

# ACCESS TO PUBLIC MEETINGS

## under the

# VIRGINIA FREEDOM OF INFORMATION ACT

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### I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and the provisions relating to meetings set forth the procedures that a public body must follow in conducting an open meeting and convening in a closed meeting. This outline breaks down the procedural requirements, such as what is required in posting a notice and certifying a closed meeting, and provides practical advice for conducting meetings that comply with FOIA. Appendix A sets forth in detail the requirements for making a motion to convene a closed meeting. Appendix B describes commonly used meeting exemptions of general applicability.

### II. OPEN MEETINGS GENERALLY

#### *What is a meeting under FOIA?*

A “meeting” is defined as "the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2 or 2.2-3708.3, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."<sup>1</sup>

#### *What is not a meeting under FOIA?*

1. The gathering of employees of a public body;
2. The gathering or attendance of two or more members of a public body 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, the gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, **and** the public business is not discussed; or
3. The gathering or attendance of two or more members of a public body at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in

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<sup>1</sup> Statutory reference: § 2.2-3701. FOIA Council Opinions AO-4-00, AO-20-01, AO-40-01, AO-46-01, AO-02-02, AO-06-02, AO-13-03, AO-15-04, AO-20-04, AO-11-05, AO-02-06, AO-10-07, AO-12-08, AO-03-09, AO-05-11, AO-07-14.



the conduct of public business may be a topic of discussion or debate at such public meeting.<sup>2</sup>

***May a public body conduct a meeting by conference call or other electronic method?***

Maybe. Prior to July 1, 2007, no local governing body or any other type of local public body was permitted to conduct a meeting through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business. However, state public bodies may conduct such meetings under specified circumstances. Since July 1, 2007, all public bodies (state, local, and regional) may also allow participation by their members via teleconference or other electronic means under certain limited circumstances.<sup>3</sup> Please see the *Electronic Meetings Guide* published by this office for details on the conduct of public meetings by electronic communication means.

***What does FOIA require for public meetings?***

For public meetings, the law requires that:

1. Public notice of the meeting be given;
2. The meeting must be open to the public; **and**
3. Minutes of the meeting must be taken and preserved.<sup>4</sup>

***What is sufficient notice?***

Notice must contain the **date, time, and location** of the meeting.

***Where does notice have to be posted?***

As of July 1, 2017, FOIA requires that all public bodies post notices in three locations:

1. On its official public government website, if any;
2. In a prominent public location at which notices are regularly posted; and
3. At the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

State public bodies must also post notice on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of meeting notices by electronic means by other public bodies shall be encouraged.<sup>5</sup>

***Who else is entitled to notice of a meeting?***

Any person who annually files a written request for notification with a public body is entitled to receive direct notification of all meetings of that public body. If the person requesting notice does not object, the public body may provide the notice electronically.

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<sup>2</sup> Statutory references: §§ 2.2-3701. FOIA Council Opinions AO-4-00, AO-10-00, AO-46-01, AO-02-02, AO-13-03, AO-12-04, AO-12-08, AO-05-11, AO-07-14.

<sup>3</sup> Statutory reference: §§ 2.2-3708.2 and 2.2-3708.3 (formerly §§ 2.2-3708 and 2.2-3708.1). FOIA Advisory Opinions AO-1-01, AO-16-02, AO-21-04, AO-12-08, AO-07-09.

<sup>4</sup> Statutory references: §§ 2.2-3700 and 2.2-3707. FOIA Council Opinions AO-40-01, AO-06-02, AO-17-02, AO-13-03, AO-15-04.

<sup>5</sup> Statutory reference: § 2.2-3707 (D). FOIA Council Opinions AO-18-01, AO-43-01, AO-08-07, AO-03-09.



The request for notice shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any.<sup>6</sup>

***When must notice be posted?***

***For regular meetings:*** The notice must be posted **at least three working days prior to the meeting.**

***For special, emergency, or continued meetings:*** Notice, reasonable under the circumstance, of special, emergency, or continued meetings must be given at the same time as the notice provided members of the public body conducting the meeting. FOIA defines an emergency as “an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which circumstance requires immediate action.”<sup>7</sup>

***May the public or the media record the meeting?***

Yes. Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open.<sup>8</sup>

***May a public body restrict the use of recording devices?***

Yes. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting to prevent interference with the proceedings. However, public bodies are not permitted to conduct meetings required to be open in any building or facility where such recording devices are prohibited.<sup>9</sup>

***When must agenda materials be available to the public and the media?***

At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.<sup>10</sup>

***Are there any exceptions for taking minutes?***

Yes. Minutes are required to be taken only at open meetings; minutes are not required to be taken during closed meetings. Minutes are also not required to be taken at deliberations of:

1. Standing and other committees of the General Assembly;
2. Legislative interim study commissions and committees, including the Virginia Code Commission;

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<sup>6</sup> Statutory reference: § 2.2-3707 (F). FOIA Council Opinions AO-3-01, AO-13-03, AO-23-03, AO-08-07.

