



# E-MAIL & MEETINGS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. Introduction

As technology advances, new and efficient ways to communicate have evolved. Perhaps the most prevalent advancement in carrying out day-to-day communications at work or at home is e-mail. E-mail can be used to send correspondence on a one-to-one or one-to-many basis over the computer. Each user has an e-mail address, and messages received at that address are stored in electronic mailboxes until the recipient retrieves the message. After reading the message, the user may save it on his computer, print it, forward it to other e-mail addresses, respond to the sender, respond to the sender and other recipients of the same e-mail, or delete it.

The use of e-mail can blur the line between correspondence and a meeting under FOIA. E-mail is similar to traditional paper correspondence in many ways, and is a written form of communication that is by definition a record under FOIA. However, from a practical perspective, e-mail is often used as a substitute for a phone call and can be used to communicate quickly with multiple people at once, making it more akin to a meeting. While FOIA addresses electronic meetings held by audio or audio/visual means, it does not explicitly address the use of e-mail in a meetings context.<sup>1</sup> In 2004, the Virginia Supreme Court, however, examined whether the exchange of e-mails between members of a city council could constitute a meeting under FOIA. A review of the Supreme Court's decision follows under the heading "II. The Impact of the Virginia Supreme decision in *Beck v. Shelton*."

The use of e-mail by public officials is clearly allowed by FOIA. One member of a public body may individually e-mail other members, even if the e-mail relates to public business.<sup>2</sup> Questions arise based on the manner in which a recipient responds to an e-

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<sup>1</sup> See § 2.2-3708, which expressly allows state public bodies to hold audio or audio/visual meetings. See also Chapter 704 of the 1997 Acts of Assembly, establishing a pilot program for certain state public bodies to hold audio/visual meetings.

<sup>2</sup> See § 2.2-3710(B). See also 2011 Op. Atty. Gen. Va. 11-096 (August 5, 2011)(Two members of a three-member electoral board may communicate by e-mail without violating FOIA because e-mail lacks the element of simultaneity required for the communication to be considered a meeting under FOIA.); 1999 Op. Atty. Gen. Va. 12 (The meeting provisions of FOIA do not prohibit members of a public body from sending e-mail to other members of the same public body. The decision rests on the fact that the use of e-mail does not result in simultaneous communication like a traditional meeting.); Virginia Freedom of



mail addressed to three or more members of a public body. When responding to an e-mail, it is possible to "reply to sender" or to "reply to all." If a recipient chooses "reply to all," then three or more members of a public body will see not only the initial e-mail, but also another member's response. Other members could then, in turn, respond to the e-mail or the ensuing responses. In the end, three or more members of a public body could have used the chain of e-mail to discuss, and possibly reach a conclusion, about a matter relating to the transaction of public business.<sup>3</sup>

It can be argued that a meeting, as defined in FOIA, refers to a simultaneous discussion (such as a face-to-face discussion or a phone conversation), and that the use of e-mail is not necessarily simultaneous among users. If a user only checks his e-mail once a day, 24 hours could pass between an initial e-mail and a response. However, it is also possible for users to be logged into their e-mail system at the same time, and the lag time between e-mails might only be the time that it takes to compose a response and hit send.

## **II. The Impact of the Virginia Supreme Court decision in *Beck v. Shelton*.<sup>4</sup>**

On March 5, 2004, the Virginia Supreme Court ("the Court") issued an opinion concerning the Virginia Freedom of Information Act ("FOIA," § 2.2-3700 et seq. of the Code of Virginia) (*Beck v. Shelton*, No. 030723), with a holding directly relevant to all elected officials in Virginia -- from members of the General Assembly to members of local school boards. *Beck* has primarily drawn interest because it is the first authoritative statement of law in Virginia as to whether use of electronic mail ("e-mail") by public officials could constitute a meeting under FOIA, but it also examines broader issues as to the applicability of FOIA to public officials and the definition of a meeting. The Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that a gathering of three members of a public body at a citizen-organized meeting did not violate FOIA. For the purposes of this document, only those portions of the Court's holding related to e-mail and meetings under FOIA will be discussed.<sup>5</sup>

### Facts

Three plaintiffs filed a petition for writ of mandamus and injunction in Fredericksburg Circuit Court against five members of the Fredericksburg City Council.

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Information Advisory Opinion 19 (2004)(two members of a three-member electoral board may communicate using e-mail without violating FOIA so long as it is not simultaneous communication that would comprise a meeting for FOIA purposes).

