

The Virginia Freedom of
Information Act

The Virginia Conflict of
Interests Act

Purpose of FOIA

- Ready access to public records.
- Free entry to meetings of public bodies.

All public records and meetings shall be presumed open unless an exemption is properly invoked.

What is a “Meeting?”

“Meeting” includes the formal and informal meetings of public bodies (including work sessions), either physically or by electronic communication means pursuant to §§ 2.2-3708.2 and 2.2-3708.3, of as many as **THREE MEMBERS** (or a quorum, if less than 3) of the public body, wherever held, with or without minutes being taken, and whether or not votes are cast.

Note: A committee of a public body is itself a public body = meetings must be noticed.

What is NOT a “Meeting?” – By Definition

- A gathering of members of a public body (regardless of number) at any place or function where no part of the purpose of such gathering is the discussion or transaction of any public business, and such gathering was not pre-arranged with any purpose of discussing or transacting public business.
- A public forum, candidate appearance, or debate to inform the electorate is not a meeting... unless discussion or transaction of any public business by a quorum of a public body occurs.
- *Gloss v. Wheeler* – Va. Supreme Court opinion

What is NOT a “Meeting?” – Common Examples

- Social events/parties
- Sporting events
- Dinners, banquets, awards ceremonies
- Religious functions/services
- Retirement receptions
- Public forums
- Candidate appearances/debates

(The above are not meetings provided that the purpose is to inform the electorate and not to transact or hold discussions concerning public business, even if the performance of members of the public body is a topic of debate.)

Meeting Requirements – Open and In Person

- All meetings of public bodies shall be open to the public, unless the meeting is subject to an exception that allows for a closed meeting.
- All meetings must be conducted in person where members are **physically assembled** except as provided by §§ 2.2-3708.2 and 2.2-3708.3. This has been amended since COVID to expressly allow electronic meetings without a quorum physically assembled in cases of state or local emergency.

Meeting Requirements – NOTICE and VOTES

Every public body shall give notice of the date, time and location of its meetings and make available a **copy of the agenda**.

Notice must be posted:

- In a prominent, public location where notices are regularly posted; and
- In the office of the clerk of the public body or the chief administrator; and
- On the official government website, if any.

Notice must be provided to anyone who has requested in writing.

Notices must be given at least **THREE WORKING DAYS** in advance.

Votes of a public body must be taken in an open public meeting.

No votes may be taken in closed meeting. Polling only. NO EXCEPTIONS!

Meeting Requirements – Recording and Minutes

Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. Physical access to meeting room is typically mandated.

Minutes must be taken at all **open** meetings, must be in **writing**, and must:

- Include date, time, and location of meeting.
- Include members of public body present and absent.
- Summarize discussion on matters considered (**topic minutes not adequate, but no requirement for verbatim minutes**).
- Record, by member, all votes taken.
- Include motions/certifications for closed meeting.

Meeting Requirements – Emergency Meetings

For special, emergency, or continued meetings, notice **reasonable under the circumstances** must be given to the public contemporaneously with notice to the members of the public body.

Closed Meetings – Common Permissible Purposes

- Personnel matters (§ 2.2-3711(A)(1))
Includes appointments to boards and commissions and interviews for employment as well as for appointed positions
- Real property (acquisition or disposition—disclosure would adversely affect bargaining position) (§ 2.2-3711(A)(3))
- Business and industry development (prospective or expansion where no previous announcement made) (§ 2.2-3711(A)(5))
- Investment of public funds (bargaining is involved and disclosure would adversely affect interest) (§ 2.2-3711(A)(6))
- Consultation with legal counsel (§ 2.2-3711(A)(7) **pending or probable** litigation)
(§ 2.2-3711(A)(8) specific legal matters; advice of counsel)
- Award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors (§ 2.2-3711(A)(29) (where discussion in open session may affect bargaining position)

