

Electronic Communications:

Special Legal Requirements for Public Records and Meetings

by Lisa Robertson

Some of us remember when push-button telephones and fax machines were new technology. Today's technologies offer an unprecedented number of means by which people may discuss and follow the operations of local government. In this article, I offer information regarding the relationship of electronic communications technology to the means by which the conduct of public business must be recorded.

The Virginia Public Records Act (VPRA).¹

All attorneys struggle to determine whether, and for how long, client records should be preserved and stored. Should tangible files be eliminated if they are converted into electronic files? Should electronic files be moved to external devices or "the cloud"? Legal counsel for public bodies must assist clients with consideration of these questions in accordance with the VPRA. Lack of familiarity with VPRA can lead to public embarrassment or even criminal consequences.² Every elected and appointed public official must be given a copy of the VPRA by legal counsel or a locality's administrator within two weeks of election or appointment, and must become familiar with its requirements.³

The definition of "public record" under the VPRA encompasses e-mail, text messages, voice messages, and any other form of technology that records the discussion or transaction of public business.⁴ VPRA prohibits a public record from being deleted or destroyed prior to expiration of a specifically-designated "retention period."⁵ Retention periods are assigned by the Library of Virginia, according to "schedules."⁶ Each retention schedule covers multiple categories of records. During a retention period, no particular means of storage is

prescribed; however, each public record must remain accessible, in one form or another, throughout its life-cycle. If electronic storage is chosen, records must be converted and migrated as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration.⁷ Even a public body's computer system must be documented: one schedule covers retention of "information technology," including network diagrams, system access records, and system maintenance records.⁸

Public officials with only a passing familiarity with VPRA may make improper choices regarding deletion of e-mails and other electronic records. There persists an incorrect assumption that records created or stored on personal devices, even if such records discuss public business, aren't subject to VPRA.⁹ VPRA requires certain correspondence of city councils and boards of supervisors, and of local administrators, to be *permanently* maintained—regardless of where created or stored.¹⁰ At the expiration of their terms, public officials must deliver public records in their possession to successors.¹¹ Thus, legal counsel for public bodies should be prepared to discuss with clients the answers to questions such as: are officials preserving e-mail and other electronic correspondence as required? If a board member and county administrator correspond with each other via e-mail, which copy will be maintained as the permanent record, and where? Is the public body's IT staff cognizant of VPRA's requirements? Are backup copies of electronically stored records maintained to protect against computer crashes and other disasters?¹² (Consider IRS official Lois Lerner, criticized for claiming to have lost e-mails due to a computer crash).

The Virginia Freedom of Information Act (FOIA).¹³

The FOIA requires public records and public meetings to be open for public viewing.

Electronic Records. When a citizen seeks electronically-stored records, public bodies must produce them in any tangible medium requested.¹⁴ Because of this, regardless of whether stored on public officials' personal or public devices, public records must be maintained in a format that can be accessed, read, converted to other formats, and e-mailed to others throughout VPRA retention periods. When assisting public clients in responding to a FOIA request, before responding on behalf of a client that "the requested records could not be found or do not exist,"¹⁵ legal counsel may want to verify that clients have searched personal and public devices and relevant external storage locations—particularly if the requested records' VPRA retention periods have not expired. If public records are in the custody of a third party for storage, maintenance, or archiving, the public body remains the legal "custodian" under FOIA.¹⁶

Electronic Meetings. FOIA allows any local public body to implement interactive audio and visual means to expand public participation in meetings;¹⁷ however, during those meetings the members of the local public body must themselves be physically assembled.¹⁸ Generally, local public bodies remain prohibited from conducting electronic meetings, except: (1) in limited circumstances, during a state of emergency declared by the governor, an electronic meeting may be conducted without assembling a quorum in one location;¹⁹

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and health, the interaction between federal and state highway safety regulations, and grand larceny thresholds.

The course has been a success. Students have received enthusiastic reviews from their respective organizations, including invitations to present their findings and papers to larger meetings and audiences even after the semester had concluded. Students also had the opportunity to engage with their nonprofit organizations' broader collaborations. Several students have created long-lasting networking connections, resulting in summer fellowships as well as permanent employment.



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or (2) when a formal written policy is in place, subject to strict procedural requirements,²⁰ an individual member may participate remotely, when attendance is not possible due to an emergency personal matter, disability, or medical condition.²¹ If remote participation is authorized for an individual, a quorum must be physically assembled at a central location, and arrangements must be made for the voice of the remote participant to be heard by everyone at the central location.²²

Endnotes:

- 1 Va. Code § 42.1-76 et seq.
- 2 See Va. Code § 42.1-88
- 3 Va. Code § 42.1-76.1 (legal counsel or a public body's administrator must provide the copies)
- 4 Va. Code § 42.1-77.
- 5 Va. Code § 42.1-86.1(A)
- 6 See Va. Code § 42.1-82(B) and see <http://www.lva.virginia.gov/agencies/records/>
- 7 Va. Code § 42.1-85(B)
- 8 See General Schedule 33 (County and Municipal Governments), Information Technology (eff. March 19, 2009)

- 9 See Va. Code § 42.1-77, definition of "public record" (noting that, regardless of physical form or characteristic, recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination).
- 10 See General Schedule GS-19 (County and Municipal Governments), Administrative Records (eff. 8/21/2014)
- 11 Va. Code § 42.1-88
- 12 See Va. Code § 42.1-86
- 13 Va. Code § 2.2-3700 et seq.
- 14 Va. Code § 2.2-3704(G)
- 15 See Va. Code § 2.2-3704(B)(3)
- 16 Va. Code § 2.2-3704(J)
- 17 Va. Code § 2.2-3708(A)
- 18 *Id.*
- 19 Va. Code § 2.2-3708(G)
- 20 Va. Code § 2.2-3708.1(B)
- 21 Va. Code § 2.2-3708.1
- 22 Va. Code § 2.2-3708.1(B)(2) and (B)(3)



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