<sup>3</sup> For a similar discussion, see Virginia Freedom of Information Advisory Opinion 01 (2001) (finding that the use of a listserv by members of a public body constitutes a meeting if used to discuss or transact public business. A listserv different from regular e-mail, because users must join a listserv, and all messages posted to the listserv are automatically send to each member of the listserv.)

<sup>4</sup> Excerpted from the Division of Legislative Services' *Virginia Legislative Issue Brief*, No. 37, March 2004, written by Lisa Wallmeyer and Maria J.K. Everett.

<sup>5</sup> For a complete analysis of the *Beck v. Shelton* case, please refer to the FOIA Council's website: <http://foiacouncil.dls.virginia.gov>.



The petition alleged that the defendants used e-mail to discuss and decide public business, and that such use of e-mail constituted an improper meeting under FOIA.

### Holding

The Court considered the question of whether use of e-mail could be a meeting under FOIA. The Court overturned the trial court's decision that use of e-mail to reach a consensus on a matter of public business was a meeting, on the grounds that the e-mails in question were similar to letters sent via U.S. Mail or facsimile.

The Court examined the definition of a meeting at § 2.2-3701, which includes *an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership*. The Court noted that e-mail can be similar to traditional forms of written correspondence, in that there may be significant delay between the time the communication is sent and received, or when a response is sent. In the instant case, the shortest interval between any two emails was more than four hours, and the longest was over two days. The Court agreed with the trial court that the dispositive consideration in examining e-mail is how the e-mail is used. In reviewing this standard, the Court focused on the language in the definition of a meeting that includes "an informal assemblage." "Assemblage," the Court concluded, means to bring together at the same time, and inherently entails simultaneity. The Court held that there is no "virtually simultaneous interaction" when e-mail is used as the functional equivalent of a letter communicated by U.S. Mail, courier, or facsimile transmission<sup>6</sup>. In further support of this conclusion, the Court noted that the Attorney General of Virginia had previously found that "transmitting messages through an electronic mail system is essentially a form of written communication."<sup>7</sup> While not binding, the General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>8</sup>

It is important to note that the Court did not hold that use of e-mail could never be a meeting under FOIA. Instead, the Court indicated that the dispositive determination in examining e-mail under the meeting provisions of FOIA was to look at how the e-mail was used. The trial court answered this question by reviewing the end result -- i.e., that e-mail was used to reach a consensus. According to the Supreme Court, this question is more appropriately answered by reviewing whether the e-mail was used as a functional equivalent of traditional correspondence.

This opinion clarifies that members of a public body need not refrain from using e-mail, but they should be cautioned against using e-mail among three or more members of the public body that is akin to using the telephone and has an element of simultaneity.

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 11 (citing 1999 Op. Atty. Gen. 12).

<sup>8</sup> *Id.* at 12 (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E. 2d 603, 605-06 (1983)).



The court did not establish a time frame as to when the use of e-mail may be considered simultaneous, nor did it address the use of chat rooms, instant messaging, or listservs.

This decision does not alter the fact that the records generated by e-mail fall under FOIA's definition of a public record. E-mails concerning public business are available for inspection or copying upon request, unless a specific statutory exemption allows a particular e-mail or contents thereof to be withheld. Furthermore, e-mails must be retained like other public records subject to the provisions of the Virginia Public Records Act (§ 42.1-76 et seq).

### Conclusion

The Court's holding has implications for members of all public bodies in the Commonwealth. With e-mail, the user must consider whether the e-mail is being used akin to traditional correspondence, or whether the e-mail has an element of simultaneity and is more like a telephone call between three or more members of the public body. This decision of the Court was fact-specific. Although no bright-line rules emerged in establishing what is or is not a meeting, the ruling underscores the notion that all meetings are presumed open under FOIA. Determining whether a particular e-mail discussion falls outside the parameters of a meeting must be considered carefully, on a case-by-case basis, examining all relevant facts.

### **III. Tips for Using E-mail**

It may be helpful to keep in mind the following tips:

- Remember the underlying principle of the open meeting provisions of FOIA -the public has the right to witness the operations of government. If you question whether your e-mail communication might lead to the deliberation of public business by three or more members of a public body in real time (i.e., an element of simultaneity), then you may be better served by saving that communication for a public meeting.
- If you receive an e-mail where three or more recipients are members of the same public body, and you wish to respond, choose "respond to sender" instead of "respond to all." One-on-one communications are clearly allowed under FOIA, and this will avoid an e-mail discussion among three or more members.
- When composing an e-mail to send to three or more members of a public body, enter the recipients' addresses in the "blind carbon copy" (bcc) field instead of in the "to" field. By doing this, an individual recipient will not be able to automatically respond to anyone but you.

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