

Virginia Freedom of Information Act (FOIA)

Purpose of FOIA

- “Our government belongs to the people it serves. By extension information retained by governmental entities likewise belongs to the people subject to legislatively mandated exceptions.... This is the foundation upon which the Virginia Freedom of Information Act (“VFOIA”) rests.” *Hawkins v. Town of South Hill*, October 20, 2022.

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, 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.

- Formal or informal (including work sessions),
- Sitting physically or by electronic communication means,
- Three or more members or a quorum.

Note: A committee of a public body is itself a public body. Thus, for example, if 2 of 3 committee members of the governing body or planning commission gather, this is a “meeting” since 2 of 3 is a quorum.

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.

What is NOT a “Meeting?” – Common Examples

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

What is NOT a “Meeting?” – Forums and Debates

Va. Code § 2.2-3701: Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) where no part of the purpose of or of such gathering is the discussion of public business or (b) at a **public forum, candidate appearance, or debate**, the **purpose of which is to inform** the electorate and **not to transact public business even though public business may be a topic of discussion or 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.
- Some exceptions permitted: Continuity of Government Ordinance on temporary basis; recent amendment permits meetings during declared local emergency if unsafe to assemble

Meeting Requirements – Remote Participation

Virginia Code § 2.2-3708.3 allows remote participation by individual members if the public body has adopted a **policy allowing remote participation**.

1. Disability or medical condition that prevents physical attendance;
2. Medical condition of a family member that requires the member to provide care;
3. Principal residence is more than 60 miles from the meeting location; or
4. A personal matter.
 - A. Must identify the personal matter with specificity;
 - B. Can only miss two meetings or 25% per year, whichever is greater.

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.
- Provided to anyone who has requested in writing.

Notice 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. 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.

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.
- Record, by member, all votes taken.
- 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.

Meeting Requirements – Electronic Meetings

Virginia Code § 2.2-3708.2 requires:

- Public notice using the best available method – must be contemporaneous with notice to members;
- Public access through electronic communication means; and
- Minutes must include the nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held.

Only applies during the state of emergency.

Some public bodies can meet virtually even if there is no state of emergency (does not include governing bodies, local school boards, planning commissions, architectural review boards, zoning appeals boards, and boards with the authority to deny, revoke, or suspend a professional or occupational license).

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) litigation)
(§ 2.2-3711(A)(8) specific legal matters)
- 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))

Closed Meetings – The Motion

The motion must include **three items**:

- The applicable FOIA exemption citation from Va. Code (incl. subsection); and
- What part of the exemption applies – the purpose (words from Act); and
- The **subject** to be discussed.

Note: The FOIA statute gives you the first two of the three.

The third (the **subject**) must be something **more** than what's in the statute, but need not be specific enough to negate the reason for the closed session in the first place.

Closed Meetings – The Motion

Examples of closed session motion's **three items**:

- The applicable exemption cite (Va. Code sec. 2.2-3711(A)(8)).
- What part of the exemption applies – the purpose (“to receive advice of legal counsel”).
- The **subject** to be discussed (“regarding case X v. Y” or “regarding the X case,” or perhaps “regarding a specific pending CUP case” if concerned about public disclosure of the specific case name. Another example: “regarding a specific town employee” so as to not identify the specific person by name).

Closed Meetings - Certification

Following a closed meeting, the public body must immediately reconvene into open meeting and take a roll call or other recorded vote **certifying** that to the best of each member's knowledge:

- Only public business matters lawfully exempted from open meeting requirements under the Act were heard, discussed, or considered in the meeting by the public body; and,
- Only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed, or considered in the meeting by the public body.
- **No action was taken during closed meeting.**
- **Remember: no action can be taken in closed meeting (other than nonbinding polling of members "straw vote" only open session votes are proper and binding)**

Closed Meetings - Protocols

A public body may permit **nonmembers** to attend a closed meeting if such persons are deemed necessary or if their presence will aid the public body in its consideration of a topic that is the subject of the closed meeting.

Materials compiled exclusively for use in closed meeting may remain confidential and exempt from FOIA. (§ 2.2-3705.1(5))

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.
- No matter the form or official status.

Exceptions to Disclosure

There are at least **136 exceptions** under FOIA that permit a public entity or body to withhold documents.

Most exceptions give the public entity or body the ability to EITHER:

1. DENY producing the records; or
2. DISCLOSE the records in the discretion of the public body, UNLESS disclosure is prohibited by law.

Categories of Exceptions

Exclusions of general applicability (§ 2.2-3705.1)

Public safety records (§ 2.2-3705.2)

Administrative investigations (§ 2.2-3705.3)

Health and social service records (§ 2.2-3705.5)

Proprietary records and trade secrets (§ 2.2-3705.6)

Miscellaneous exclusions (§ 2.2-3705.7)

Law Enforcement Records (§ 2.2-3706)

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**.

