act that require certain records to be confidential?

Nothing in the act requires any record to be confidential. There are, however, some other statutes that require confidentiality of certain records. Some major examples of records that the public body ordinarily must not disclose, except by permission of the person who is their subject or under court order, include:

- Tax returns and other tax records that reveal information about the income or business of the subject
- Scholastic and medical records
- Court and probation records involving juveniles
- Records of social service agencies containing information about specific clients

ref: Code §§58.1-3; 22.1-287 et seq.; 16.1-300 et seq.; 63.1-53.

REQUESTING PUBLIC RECORDS

What is the procedure for making a request for records under the act?

The person asking for the records only needs to identify them "with reasonable specificity."
ref: Code §2.2-3704(B).

Does the request have to cite the act?

No. The act clearly states that a specific reference to the act is not required to invoke its requirements. Any request for records must be answered properly and within the time limit set by the act, regardless of whether the requester has mentioned the act.
ref: Code §2.2-3704(B).

May the records custodian ask for the requester's identity?

Yes, the requester may be asked to provide his name and address.
ref: Code §2.2-3704(A).

May the custodian insist that a request for records be put in writing?

The act does not specifically address that question. If the request is for multiple records that will require the custodian to search for them, the act's requirement for reasonable specificity may justify insistence on a written request. There is no justification, however, for a custodian's refusal to honor a clear oral request for a single, readily identifiable document. An opinion of the advisory council has concluded that a public body may not refuse to provide a record or ignore the time limit for its response solely because the request has not been made in writing.
ref: Code §2.2-3704(A) and (B); AO-18-04.

When and how must the custodian respond to a request for records?

The initial response must occur within five work days after the custodian of the records receives the request. The custodian must make one of these four responses:

- Make the records available as requested.
- Advise the requester that the records are being withheld as permitted by the act or other applicable statute. If that is the response, it must also describe generally the volume and subject matter of the withheld records and cite the specific section(s) of the Code that exempt the records from disclosure.
- If only part of a requested record is exempt from disclosure, delete the exempt part, make the rest of the record available, and advise the requester in writing of the subject matter of the deleted part and the specific code section that exempts that part from disclosure.
- Tell the requester in writing that it is not practically possible to identify or collect the requested records within five work days, and explain why. If this response is made within the five work days, the custodian then

gets an additional seven work days to make one of the preceding three responses.

ref: Code, §2.2-3704(B)(1) through (4).

Is there any way to get more time to respond?

If the request is for a particularly large volume of records and meeting the time limit will keep the public body from fulfilling its operating responsibilities, it may petition its local circuit court for more time to respond. Before doing that, however, the custodian must try to reach agreement with the requester for a time extension.

ref: Code §2.2-3704(C).

Suppose we don't have any records of the sort requested. Should we just ignore the request?

The act does not specifically require the public body to tell the requester it does not have the requested record, but common sense and common courtesy would seem to require doing so. Citizens are entitled to be treated fairly and, unless they are being particularly abusive, helpfully by their public officials. If the recipient of the request knows that some other public body may have the record being requested, redirecting the requester to the proper place is simply good governmental practice.

We got a request recently from someone who was obviously just trying to make trouble. Are we allowed to ask the requester what he or she intends to do with the records?

No. The Virginia Supreme Court has ruled that the motive for a request for records is irrelevant. Idle curiosity is sufficient. Even if the requester wants the records for commercial purposes or to use in a political campaign, the public body must make them available. The requester is not obligated to tell the custodian his or her occupation or to explain why the records are being requested.

ref: Associated Tax Serv., Inc. v. Fitzpatrick, 236 Va. 181; 372 S.E.2d 625 (1988).

ALLOWABLE CHARGES

Are we allowed to charge for assembling and copying records?

