
IV. Virginia Freedom of Information Act (FOIA) and Virginia Public Records Act (PRA)

A. Virginia FOIA and PRA

The VSB and its boards, committees, conferences, sections, employees, and volunteers are subject to both the:

1. Virginia Freedom of Information Act, Va. Code § 2.2-3700, et seq. and
2. Virginia Public Records Act, Va. Code §§ 42.1-76 - 42.1-91.

FOIA ensures Virginians access to both:

- (1) **public records** in the custody of a public body, its officers, and employees and
- (2) **meetings of public bodies, wherein public business is conducted.**

The Public Records Act (PRA) governs how long a government entity must retain certain records.

RECORDS

Records are broadly defined under both FOIA and the PRA to include all recorded information, whatever the form, prepared or documenting public business.

FOIA — all writings and recordings prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business. Va. Code § 2.2-3701.

Examples include but are not limited to **e-mails, handwritten notes, typewritten documents, electronic files, audio or video recordings, CDs, emails, photographs, or any other written or recorded media.**

Minutes of meetings of public bodies.

Records include **all drafts** and final versions.

PRA — recorded information, regardless of physical form, that documents a transaction or activity by or with any public officer, agency, or employee of an agency.

The 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 of whether the recording is a public record.

Under FOIA, all public records are **open to the public**, unless a specific exemption in law allows the record to be withheld.

FOIA records exemptions include personnel exemptions, the attorney-client privilege, attorney-client work product, and personal contact information, all as defined and limited at Va. Code § 2.2-3705.1.

The Rules of Court, Part Six, Section IV, Paragraphs 10 and 13-30 are treated as exemptions to FOIA.

Paragraph 10-2.E. provides that the records of the Ethics Committee, including Committee deliberations, memoranda, correspondence, and work product shall be confidential and privileged and will not be provided to anyone absent a court order.

Paragraph 10-5.C. provides that communications between Ethics Counsel and members requesting advice are confidential. Likewise, Paragraph 13-30.A. protects disciplinary records as follows:

13-30. A. Confidential Matters.

1. Bar complaints, unless introduced at a public hearing or incorporated in a Charge of Misconduct, when the matter is placed on the public docket, or a Certification.
2. Bar investigations, except Reports of Investigation admitted as exhibits at a public hearing.
3. Impairment proceedings, except the final orders, which are public.
4. Notes, memoranda, work product, research of Bar Counsel.
5. Records, communications, and information protected by RPC 1.6.
6. Subcommittee records and proceedings, except determinations imposing public discipline.
7. Deliberations and working papers of the District Committees, Disciplinary Board, and three-judge Circuit Courts.

13-30. K. Records of the Disciplinary System.

Requests for Information/Records

If you receive any request for information or records in connection with your work with the VSB, please contact your committee, conference, or section liaison. The VSB must timely, within five business days, respond to any request for production, including citing any appropriate exemption and/or producing the non-exempt records.

Retention of Records

- Any records you receive from the VSB are duplicates unless you have taken substantive notes and have documents that should be included as part of the work product of the file.
- If you send an e-mail that relates to the transaction of section business, please either copy or forward to your liaison. Once sent to your liaison, you do not have to preserve it.
- If you create a record outside of what is provided to you by the VSB, please scan or copy it and send it to your liaison.
- Once the VSB liaison is in possession of any records you have created or obtained outside of what the VSB provided to you, you may destroy your case file.
- Try not to commingle personal and official e-mails. Private e-mails do not need to be retained; e-mails relating to the transaction of public business do. When sending e-mails or otherwise acting on behalf of the VSB, please be mindful of the fact that you are creating a public record.
- If you have any questions, please do not hesitate to call your liaison.

MEETINGS

FOIA requires that all public bodies:

- post notice of meetings at least three working days in advance of the meeting;
- ensure the meeting is open to the public; and
- take and preserve minutes.

A meeting is defined as three or more members of the public body, or a quorum if the public body is less than three members, where public business is transacted or discussed, whether or not minutes or votes are taken. To avoid an accidental electronic meeting, please do not e-mail more than one other member about VSB business, and **please do not hit reply all** if other members of the committee are copied on the e-mail. Please use the “bcc” (blind carbon copy) option when emailing a group. For a helpful discussion about this topic and other FOIA questions, please see the following publications by the Virginia FOIA Council: *A Guide to the Virginia Freedom of Information Act for Members of Boards, Councils, Commissions, and other Deliberative Public Bodies* and *E-Mail: Use, Access & Retention*.