How Do You Respond to a Request?

5 Days - 5 main responses

1. Provide the records in their entirety.
2. Withhold the records in their entirety.
3. Provide in part, withhold in part (including redaction).
4. Records could not be found or do not exist.
5. Invoke the 7-day extension or request a longer extension (court or by agreement).

How Do You Respond to a Request?

- All responses must be made **in writing**.
- **Withheld** records - in whole or in part
 - identify the volume and subject matter of withheld records
 - cite the exception (the Code section) relied upon to withhold the records.
- Portions excluded from disclosure may be **redacted**.
- **Extension**
 - entitled to seven (7) days
 - the public body must explain why it is not practically possible to respond within the timeframe required by FOIA
 - additional time may be granted by a petition to the court

How Do You Respond to a Request?

All FOIA requests should be handled by the **FOIA Compliance Officer**

Public Bodies shall have a FOIA Compliance Officer:

- Must be trained at least once during each consecutive period of two calendar years commencing on date of last training session.
- Contact Information For FOIA Compliance Officer must be provided to FOIA Council.
- Public may make comments on quality of assistance provided by FOIA Compliance Officer.

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.

Cost of Production - Reimbursement

- **Reasonable charges**
 - Actual cost in accessing, duplicating, supplying, or searching for the requested records
 - Not legal fees
 - Prior charges must be paid
- **Likely to exceed \$200** (estimate)
 - Contact the requester (this stops the clock)
 - May require payment in advance
 - If the actual cost differs, refund balance or bill for additional costs
- *The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within **30 days** of sending the cost estimate, the request shall be deemed to be withdrawn.*

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

Violations of the Act – Mitigating Factors

No shield from civil penalty is available, but mitigating factors may include:

- Reliance on opinions of the Attorney General
- Reliance on court cases
- Freedom of Information Advisory Council published opinions

Training for Local Officials

§ 2.2-3704.3 requires all local elected officials, constitutional officers and IDA or EDA directors and members to take training on the provisions of FOIA **within 2 months of assuming office and at least once every two years.**

Freedom of Information Act Advisory Council offers numerous online options and live courses to satisfy training requirement

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.

Purpose

General Assembly sought to:

- Ensure all levels of government remain untainted by corruption by prohibiting involvement of legislative members in certain activities, contracts or votes wherein their judgment would be clouded by personal interests. No “personal interests” in a “transaction.”
- Establish a common body of law on the subject of conflicts of interests for local and state officers or employees throughout the Commonwealth (Virginia Code § 2.2-3100).
- Promote transparency through disclosure of certain types of interests by elected and some appointed officials, annually and before certain votes.

Prohibited Conduct - Acceptance of Money or Things of Value

No officer or employee may solicit, offer, or accept consideration:

- for **performing services** that are within the scope of his official duties;
- for obtaining **employment, appointment, or promotion of any person** with any governmental or advisory agency; or
- for using his public position to **obtain a contract** with any governmental or advisory agency for any person or business.

Va. Code § 2.2-3103(1-3).

Prohibited Conduct – Confidential Information

No officer or employee may use for his own economic benefit or that of another party **confidential information** that he has learned because of his public position if that information is not available to the public. Va. Code § 2.2-3103(4).

Prohibited Conduct - Influence

No officer or employee may:

- “[a]ccept any money, loan, gift, favor, service, or business or professional opportunity that reasonably **tends to influence** him in the performance of his official duties.” Va. Code § 2.2-3103(5).
 - Does not apply to political contributions that are actually used for campaign or constituent services purposes and reported as required by the Campaign Finance Disclosure Act of 2006 (Va. Code § 24.2-945 et seq.).
- **accept any business or professional opportunity** if he knows that there is a reasonable likelihood that the opportunity is being afforded to him to influence him in the performance of his official duties, regardless of whether the opportunity actually does influence him in the performance of those duties. Va. Code § 2.2-3103(6).

Prohibited Conduct – Gifts and Retaliation

No officer or employee may:

- Accept gifts from people who have interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality;
- Accept so many gifts as to give the appearance of the use of his public office for private gain; or
- Use his public position to retaliate against any person for expressing views on matters of public concern or exercising rights protected by law.

Va. Code § 2.2-3103(8, 9, and 10).

Gifts

- Gifts valued in excess of \$100, individually or in the aggregate, are prohibited, if they are from lobbyists, lobbyist's principals, or anyone seeking a contract with the public body.
- Gifts with a value of less than \$20 are not subject to aggregation.