Yes. The public body may make a reasonable charge to cover its actual cost to access, search for, duplicate, and supply requested records. "Overhead" charges or other fees to cover the public body's general costs of creating and maintaining records are prohibited. Copying or duplicating charges must not exceed the actual cost of those services. Although some public bodies may disagree, an opinion of the FOI Advisory Council concludes that the cost of fringe benefits for the employee searching for and copying the requested records is not an allowable part of the costs to be charged to the requester.

ref: Code §2.2-3704(F); OAG, 1986-87, p. 283; 1983-84, p. 436; AO-05-02.

May we charge for the time of an employee who sits and watches while the requester inspects the records?

Generally not. An opinion of the attorney general concludes that a public body may not make this type of charge unless the custodian has reason to believe that the requester will improperly damage or destroy the records.

ref: OAG, 1989, p. 12.

May we require advance payment for the searching and copying charges?

The requester may always ask for an advance estimate of the charges for complying with his or her request. If the charges are expected to exceed $200, the public body may require the requester to pay the estimated charges in advance, before it processes the request. If the public body does this, the time for its response stops running until the requester responds.

ref: Code §2.2-3704(F).

Do we have to keep furnishing additional records to someone who hasn't paid for previous requests?

No. A 2003 amendment allows public bodies, before processing any new requests, to require requesters to pay any amount that remains unpaid more than 30 days after billing.

ref: §2.2-3704(F).

NONEXISTENT RECORDS

What is required if there is no existing record that answers the requester's question?

The act only requires disclosure of existing records. It does not require any public body to create a new record or report that does not already exist. Many reporters and other citizens make the mistake of asking for "information" about a particular subject, or of submitting a list of questions for the public body to answer. Even if the answers to these questions can be gleaned from existing records, the act does not require the public body to abstract or summarize information out of its records, although sometimes the public body may find it desirable to do so. Only a request for particular documents or other specific existing records triggers the requirement of a response under the act.

ref: Code §2.2-3704(D); OAG, 1991, p. 9; 1983-84, p. 436.

We received a request from a citizen for copies of all records "created in the future" about a particular matter. How long do we have to keep giving him these records?

An attorney general's opinion concludes that because the act only obligates public bodies to furnish existing records, they are not required to honor this type of request for continuing disclosure.
ref: OAG, 1991, p. 7.

DRAFTS

May we refuse to disclose records that are still in draft form?

No. When the act was first adopted, the definition of "official records" subject to disclosure was limited to records of "completed actions or transactions." That language was removed by a 1973 amendment, creating the implication that a document does not have to be completed or finally approved to be subject to disclosure. A 1999 amendment makes it clear that even unapproved drafts of the minutes of a public body must be disclosed on request.
ref: Ch. 333, 1973 Va. Acts, amending former Code §2.1-341 (definition of "public record"); current Code §2.2-3707(I) (draft minutes).

COMPUTER RECORDS

How much are we required to do to retrieve records stored in a computer data base or other electronic format?

Unless computerized records are exempt under some specific provision in the act or some other statute, the public body must make them available on request at a reasonable cost, not to exceed the actual cost of producing them. If an electronic data base contains both exempt and non-exempt information, the public body must make the nonexempt parts available. Sorting out the nonexempt parts of a data base is not considered to be the creation of a new record.

The public body must also produce records that it is required to disclose in any medium that the public body itself uses in the ordinary course of business. For example, the requester may ask the public body to print out the record, or put the record on a diskette, or email the record to the requester, if the public body regularly uses email.

The public body may negotiate with the requester over the terms and conditions of electronic data requests, and may make reasonable charges for sorting data or converting data to other formats. The public body does not have to manipulate data to suit the requester's wishes or produce records in a format that the public body does not regularly use itself.
ref: Code §2.2-3704(G).

RECORDS EXEMPT FROM DISCLOSURE

What types of records does the act exempt from disclosure?