Meeting Type	Notice	Published	
Regular Meeting	3 days	Official website; prominent public location; at the clerk's office	2.2-3707
Closed Meeting	3 days (on regular meeting agenda)	Part of agenda	2.2-3711
Special Meeting/ Emergency Meeting	Contemporaneously with notice to members.	Official website; prominent public location; at the clerk's office	2.2-3707(E)
Electronic Meeting	3 days or contemporaneously with notice to members if an emergency.	Official website; prominent public location; at the clerk's office	2.2-3708.2 and 2.2-3708.3

Meeting Type	Notice	Published	Code
Zoning ordinance - public hearing	Twice in newspaper (Not more than 28 days prior to hearing and not less than 7 days)	Newspaper, official website; prominent public location; at the clerk's office	15.2-2204
Workshop	3 days	Official website; prominent public location; at the clerk's office	2.2-3707
Committee Meeting	3 days	Official website; prominent public location; at the clerk's office	2.2-3707

Public Records

Public records are **OPEN** to the public and must be produced upon proper request, **unless an exception applies**.

Parties entitled to public records in Virginia:

- Citizens of the Commonwealth.
- Newspapers and magazines with circulation in the Commonwealth.
- Radio and television stations broadcasting in or into the Commonwealth.

What is a Public Record?

Includes ALL Documents

- All writings and recordings in the possession of a public body (email, texts, social media posts, charts, etc.).
- No matter the form or official status.

Does NOT Include Answers to Questions (documents only).

Note: An irony of FOIA is that the Freedom of Information Act does not entitle a citizen to info... only meetings & documents.

Common Exclusions

- Personnel records regarding specific individual (personnel file)
- Attorney-client privileged information
- Records compiled for litigation (work product)
- Records compiled for closed meeting
- Records relating to exempt purposes (contracts, bargaining)
- Personal information (account numbers, addresses, email addresses)
- Public safety records and information about systems
- Public utility account information
- Local parks and recreation information relating to minors
- **Confidential working papers and correspondence of local government manager or administrator (not Mayor, Chair or member of public body)**

When Is a FOIA Request Made?

A request for public records must identify the requested records with **reasonable specificity**.

The request does NOT have to:

- Be in writing, or
- Make reference to the Freedom of Information Act

A requester has the right to either inspect the document or receive a copy, or both, **at their election**. Requester may specify a particular format, if it is one public body uses.

Timeline for Responding to FOIA Requests

5 work days to respond

- Produce
- Entirely withheld
- Provide in part, withhold in part
- Records not found or do not exist
- Notice of extension

7 work day extension

- Only if not practicably possible to respond in the initial 5 days and reasons must be given.

Petition the Court

- Extraordinary volume requested
- Extraordinarily lengthy search
- **And**, responding to the request will keep public body from meeting its operational responsibilities.

Violations of the Act

Violation willfully and knowingly made

- The court will impose a civil penalty between \$500 and \$2,000.
- The court may also issue a writ of mandamus or provide injunctive relief.

Second or subsequent violation

- The court will impose a civil penalty between \$2,000 and \$5,000.

Destroying or Altering Records

- The court may impose a civil penalty up to \$100 per record.

Certification of a Closed Meeting Not in Compliance with FOIA

- The court may impose a civil penalty of up to \$1,000.

Penalties imposed against individual members of the public body (i.e., you).

Virginia Conflict of Interests Act (COIA)

Generally

This presentation is general in nature.

This presentation is NOT a substitution for reading the Act and receiving advice from your attorney or Commonwealth's Attorney or COIA Council.

This presentation is not a substitute for advice on your specific facts.

Consult the COIA Council website: <http://ethics.dls.virginia.gov>.

- The Virginia State and Local Government Conflict of Interests Act.
- Helpful opinions.

COIA is the one and only body of law on conflicts in Virginia. 2.2-3100

Generally – Personal Interest

Most prohibitions and requirements regarding involvement in transactions (votes) and in contracts center around whether there is a “**personal interest**” in the transaction or contract.