B. A Guide to the Freedom of Information Act for Members of Boards, Councils, Commissions, and other Deliberative Public Bodies

Prepared by the Virginia Freedom of Information Advisory Council

POLICY OF FOIA

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

MEETING REQUIREMENTS

What is considered a MEETING under FOIA?

ANY gathering, including work sessions, of the constituent membership, sitting (or through telephonic or video equipment pursuant to § 2.2-3708 or § 2.2-3708.1) as:

-
- the board, or
 - an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership, WHEREVER the gathering is held; **REGARDLESS OF WHETHER minutes are taken OR votes are cast.**

NOTE: This requirement also applies to ANY meeting, including work sessions, of any subgroup of the board, regardless how subgroup is designated (i.e. subcommittee, task force, workgroup, etc.).

WHAT is NOT a MEETING?

- The gathering of employees; or
- The gathering or attendance of two or more board/council members at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business; OR a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to discuss or transact public business.

OTHER FOIA PROVISIONS

MINUTES: Minutes **ARE REQUIRED** for any meeting of the board/subgroup of the board.

VOTING: **NO secret or written ballots are ever allowed.**

POLLING: You **MAY** contact individual members **separately (one-on-one)** to ascertain their positions by phone, letter or email.

REMEMBER: This exemption **CANNOT** be used in lieu of a meeting. **REMEMBER ALSO:** If you choose to use email to poll, you are creating a public record!

CLOSED MEETINGS: Allowed **ONLY** as specifically authorized by FOIA or other law and **REQUIRES** a motion stating the purpose, the subject *and* Code cite. [See § 2.2-3711 of FOIA for allowable purposes for closed meetings.]

E-MEETINGS: Are allowed for state public bodies under heightened procedural and reporting requirements (i.e. quorum must be physically assembled in one location, remote meeting locations must be open to the public, etc.). For all public bodies, limited individual participation by electronic means is allowed under certain circumstances (emergency or personal matter, medical reason, or distance in the case of regional public bodies). [See §§ 2.2-3708 and 2.2-3708.1 of FOIA.]

E-MAIL AND MEETINGS: The VA Supreme Court has held that e-mails may constitute a “meeting” under FOIA if there is simultaneous e-mail communication between three or more board members. Avoid “reply to all” as a general rule. See FOIA Council handout entitled “*Email and Meetings*” available on the FOIA Council website.

RECORDS

WHAT is a PUBLIC RECORD?

ALL writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

ALL public records are OPEN to the public UNLESS a specific exemption in law allows the record to be withheld.

WHAT about RETENTION of PUBLIC RECORDS?

Public records **MUST** be retained according to retention schedules set by the Library of Virginia. The length of retention depends on the content of the record. After expiration of the applicable retention period, the records may be destroyed or discarded.

E-MAILS

Emails that relate to the public business are public records, regardless of whether you use your home or office computer, text or other forms of social media. It is the **content** of the record, not the equipment used, that controls.

As such, these emails must be retained as required by the VA Public Records Act. For practical advice for email use, access and retention, see FOIA Council handout entitled “*Email: Use, Access and Retention*” available on the FOIA Council website.

VA Freedom of Information Advisory Council:

Alan Gernhardt, Executive Director • Jessica L. Budd, Attorney • E-mail: foiacouncil@dls.virginia.gov
Telephone (804) 698-1810 • Toll-Free 1-866-448-4100 • <http://foiacouncil.dls.virginia.gov>

C. E-mail: Use, Access & Retention

The use of e-mail in the business place has become routine and is a preferred mode of communication. For state and local government officials and employees, the application of the Virginia Freedom of Information Act (FOIA) relating to access to records and the Virginia Public Records Act (the PRA) relating to the retention of records comes into play.

Government officials and employees frequently ask two key questions about the use of e-mail — **“Can the public and media access my e-mail under FOIA?”** and **“Do I have to save my e-mail?”**

This document will attempt to answer these questions and provide guidance about the use and management of e-mail by state and local government.

The nature of e-mail

E-mail generally refers to any communication that requires an electronic device for storage and/or transmission.¹ E-mail is a medium for correspondence — essentially, e-mail is the “envelope” for the communication. For purposes of FOIA & the PRA, e-mail provides a medium for communication, much like a telephone or the U.S. Mail provides a means of communication. The fact that a communication is sent via e-mail is not alone conclusive of whether that e-mail must be accessible to the public under FOIA or retained pursuant to the PRA; one must look at the text and substance of the communication to determine whether it is indeed a public record.