As of July 1, 2006, the act lists over 100 categories of public records that public bodies are not required to disclose. Many of these categories of records do not exist at the local level of government. Some of the most common types of local government records that are exempt from mandatory disclosure under the act include:

- Individual tax returns of persons or entities subject to income, estate, personal property, or business license taxes [§2.2-3705.7(1)].
- Medical records [§2.2-3705.5(1)].
- Scholastic records [§2.2-3705.4(1)].
- Personnel records, unless the subject consents to disclosure [§2.2-3705.1(1)].
- Correspondence and "working papers" of the "mayor or other chief executive" of a political subdivision [§2.2-3705.7(2)].
- Written advice of the legal counsel to the public body, its officers or employees, and other records protected by attorney-client privilege [§2.2-3705.1(2)].
- Opinions, memos, or reports prepared exclusively for use in litigation or an administrative investigation or for discussion in a lawfully convened closed meeting of a public body [§2.2-3705.1(3)].
- Public libraries' records of patrons and the items they borrow [§2.2-3705.7(3)].
- Tests or examinations used to evaluate the skills or performance of students, current or prospective public employees, or applicants for licensing or certification by a public body [§2.2-3705.1(4)].
- Vendors' proprietary computer software, and software developed by or exclusively for particular local governments [§2.2-3705.1(6) and (7)].
- Lists of the registered owners of bonds issued by a public body [§2.2-3705.7(5)].
- Customer account records of any public utility affiliated with a political subdivision [§2.2-3705.7(7)].
- Records showing the amounts of reserves established for the payment of pending claims [§2.2-3705.1(9)].

- Architectural plans, specifications, and tactical security plans for government buildings and facilities [§2.2-3705.2(6)].
- Names, addresses, and phone numbers of persons making complaints of zoning violations [§2.2-3705.3(10)].
- Citizens' email addresses furnished to a public body, if the citizen requests that the address not be disclosed [§2.2-3705.1(4)].
- Records of public assistance and social services furnished to individuals [§2.2-3705.5(4)].
- Records related to a prospective contract, but only until the public body makes a final decision to award or not award the contract. [§2.2-3705.1(12)].
- Records of investigations of employment discrimination complaints [§2.2-3705.3(3)].
- Records related to claims under a public body's insurance policies or self-insurance plans. [§2.2-3705.1(9)].

Aren't people usually entitled to see their own records?

Yes. For example, the act gives present and past employees of public bodies an absolute right to see their own personnel records. Medical patients (except some mental health cases) and authorized physicians may inspect their own or their patients' medical records. Students are guaranteed access to their scholastic records, and taxpayers may always see their own tax returns. But a person who is the subject of a criminal investigation does not have any absolute right under the act to see records compiled for use in that investigation.
ref: Code §§2.2-3705.5(1), 2.2-3705.7(1), 2.2-3706, 58.1.3.

Do personnel records have to be made public if the employee consents?

Yes. As a result of the 1999 revisions, any person over age 18 may waive the confidentiality of his or her personnel records. If the public body has received such a signed waiver, it must then produce that person's personnel records for other requesters, including the news media.
ref: Code §2.2-3705.1(1).

Do we have to show an employee any letters of reference or background investigation reports in his or her personnel files?

No. Although §2.2-3705.1(1) generally guarantees an employee of a public body access to his or her personnel records, §2.2-3806(B), part of the Government Data Collection and Dissemination Practices Act, expressly states that public agencies are not required to disclose recommendations or letters of reference from third parties that are part of a data subject's personnel file. In addition, §2.2-3706(G)(3) provides that law enforcement agencies do not have to disclose records of background investigations of job applicants. These specific provisions override the more general statement in §2.2-3705.1(1).

SALARY DISCLOSURES

Do we have to disclose employee salaries? Aren't those exempt as personnel records?

Even though salary information is a personnel record, specific language in the act requires disclosure of the position, job classification, and salary or pay rate of any state or local public officer or employee who earns more than $10,000 per year. Individual expense allowances and reimbursements must also be disclosed.