Gifts - Exceptions

- Gifts of food and beverages, entertainment, or the cost of admission while in attendance at a widely attended event and associated with the event.
- Gifts provided on the basis of a personal friendship.
 - Factors to consider: (i) the circumstances under which the gift was offered; (ii) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (iii) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (iv) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in § 2.2-3117 or 30-111.
- Gifts of travel if pre-approved.
- Gifts that are returned or paid for.

Gifts – 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

Gifts - Summation

- No public official or employee may accept a gift that has the appearance of affecting the officer's or employee's performance of his duties.
- No gifts valued over \$100 may be accepted from a lobbyist, lobbyist's principal, or locality contractor, unless the exceptions above apply.
- Gifts valued over \$50 (singly and in the aggregate and not from a relative or personal friend) must be disclosed.

Generally – Personal Interest

No person elected or appointed as a member of the governing body of a county, city or town shall have:

- A personal interest in a contract with his city or town or with certain other government agencies (§ 2.2-3107(A))
- A personal interest in any matter considered by his locality. (§ 2.2-3101)

Personal Interest in a Transaction

A personal interest exists when an officer or employee or immediate family member has a personal interest in property, or a business and such property or business is:

1. The subject of the transaction.
2. May realize a reasonable foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.

Definitions – “Personal Interest”

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

- (i) **ownership** in a business if the ownership interest **exceeds three percent** of the total equity of the business;
- (ii) annual **income that exceeds**, or may reasonably be anticipated to exceed, **\$5,000** from ownership in real or personal property or a business;
- (iii) **salary, other compensation, fringe benefits, or benefits** from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, **\$5,000** annually;

Definitions – “Personal Interest”

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

- (iv) **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;
- (v) **personal liability incurred or assumed on behalf of a business** if the liability exceeds three percent of the asset value of the business; or
- (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of clause (i) or (iv).

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.”

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.
§ 2.2-3101.

What to Do

- If conflict exists and there is no exception, then:
 - **Disclosure** of the conflict is required.
 - Cannot discuss the transaction, participate in closed meetings, or vote on the transaction.
- Exceptions:
 - Affects the public generally. (Ex. Raising taxes)
 - Member of a group of three or more affected by the transaction, and makes a Declaration:
 - (i) the transaction involved, (ii) the **nature of the officer's or employee's personal interest affected by the transaction**, (iii) that he is a member of a business, profession, occupation, or group the members of which are affected by the transaction, and (iv) that he is **able to participate in the transaction fairly, objectively, and in the public interest**.
 - Declaration must be made either in full in the minutes or in full in writing with clerk and referenced in minutes and must be repeated at each meeting in which it is discussed.

The Quorum Exception

How do we ever get a majority vote if many members disqualify themselves from voting pursuant to COIA?

- The “Savings Clause” of §2.2-3112 (C) or (D) allows the remaining members of a body to constitute a quorum to take action if disqualification under the Act would result in fewer than the number of members required to act.
- There must be an actual **disqualification under the Act** and not a mere absence or even recusal for some other reason.

Disclosure Forms (§ 2.2-3115)

Members of every governing body, school boards of counties and cities (and **towns if over 3,500 population**), and executive directors and members of IDAs/EDAs must file the Statement of Economic Interests form specified on website: ethics.dls.virginia.gov

- Must file as a condition of assuming office
- Thereafter, must file annually on or before February 1—and no earlier than January 1

Disclosure Forms (§ 2.2-3115)

Other local officials are required to file the Real Estate Disclosure (counties, cities and in **towns if over 3500 pop.**) per § 2.2-3115 (G):

- Planning commission members
- Members of boards of zoning appeals
- Real estate assessors
- County administrators and county managers
- City and town managers
- Executive officers

What Must Be Disclosed?

- Liabilities
- Annual salary and wages
- Interests in real estate/other assets in excess of \$5,000
- Payments for services of more than \$100 in the past year for attending certain talks, meetings, and conferences
- Compensation in excess of \$1,000 for representation of any business before any state governmental agency
- Gifts or entertainment with a value in excess of \$50

Other Disclosure Requirements

- Virginia Code § 15.2-852 - requiring disclosures of interests in land use proceedings by members of boards of supervisors, planning commissions, and boards of zoning appeals in localities operating under the urban county executive form of government
- Virginia Code § 15.2-2289 - authorizing localities to require disclosures of interests by applicants for special exceptions or special use permits
- Virginia Code § 15.2-2287 - authorizing localities to require an oath by petitioners in zoning matters regarding property interests of members of local planning commission or governing body

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

Virginia Code § 2.2-3132: Requires all local **elected** officials and the executive director and members of Industrial Development Authorities or Economic Development Authorities 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.

Questions?

Thank you for your time!

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