

# *A Guide to the Freedom of Information Act for Governing Boards of Public Institutions of Higher Education*



*Prepared by the Virginia Freedom of Information Advisory Council  
in cooperation with the State Council of Higher Education for Virginia*

## **Policy Statement of the Virginia Freedom of Information Act (FOIA)**

*By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees 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 its officers and employees specifically elect 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.<sup>1</sup>*

## **FOIA Training Requirement**

Governing boards of public institutions of higher education are required to receive annual training on various topics, including FOIA.<sup>2</sup> To satisfy this statutory requirement, FOIA Council staff regularly participates in SCHEV's annual training presentations for board members and has developed this guidance document for reference.

## **Public Records**

### *What is a public record?*

For the purposes of FOIA, the term public record includes 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

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<sup>1</sup> See Subsection B of § 2.2-3700 of the Code of Virginia, the first section of the Virginia Freedom of Information Act.

<sup>2</sup> See § 23.1-1304 of the Code of Virginia.

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.<sup>3</sup>

All public records are open to the public unless a specific exemption in law allows the record to be withheld and a public body invokes such exemption.

### *What about retention of public records?*

Public records must be retained according to retention schedules set by the Library of Virginia pursuant to the Virginia Public Records Act (§ 42.1-76 et seq.). 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.

### *What about electronic mail?*

Emails that relate to public business are public records, regardless of whether a home or office computer or phone is used and regardless of whether the communication is through text or a form of social media or other electronic application. It is the content of the record, not the equipment or account that is used, that controls.

Emails that qualify as public records must be retained as required by the Virginia Public Records Act. For additional information, see the Freedom of Information Advisory Council handout entitled "Email: Use, Access, and Retention" available on the FOIA Council website.

## **Public Meetings<sup>4</sup>**

### *What is considered a meeting under FOIA for governing boards of public institutions of higher education?*

For the purposes of FOIA, a public meeting of a board is any gathering, including work sessions, of the constituent membership of the board convened physically or through electronic communication means pursuant to § 2.2-3708.2 or 2.2-3708.3 where the members discuss or transact public business of the board. This meaning applies:

- To the board or to 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; and
- 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 of how the subgroup is designated (e.g., a committee, subcommittee, task force, work group, panel, etc.).

### *What is public business under FOIA?*

For purposes of public meetings, public business means any activity a public body has undertaken or proposes to undertake on behalf of the people it represents.<sup>5</sup>

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<sup>3</sup> See the definition of "public records" in § 2.2-3701.

<sup>4</sup> See the definition of "meeting" in § 2.2-3701.

<sup>5</sup> *Id.*

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

- The gathering of employees of the board; or
- The gathering or attendance of two or more board 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 of the public body, and no discussion or transaction of public business takes place among the members of the public body; or
  - A public forum, informational gathering, candidate appearance, meeting of another public body, or debate, the purpose of which is to inform the electorate or to gather information from the public and not to transact public business or to hold discussions relating to the transaction of public business, where no discussion or transaction of public business takes place among the members of the public body, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or, debate, or question presented by others at such public meeting.

### **Specific Aspects of Public Meetings**

**Minutes:** Minutes are required for any meeting of the board or a subgroup of the board.

**Voting:** No secret or written ballots are allowed. Votes must be taken at a public meeting conducted in accordance with FOIA.

**Polling:** Individual members may be contacted separately (one-on-one) to ascertain their positions by phone, letter, or email, so long as the contact is done on a basis that does not constitute a meeting.

**Closed Meetings:** A closed meeting is allowed only for certain limited purposes as specifically authorized by FOIA in § 2.2-3711 or other law and requires a motion stating the purpose, the subject of the closed meeting, and the specific Code section that authorizes the closed meeting. See § 2.2-3711 of FOIA for allowable purposes for closed meetings and §§ 2.2-3711 and 2.2-3712 of FOIA for procedures for holding a closed meeting.

**Electronic Meetings:** Meetings held through electronic communication means are allowed for boards under heightened procedural and reporting requirements depending on the type of electronic meeting (i.e., a meeting during a declared state of emergency, an in-person meeting with individual member(s) using remote participation, or an all-virtual public meeting). See §§ 2.2-3708.2 and 2.2-3708.3 of FOIA for specific requirements for meetings held under these circumstances.

**Email and Meetings:** The Virginia Supreme Court has held that emails may constitute a "meeting" as defined under FOIA if there is simultaneous email communication between three or more members of a public body.<sup>6</sup> Avoid "reply all" as a general rule. For additional information,

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<sup>6</sup> See *Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 727 S.E.2d 75 (2012); *Beck v. Shelton*, 267 Va. 482, 494, 593 S.E.2d 195 (2004).

see the FOIA Council handout entitled "Email and Meetings" available on the FOIA Council's website.

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**Virginia Freedom of Information Advisory Council**

Alan Gernhardt, *Executive Director*  
Joseph Underwood, *Senior Attorney*  
Email: [foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov)  
Telephone (804) 698-1810  
Toll-Free 1-866-448-4100  
[foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov)

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