Some newspapers make a practice of requesting and publishing a list of the salaries of all employees of their local governments. Such a list is an exception to the general rule that the public body only has to provide existing records. If this information is requested for all of a public body's employees, the public body must provide this information even if a complete list does not already exist.
ref: Code §2.2-3705.8(A); OAG, 1987-88, p. 33; 1978-79, p. 310.

Does that mean we have to tell our employees what their co-workers are being paid?

If an employee of a public body requests this information, he or she has the same right to receive it as any other citizen of Virginia.

WORKING PAPERS

At the local government level, who may assert the "executive" exemption for "correspondence and working papers"?

Although this part of the act refers to the "mayor or other chief executive officer of a political subdivision," in most localities the chief executive is not the mayor or chairman of the board of supervisors. Instead, this exemption typically is asserted by the city or town manager, the county administrator, or comparable official with some other title serving as the chief executive of the locality. An advisory opinion of the FOI Advisory Council concludes that a municipality may claim the exemption for either the mayor or the manager, but not for both. Opinions of the attorney general also conclude that this exemption is available to school superintendents, since local school divisions are considered, at least for this purpose, to be separate political subdivisions.
ref: Code §2.2-3705.7(2); OAG, 1982-83, p. 708 and 1976-77, p. 318 (school superintendents), AO-12-02.

What qualifies as a "working paper"?

A working paper is a record prepared for the chief executive's personal deliberative use. Routine reports generated by subordinate units of the public body aren't working papers merely because a copy is sent to the chief executive, or attached to a letter sent to him. But a report or proposed action that the chief executive may accept or reject can be considered a working paper.

For example, former Governor Mark Warner took the position that budget reduction proposals submitted to his office by individual state agencies were his working papers even though records of the reductions he selected ultimately become public. An advisory opinion of the FOI Advisory Council has reached the opposite conclusion, however, about city departmental budget requests to the city manager.

Once the chief executive distributes a document to the governing body, it can no longer be claimed exempt as a working paper. Similarly, a report from a consultant, even if arguably a working paper when it is prepared and delivered to the chief executive, loses that status and is subject to disclosure once the report is given to the public body or placed on its agenda for action.

ref: Code §§2.2-3705.7(2), 2.2-3705.8(2), 2.2-3705.8(B); OAG, 1982-83 p. 724; 1975-76, p. 415; AO-32-01 (budget requests); AO-50-01 (correspondence).

LAW ENFORCEMENT RECORDS

What law enforcement records must be disclosed? Aren't criminal investigation records exempt?

The 1999 revision gave special attention to law enforcement records. "Criminal incident information" about felonies usually must be disclosed on request. That term includes a general description of the reported crime, including the date and general location of the incident; a description of injuries suffered or property damaged or stolen; and the identity of the investigating officer. This information may be withheld by the law enforcement agency if disclosure is likely to jeopardize an investigation or prosecution, endanger witnesses or investigators, or cause a suspect to flee or destroy evidence.

Law enforcement agencies must also identify adults who have been arrested and the status of the charges. They must not disclose the identity of persons who have furnished information under a promise of anonymity.

They also have the option not to disclose:

- Records relating to criminal investigations, except for the criminal incident information described above, but including witness statements and prosecutors' case files.
- Photographs of adults who have been arrested, but only as long as the release of the photograph may jeopardize any ongoing investigation.
- Reports submitted to police investigators in confidence.
- Records that would identify confidential informants.
- Records identifying individual participants in neighborhood watch programs.
- The identity of victims, witnesses, or undercover officers.
- Prisoner records relating to imprisonment.

ref: Code, §2.2-3706(A)(B)(C)(D)(E) and (F).

What about other non-criminal records of law enforcement agencies?

A few of these agencies' non-criminal records are exempt:

- Information of a personal, medical, or financial nature about identifiable individuals.
- Tactical plans of law enforcement agencies, if disclosure would pose a safety risk.
- Investigative techniques and procedures.
- Records of plans for or resources allocated to undercover operations.
- Background investigations of applicants for law enforcement jobs, or other legally authorized administrative investigations.