<sup>7</sup> Statutory references: §§ 2.2-3701, 2.2-3707 (C),(D). FOIA Council Opinions AO-13-00, AO-3-01, AO-18-01, AO-06-02, AO-08-07.

<sup>8</sup> Statutory reference: § 2.2-3707 (H). FOIA Council Opinions AO-03-03, AO-10-05.

<sup>9</sup> Statutory reference: § 2.2-3707 (H). FOIA Council Opinions AO-03-03, AO-10-05.

<sup>10</sup> Statutory reference: § 2.2-3707 (G). FOIA Council Opinions AO-3-01, AO-35-01, AO-23-03, AO-05-12.



3. Study committees or commissions appointed by the Governor; or
4. Study commissions or study committees, or any other committees or subcommittees appointed by the governing body or school board of a county, city or town, except where the membership of the commission, committee or subcommittee includes a majority of the members of the governing body.<sup>11</sup>

***What information must be included in meeting minutes?***

Minutes are required (except as noted above) of all open meetings, and must include: the date, time, and location of the meeting; the members of the public body present and absent; a summary of matters discussed; and a record of any votes taken. In addition, motions to enter into a closed meeting and certification after a closed meeting must be recorded in the minutes.<sup>12</sup>

***Are the additional minutes requirements for electronic meetings?***

Yes. Minutes for meetings conducted using electronic communications must include the following three items:

- (1) the identity of the members of the public body who participated in the meeting through electronic communication means,
- (2) the identity of the members of the public body who were physically assembled at one physical location, and
- (3) the identity of the members of the public body who were not present at the location identified in clause (2) but who monitored such meeting through electronic communication means.<sup>13</sup>

Depending on the type of electronic meeting, there are other specific elements that must be included in the meeting minutes.<sup>14</sup>

***Are meeting minutes considered public records under FOIA?***

Yes. Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual recordings, are public records and must be released upon request.<sup>15</sup>

***Is there an affirmative obligation to post meeting minutes?***

Yes, but there are separate posting requirements for local public bodies and for state public bodies in the executive branch.

**Local public bodies:**

Except as provided in subsection I of § 2.2-3707, any local public body subject to the provisions of this chapter shall post minutes of its meetings on its official public government website, if any, within seven working days of final approval of the minutes.

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<sup>11</sup> Statutory reference: § 2.2-3707 (I). FOIA Council Opinion AO-08-07.

<sup>12</sup> Statutory references: §§ 2.2-3707 (I), 2.2-3712 (A),(D). FOIA Council Opinions AO-25-04, AO-01-06, AO-05-15.

<sup>13</sup> Statutory reference: § 2.2-3707 (I).

<sup>14</sup> Statutory references: §§ 2.2-3708.2 and 2.2-3708.3 (B)(4) and (C)(10).

<sup>15</sup> Statutory reference: § 2.2-3707 (I). FOIA Council Opinions AO-13-03, AO-25-04.



If a local public body does not own or maintain an official public government website, such public body shall make copies of all meeting minutes available no later than seven working days after final approval of the minutes (i) at a prominent public location in which meeting notices are regularly posted pursuant to subdivision D 2 of § 2.2-3707; (ii) at the office of the clerk of the public body; or (iii) in the case of a public body that has no clerk, at the office of the chief administrator.

State executive branch public bodies:

All boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to the provisions of this chapter shall post minutes of their meetings on such body's official public government website and on a central electronic calendar maintained by the Commonwealth. Draft minutes of meetings shall be posted as soon as possible but no later than 10 working days after the conclusion of the meeting. Final approved meeting minutes shall be posted within three working days of final approval of the minutes.<sup>16</sup>

***Must all votes of a public body take place in a public meeting?***

Yes. Any and all votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting.

A public body may not vote by secret or written ballot.<sup>17</sup>

***Is it a FOIA violation to poll members of a public body?***

No. Nothing in FOIA prohibits separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business. Such contact may be done in person, by telephone, or by electronic communication, provided the contact is done on a basis that does not constitute a meeting as defined in FOIA.<sup>18</sup>

### **III. CLOSED MEETING PROCEDURES**

***What is the procedure for conducting a closed meeting?***

In order to conduct a closed meeting, the public body must take an affirmative recorded vote in an open meeting approving a motion that:

1. Identifies the subject matter for the closed meeting;
2. States the purpose of the closed meeting; **and**
3. Makes specific reference to the applicable exemption from the open meeting requirements.