The Virginia Freedom of Information Act

FOIA addresses access to public records. Section 2.2-3701 of the Code of Virginia defines public records for purposes of FOIA to include *“all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”*

Clearly an e-mail would fall under this broad definition of a public record, because it applies to all writings and recordings ... set down by ... mechanical or electronic recording ... however stored, regardless of physical form or characteristics. As noted above, e-mail is just the medium, or the envelope, used to convey the communication. Just as a letter sent via U.S. Mail from one public official to another concerning public business would be a public record under FOIA, so would that same communication sent via e-mail.

FOIA requires that unless subject to a statutory exemption, all public records must be open to inspection and copying. Therefore, an e-mail relating to public business would be accessible just like any other public record, and may be withheld from public disclosure only if a particular exemption applies to the content of the e-mail.

The Virginia Public Records Act

While FOIA governs access to records held by state and local government, the PRA governs how long a government entity must retain certain records. The PRA defines “public record” for purposes of records retention, and like FOIA, the definition is fairly broad and would include e-mail as a public record. Section 42.1-77 defines a public record to include recorded information that documents a transaction or activity by or with any public officer, agency or employee of the state government or its political subdivisions. Regardless of physical form or characteristic, the 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 PRA sets forth different retention schedules for different types of records. Several factors shape how long a record needs to be held. Many records are only kept for so long as business requires them to be kept, although if a record has historical significance or is created by an agency head or director, it may need to be kept longer. For example, certain records are required to be maintained permanently, such as records from standing committees of the General Assembly, annual reports of state agencies, and correspondence of agency directors. Other records need only be kept so long as they are administratively necessary, such as reminders of events like blood drives or fund raisers, courtesy copies of correspondence, or messages received from a listserv. Along the continuum, other records may be required to be retained for 30 days to ten years, depending on their content. After the retention time has expired for a particular document, then that record may be destroyed pursuant to the guidelines set forth by the Library of Virginia.²

In providing guidance for adhering to the PRA, the Library of Virginia notes that e-mail should be treated the same as paper correspondence. Again, e-mail is only the medium, or the envelope, by which the correspondence is sent; the retention schedule for a particular e-mail will depend on its content and should be preserved the same as its paper equivalent. Both incoming and outgoing e-mail should be retained, along with any attachments sent via e-mail.

Tips for using and managing e-mail

All e-mails related to public business are subject to the provisions of FOIA and the PRA, and should be managed in the same manner as all other public records.

There is a tendency with e-mail to hit the delete button as soon as you are finished with a particular message. However, consideration must be given to whether that particular e-mail must be retained for purposes of the PRA — you can't automatically delete your e-mail, just as you can't automatically throw away paper correspondence and records.

FOIA governs access to records. The PRA dictates how long you are required to keep certain records. If a government entity keeps an e-mail (or any other record) for longer than its retention schedule requires, that e-mail will still be subject to FOIA if requested. Conversely, if a government entity properly disposes of a record pursuant to a retention schedule, and a subsequent FOIA request is made for that record, FOIA does not require the government entity to recreate the record.

E-mail is often used as a substitute for a telephone call, and is quite informal. However, e-mail creates a record of that communication that must be retained pursuant to the PRA and will be available upon request to the public under FOIA. Consider the consequence of choice to use e-mail instead of the telephone — it may not be in your best interest to be as informal on e-mail as you are on the telephone.

The Library of Virginia discourages the practice of maintaining permanent records solely in electronic format, without a paper or microfilm backup.³ For records that do not need to be maintained permanently, these e-mails can be printed out and stored in a traditional, paper file (and the electronic copy can be deleted) or electronic folders can be created on the computer to organize e-mails based on functions, subjects or activities. The Library of Virginia suggests that these folders are assigned to your home directory on the computer, and not on the network. By way of example, at the FOIA Council we print a copy of all of the FOIA questions that we receive via e-mail, along with our corresponding response, and file the paper copy in a chronological file. After we have printed a copy to retain for our records, we delete the e-mail off of the computer.

Public officials and employees should not commingle personal and official e-mails. Private e-mails do not need to be retained; e-mails relating to the transaction of public business do. From an e-mail management perspective, it is probably not a good idea to mix personal and official business in the same e-mail. Official e-mails that need to be retained should be maintained with other public records that relate to the same content.

1 Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).

2 PRA is administered by the Library of Virginia. For more details on retention schedules for particular types of records or for a particular agency, or for information regarding the proper disposal of records, please contact the Library of Virginia. Records retention information and contact information is also available on the Library's website at <http://www.lva.lib.va.us/whatwedo/records/index.htm>.

3 Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).