All other non-criminal records of law enforcement agencies must be disclosed.

ref: Code §2.2-3706(D) and (G).

Didn't the Virginia Supreme Court say that a 911 dispatcher's tape recording was exempt from disclosure?

In a 1998 case, the Virginia Supreme Court said that a sheriff's E-911 dispatch tape, although an official record under the act, was exempt from disclosure under Code §15.2-1722(A). The 1999 legislative revisions, however, removed the exemption language from that section.

As a result, such dispatch tapes generally must now be disclosed, although the other exemptions described above may allow some parts of a tape to be withheld.

ref: Tull v. Brown, 255 Va. 177 (1998); Code §15.2-1722(A).

Does the act also apply to commonwealth's attorneys?

Yes. In 2001 the Virginia Supreme Court ruled that a commonwealth's attorney, not being a "public body," was not bound by the act's disclosure requirements. At its 2002 session, however, the Virginia General Assembly responded to this decision by specifically designating all constitutional offices as "public bodies" for purposes of the records requirements of the act. In the same bill, the General Assembly added case files and witness statements in criminal investigations and prosecutions to the types of law enforcement records exempt from disclosure under §2.2-3706.

ref: Connell v. Kersey, 267 Va. 154, 547 S.E.2d 228 (2001); Code §§2.2-3701 (definition of "public body"); 2.2-3706(F)(1).

PENALTY FOR VIOLATIONS

What happens if we violate the act? Is it a crime?

The act is not a criminal statute. It gives the local commonwealth's attorney the same right as any other citizen to initiate a civil suit to enforce the act, but does not impose an affirmative duty on him or her to do so.

If the court that hears such a civil suit finds that a member of a public body has willfully and knowingly violated the act's records disclosure or public meeting requirements, the court is required to impose a civil penalty of at least $250 but not more than $1,000 on the member in his or her individual capacity. This means that the penalty must be paid by the member and not from public funds. For a second violation, the penalty must be at least $1,000 and not more than $2,500.

ref: Code §§2.2-3713(A); 2.2-3714; OAG, 1983-84, p. 437; 1975-76, p. 417; R.F.&P. Corp v. Little, 247 Va. 309, 440 S.E.2d 908 (1994).

ATTORNEY'S FEES

Apart from the civil penalties, what is the risk to the public body for a violation of the act?

If the court finds that the public body has violated the act, it must order the public body to pay the reasonable costs and attorney's fees of the citizen who has filed the suit. These can be quite substantial. The court can avoid the costs and attorney's fees only if it finds "special circumstances" that make such an award unjust. The act mentions the public body's reliance on an opinion of the attorney general or a previous court decision that substantially supported the public body's actions as one such special circumstance that can justify a denial of attorney's fees. Reliance on the advice of the public body's own attorney is not mentioned.

ref: Code §2.2-3713(D).

CITIZEN SUITS

How does a citizen bring a suit to enforce the act?

A person denied the rights and privileges guaranteed by the act may seek enforcement by filing a petition for mandamus or injunction. (A mandamus is a court order to make someone start doing something that a law requires; an injunction orders someone to stop doing something prohibited by law.) This petition may be filed in either the general district court

or circuit court of the county or city from which the public body is elected or appointed and in which the denial of rights under the act occurred.

The petition must be accompanied by an affidavit showing good cause to believe that the act has been violated. A single instance of a violation is enough to justify the court's granting an injunction or writ of mandamus and awarding costs and attorney's fees. Unlike in other suits seeking injunctions, a person bringing a suit under the act does not have to show an "irreparable injury." The court still has considerable discretion, however, about whether to grant an injunction against future violations of the act.