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<sup>16</sup> Statutory reference: § 2.2-3707.1.

<sup>17</sup> Statutory reference: § 2.2-3710 (A). FOIA Council Opinions AO-9-00, AO-15-02, AO-01-03, AO-13-03, AO-01-05, AO-05-09, AO-07-09, AO-02-17.

<sup>18</sup> Statutory reference: § 2.2-3710 (B). FOIA Council Opinions AO-08-02, AO-15-02, AO-01-03, AO-07-09.



The motion must be set forth in detail in the minutes of the open meeting.

**NOTE:** A general reference to the provisions of FOIA, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting.<sup>19</sup>

***What may be discussed during a closed meeting?***

A public body holding a closed meeting must restrict its discussions during the closed meeting to those matters specifically exempted from the provisions of FOIA and identified in the motion to convene the closed meeting.<sup>20</sup>

***What does a public body have to do at the end of a closed meeting?***

At the conclusion of any closed meeting, the public body holding the meeting must immediately reconvene in an open meeting and take a roll call or other recorded vote certifying that to the best of each member's knowledge:

1. Only public business matters lawfully exempted from open meeting requirements under this chapter, and
2. 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.

The vote must be included in the minutes of the open meeting.

Any member of the public body who believes that there was a departure from the requirements of (1) or (2) above must state so prior to the vote and indicate the substance of the departure that, in his judgment, has taken place. This statement must also be recorded in the minutes of the open meeting.<sup>21</sup>

***When do decisions made in a closed meeting become effective?***

Decisions become effective when the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation, or motion agreed to in the closed meeting. Otherwise, no resolution, ordinance, rule, contract, regulation, or motion adopted, passed, or agreed to in the closed meeting is effective.<sup>22</sup>

Public officers improperly selected due to the failure of the public body to comply with the other provisions of § 2.2-3711 will become *de facto* officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.<sup>23</sup>

***Can there be a closed meeting without first having an open meeting?***

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<sup>19</sup> Statutory reference: § 2.2-3712 (A). FOIA Council Opinions AO-8-00, AO-19-00, AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-17-02, AO-02-04, AO-24-04, AO-01-05, AO-06-07, AO-13-07, AO-04-08, AO-13-09, AO-03-13, AO-02-16, AO-03-17.

<sup>20</sup> Statutory reference: § 2.2-3712 (C). FOIA Council Opinions AO-8-00, AO-13-07, AO-13-09, AO-02-16.

<sup>21</sup> Statutory references: § 2.2-3712 (D) and (E). FOIA Council Opinions AO-8-00, AO-17-02, AO-02-04, AO-06-07, AO-04-08, AO-02-16, AO-03-17.

<sup>22</sup> Statutory references: §§ 2.2-3711 (B) and 2.2-3712 (H). FOIA Council Opinions AO-23-01, AO-38-01, AO-15-02, AO-01-03, AO-13-03, AO-24-04, AO-01-05, AO-13-09.

<sup>23</sup> Statutory reference: § 2.2-3711 (C).



No. A closed meeting can take place only within the context of an open meeting, even if the closed meeting is the only agenda item. A closed meeting motion must be made and voted upon in an open meeting. After the conclusion of the closed meeting, the members of the public body must reconvene in an open meeting to vote to certify that they restricted their discussion during the closed meeting to those matters specifically exempted from the provisions of FOIA and identified in the motion. Because votes must be taken at open meetings, public bodies must convene in open meeting both before and after any closed meeting.<sup>24</sup>

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<sup>24</sup> FOIA Council Opinions AO-02-04, AO-06-07, AO-08-07, AO-13-09, AO-02-10.



## APPENDIX A

**How to Make a Motion to Convene a Closed Meeting****The Requirements**

Section 2.2-3712(A) states that *[n]o closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting and (iii) makes specific reference to the applicable exemption from open meeting requirements.* (Emphasis added.)

