

FOIA AND MEMBERS OF PUBLIC BODIES

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.

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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.

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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

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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.

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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.

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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.]