Definitions – “Personal Interest”

Financial benefit or liability accruing to an officer or employee or a member of his immediate family by virtue of:

- Ownership if the interest exceeds three percent of the total equity of the business, or would result.
- Annual income that exceeds or is reasonably anticipated to exceed \$5,000 from ownership in real or personal property or a business.
- An option to buy real or personal property, or to buy into a business, if the purchase would result in ownership of property valued in excess of \$5,000, or exceed three percent of value of the business.
- Salary, other compensation, fringe benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually.
- Ownership of real or personal property if the interest exceeds \$5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property.
- Personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the total equity of the business.

Definitions – “Immediate Family”

"Immediate family" means (i) a spouse and (ii) any other person who resides in the same household as the officer or employee and who is a dependent of the officer or employee.

Note: This definition differs from the common understanding of immediate family: for example, adult children living on their own are not “immediate family.” Your adult sibling is not your “immediate family.”

Definitions – “Transaction”

“Transaction” means any matter considered by any governmental or advisory agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated.

Includes votes but also consideration beforehand if official action may be “contemplated.”

What to Do

- Conflict and no exception
 - Official action prohibited (discussion and vote).
 - **Disclosure** of the conflict is required.
- Conflict but exception for large groups
 - Affects the public generally – no further action required. (Ex. tax rate, major public works projects, most rezonings unless your land.)
 - Business, profession, occupation, or industry groups of 3 or more - with a **declaration** that you can fully, fairly and in the public interest participate in the vote. Declaration must be made either in full in the minutes or in full in writing with clerk and referenced in minutes.

Gifts

- Gifts valued in excess of \$100 are prohibited.
- The \$100 limit is to be adjusted every 5 years.
- Aggregation applies to gifts from the same party.
- No aggregation when each gift is less than \$20.
- Locality may adopt an ordinance regulating gifts (§ 2.2-3104.2).
- Does not apply to gifts from family members and friends other than lobbyist or someone seeking a contract with the locality.

Gifts – Common Exclusions

- Tickets, admissions, coupons, passes if not actually used.
 - Honorary degrees.
 - Athletic, merit, need based scholarships.
 - Campaign contributions already disclosed due to another Act.
 - Gifts related to the recipient's private profession or public service.
 - Travel paid for by the federal government or already disclosed due to another Act.
 - Food or beverages while attending event in performance of official duties.
- Food, beverages, admissions at event when recipient is a featured speaker or lecturer.
 - Plaques, mementos, trophies when unsolicited.
 - Travel for official duties.
 - Devise or inheritance.
 - Gifts less than \$20 in value.
 - Attendance at reception where food can be conveniently consumed while standing and walking.
 - Door prizes - raffles

Violations

- Knowingly violating any part of the Act constitutes a **Class 1 misdemeanor**. (Certain violations constitute **Class 3 misdemeanor** for local officers).
- Knowing and intentional misstatement on the Statement of Economic Interests (Long Form) is a **Class 5 Felony!**
- Above violations of the Act constitute **malfeasance in office**.
- Contracts or purchases made in violation of the Act may be declared void and rescinded by the governing body.
- Forfeiture of monies or profits by transactions in violation of the Act.

What if You Think You Have a Conflict?

Ask for a **written opinion** of the **Commonwealth's Attorney** or the **Conflicts of Interests and Ethics Advisory Council**.

Virginia Code § 2.2-3121 provides that no officer or employee shall be prosecuted if their actions were made in good faith reliance upon the written opinion issued by either after a full disclosure of the facts.

Advice of local government attorney is evidence of good faith and can be introduced in evidence, to either support a defense of lack of willfulness or reduce the fine. However, it is not a shield from prosecution.

Training

§ 2.2-3132 was amended in 2019 to require all local elected officials to take training on the provisions of the State and Local Government Conflict of Interests Act **within 2 months of assuming office and at least once every two years.**

The COIA Advisory Council may provide such training by online means. Check out the COIA Advisory Council website – home/index page – for details.