FOIA Council opinions have held that a motion that lacks any of these three elements is insufficient under the law and would constitute a procedural violation.<sup>25</sup> Here's a step-by-step look at how to put together a motion that meets all three requirements:

**1. Identify the subject matter.**

- The identification of the subject goes beyond a general reference to the exemption, and provides the public with information as to specifically why the closed meeting will be held. The subject matter describes the particular fact, scenario, or circumstances that will be discussed by the public body during the closed meeting.
- The specificity required for identification of the subject must be determined on a case-by-case basis. It involves balancing FOIA's policy of affording citizens every opportunity to witness the operations of government with the need of the public body to hold certain discussions in private. The identification of the subject need not be so specific as to defeat the reason for holding a closed meeting in the first place.
- Examples of identification of the subject: discussion of candidates for the appointment of a new city manager; discussion of the appropriate disciplinary action to take against a high school student for violation of school policy; discussion of probable litigation relating to highway construction.<sup>26</sup>

**2. State the purpose.**

- The purpose refers to the general, statutorily allowed meeting exemptions set forth at § 2.2-3711(A). Section 2.2-3711(A) states that *public bodies may only hold closed meetings for the following purposes* (emphasis added) and then sets forth the exemptions.
- Examples of purposes: personnel matters; student admissions or discipline; consultation with legal counsel.

**3. Make specific reference to the applicable exemption.**

- All of the meetings exemptions can be found at § 2.2-3711(A). It is not enough to cite this general Code provision, because § 2.2-3711(A) includes over 50 different exemptions. Instead, the citation must be as specific as possible.

<sup>25</sup> FOIA Advisory Opinions AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-24-04, AO-01-05, AO-06-07, AO-04-08, AO-13-09, AO-02-10, AO-03-13, AO-02-16.

<sup>26</sup> Example of probable litigation taken from FOIA Advisory Opinion AO-14-01.





- Examples of specific Code references: § 2.2-3711 (A)(1); § 2.2-3711 (A)(2); § 2.2-3711 (A)(7).

### **Putting It All Together**

Based upon the analysis above, here are three examples of motions to go into closed session that satisfy the minimum requirements of § 2.2-2712(A). It is always appropriate to include more information, and any motion should be tailored with additional facts describing the particular scenario being addressed by the public body.

1. I move that (insert name of public body) convene in closed session to discuss the candidates being considered for the appointment of a new city manager pursuant to the personnel exemption at § 2.2-3711(A)(1) of the Code of Virginia.
2. I move that (insert name of public body) convene in closed session to discuss the appropriate disciplinary action to take against an individual high school student for violation of school policy pursuant to the scholastic exemption at § 2.2-3711(A)(2) of the Code of Virginia.
3. I move that (insert name of public body) convene in closed session to meet with legal counsel about probable litigation relating to highway construction pursuant to the consultation with legal counsel exemption at § 2.2-3711(A)(7) of the Code of Virginia.

Remember, the appropriateness of any given motion is fact-based, and no “fill-in-the-blank” model motion will work in all situations. When drafting a motion, go down the checklist and ensure that you have included all three elements. Keep in mind the balancing required to keep citizens informed of the workings of a public body while maintaining the integrity of the closed session. Please do not hesitate to contact the FOIA Council to discuss these requirements or the sufficiency of a specific motion.



**APPENDIX B****Meeting Exemptions of General Applicability**

As of July 2019, FOIA contains more than 50 open meeting exemptions. Although many of these exemptions apply to specific agencies or to very content-specific discussions, there are several open meeting exemptions of general applicability that may be used by virtually all public bodies. The open meeting exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

**§ 2.2-3711 (A)(1): Personnel.** Provides an exemption for:

Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

**§ 2.2-3711 (A)(2): Students.** Provides an exemption for:

Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any public institution of higher education in the Commonwealth or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

**§ 2.2-3711 (A)(3): Acquisition & disposition of property.** Provides an exemption for:

Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

**§ 2.2-3711 (A)(4): Privacy.** Provides an exemption for:

The protection of the privacy of individuals in personal matters not related to public business.

**§ 2.2-3711 (A)(5): Prospective business.** Provides an exemption for:

Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

**§ 2.2-3711 (A)(6): Investment of public funds.** Provides an exemption for:



Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

**§ 2.2-3711 (A)(7): Legal advice or briefings regarding actual or probable litigation.** Provides an exemption for:

Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

**§ 2.2-3711 (A)(8): Legal advice regarding specific legal matters.** Provides an exemption for:

Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

**§ 2.2-3711 (A)(12): Tests & exams.** Provides an exemption for:

Discussion or consideration of tests, examinations, or other records excluded from this chapter pursuant to subdivision 4 of § 2.2-3705.1.

**§ 2.2-3711 (A)(16): Medical.** Provides an exemption for:

Discussion or consideration of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5.

**§ 2.2-3711 (A)(19): Public safety.** Provides an exemption for:

Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of information subject to the exclusion in subdivision 2 or 14 of § 2.2-3705.2, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

**§ 2.2-3711 (A)(29). Contracts.** Provides an exemption for:

Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.



**§ 2.2-3711 (A)(39). Economic development.** Provides an exemption for:

Discussion or consideration of information subject to the exclusion in subdivision 3 of § 2.2-3705.6 related to economic development.