In most cases the court must hold the initial hearing on a petition to enforce the act within seven days after it is filed. This time limit does not apply if the petition is filed outside the regular term of a county circuit court in a multi-county circuit, but the petition still must receive priority on the court's docket.

ref: Code §2.2-3713; Hale v. Washington County School Bd., 241 Va. 76, 400 S.E.2d 175 (1991); Marsh v. Richmond Newspapers, Inc., 223 Va. 245, 288 S.E.2d 415 (1982); Nageotte v. King George County, 223 Va. 259, 288 S.E.2d 423 (1982); WTAR Radio-TV Corp. v. City Council, 216 Va. 892, 223 S.E.2d 895 (1976).

Who has the burden of proof in a suit to enforce the act?

The public body has the burden to establish by a "preponderance" of the evidence that the record or closed meeting is exempt. Any failure by the public body or records custodian to follow the act's required procedures is presumed to be a violation. "Preponderance" means that there is more evidence supporting use of the exemption than there is for the opposite conclusion.

ref: Code §2.2-3713(E).

What is the Freedom of Information Advisory Council?

The Virginia Freedom of Information Advisory Council was created by the 2000 session of the General Assembly as an advisory agency in the legislative branch of state government, to encourage compliance with the act. The 12-member council includes legislators, executive branch officials and appointees representing the news media, local governments, and citizen groups. It meets quarterly to hear presentations by its staff, government officials, and members of the public. One of its evolving practices has been the creation of subcommittees or "work groups" to consider amendments to the act that have either been referred to the council by the General Assembly or proposed by other interested individuals or organizations. This process has led to consensus recommendations for a number of useful changes to the act that have been adopted by the General Assembly, and that would have proven very controversial had they been considered by the legislators without having been vetted by the council.

The council's staff conducts training for state and local officials, produces publications about the act, and issues non-binding advisory opinions applying the provisions of the act in specific factual situations. It is not authorized to investigate alleged violations of the act or to serve as the "FOIA police."

Use of the council's services has steadily increased during its six years of operation. Although it issued only 16 written advisory opinions in 2005, the council's staff responded to over 1650 informal inquiries by telephone or email. The largest number of these inquiries came from local and state officials. Private citizens comprised the next largest group, and representatives of the news media the third largest.

How can we contact the FOI Advisory Council to get more information?

Staff may be reached as follows:

Marla J.K. Everett, Executive Director
Alan Gernhardt, Staff Attorney

General Assembly Building, 2nd Floor
910 Capitol Street
Richmond, VA 23219
Telephone 804.225.3056
Toll-free telephone 866.448.4100
email: foiacouncil@leg.state.va.us

The council also has a very useful website at http://dls.state.va.us/foiacouncil.htm. The website contains links to the full

text of the act, an archive of past advisory opinions, information about training sessions on the act, and other useful items. This site receives over 20,000 "hits" per year.

What are some other sources of information about the act?

The Virginia Coalition for Open Government calls itself "a non-profit, non-partisan partnership working for easy access to public records and government meetings." Although anyone can join on payment of modest annual dues, the coalition's membership is primarily made up of current or former media employees.

Local government officials will not agree with everything they read on the coalition's website, found at http://www.opengovva.org. However, that site contains much useful information, including a searchable database containing every Virginia court decision or attorney general's opinion interpreting or applying the act, as well as links to dozens of other state and local government sources.

The following other organizations publish guides to the act comparable to this one, each from the perspective of the organization's own membership:

Virginia Press Association
11529 Nuckols Road
Glen Allen, VA 23059
http://www.vpa.net
804.521.7570

Virginia Municipal League
13 E. Franklin Street
Richmond, VA 23219
http://www.vml.org
804.649.8471

Virginia School Boards Association
2320 Hunter's Way
Charlottesville, VA 22901
http://www.vsba.org
434.295.8722

Virginia Association of Chiefs of Police
1606 Santa Rosa Road, Suite 134
Richmond, VA 23288
http://www.vachiefs.org
804.285.8227