

# FOIA, COIA and the Virginia Public Records Act

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# The Virginia Freedom of Information Act ("FOIA")

Two main components:

- Open Records
- Open Meetings

# FOIA - Policy

- Va. Code § 2.2-3700. Short title; policy.
- A. This chapter may be cited as "The Virginia Freedom of Information Act."
- B. 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 or 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.
- The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.
- All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.
- Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

# MEETINGS

- What is a Meeting?
- ““Meeting" or "meetings" means 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. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) 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, or (b) 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 the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.” Va. Code § 2.2-3701.

# MEETINGS, cont'd

- What constitutes the “discussion” of “or transaction of” “public business”?
- The code does not provide a clear definition, but we do have some recent guidance from the Supreme Court of Virginia:

“For a topic to constitute the "business" of a public body, it must relate to a subject that falls within the purview of that public body. Thus, a topic or topics may constitute "public business" for one public body, such as a board of supervisors, but not constitute the "public business" of another, such as a county's industrial development authority.

Furthermore, for a topic to constitute public business it must not just be something that conceptually could at some point come before a public body, but rather, the topic must be something that is either before the public body or is likely to come before the body in the foreseeable future.”

*Gloss v. Wheeler*, 887 S.E.2d 11, 21 (Va. 2023)

# MEETINGS, cont'd

- All meetings must be open to the public. Va. Code § 2.2-3707(A).
- Closed meetings are only allowed for very specific enumerated reasons, which are set forth in Va. Code § 2.2-3711.
- Advance notice must be provided for every meeting. Va. Code § 2.2-3707(D).
- Access to the agenda and supporting materials must be provided to the public. Va. Code § 2.2-3707(G).
- Minutes must be taken at all open meetings. Va. Code § 2.2-3707(I).
- There are provisions for remote participation in meetings under certain circumstances. Va. Code §§ 2.2-3708.2 & 2.2-3708.3.

# MEETINGS, cont'd

- Votes on transaction of public business can only occur at a meeting conducted pursuant to FOIA. Va. Code § 2.2-3710
- Common reasons invoked for conducting a closed meeting:
  - Discussion of certain personnel matters. Va. Code § 2.2-3711(A)(1).
  - 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. Va. Code § 2.2-3711(A)(3).
  - 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. Va. Code § 2.2-3711(A)(5).
  - 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. Va. Code § 2.2-3711(A)(6).
  - The protection of the privacy of individuals in personal matters not related to public business. Va. Code § 2.2-3711(A)(4).
  - Consultation with legal counsel. Va. Code §§ 2.2-3711(A)(7) & §2.2-3711(A)(8).

# RECORDS

- What are “public records” under FOIA?
- “‘Public records’ means all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, 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.”

Va. Code § 2.2-3701.

# RECORDS, cont'd

- If it isn't made in the transaction of public business, it is not subject to the disclosure requirements of FOIA:
  - Personal records
- All public records must be open for inspection unless there exists an exemption as set forth in the statute.
- This applies also to records that might be in your personal possession, such as emails sent from a personal or work email account or text messages sent from a personal phone number, if the record was made in the transaction of public business.
- When in doubt, assume it is a public record.
- If you have any questions, you can also contact York County's FOIA officer, Gail Whittaker (757-890-3310) [foia@yorkcounty.gov](mailto:foia@yorkcounty.gov) or my office.

# RECORDS, cont'd

- If someone requests public records under FOIA, the code sets forth the manner in which the custodian must respond to the request and deadlines for doing so. Va. Code § 2.2-3704.
- Many requests for access to public records under FOIA come in now through York County's *NextRequest* portal:
  - <https://www.yorkcounty.gov/328/Freedom-of-Information-Requests>
  - That page also has a list of the County's FOIA officers and additional information on FOIA requests, and a link to the County's policy
- Even though the public can use *NextRequest*, they are not required to do so. At the same time, while the code requires that a requestor "identify the requested records with reasonable specificity," it does not require the use of any magic words. Someone may call or send an email requesting information and, in fact, be making a request under FOIA.
  - A member of the public can submit a FOIA request to you directly without going to the FOIA officer or *NextRequest*.
  - If there is any doubt as to whether someone is making a request, assume they are and follow up with them to clarify the request.
  - Refer the requestor to Gail or the appropriate FOIA officer and consider providing the link above to the County's FOIA information and link to *NextRequest*.

# RECORDS, cont'd

- This is by no means an exhaustive list, but here are a few of the common exemptions to disclosure:
  - Personnel information. Va. Code § 2.2-3705.1(1).
  - Records subject to attorney-client privilege, Va. Code § 2.2-3705.1(2), or attorney work product. Va. Code § 2.2-3705.1(3).
  - Vendor proprietary information. Va. Code § 2.2-3705.1(6).
  - Records relating to the negotiation and award of a contract, prior to a contract being awarded. Va. Code § 2.2-3705.1(12).
  - Working papers and correspondence of the County Administrator. Va. Code § 2.2-3705.7(2)
  - Tax records covered by Va. Code § 58.1-3.
  - Social Services and Health Records. Va. Code § 2.2-3705.5(1).
  - Public safety. Va. Code § 2.2-3705.2.
  - Personal financial information. Va. Code § 2.2-3705.1(13).
  - Certain personal contact information. Va. Code § 2.2-3705.1(10).

# The Virginia Public Records Act

- While FOIA deals mainly with access to public records, the Virginia Public Records Act deals with records management and preservation. Va. Code §§ 42.1-76 – 42.1-91.1.
- The VPRA requires political subdivisions to designate a records officer. Va. Code § 42.1-85(C). For York County, that person is Deputy Clerk Heather Schott (757) 890-3326, [heather.schott@yorkcounty.gov](mailto:heather.schott@yorkcounty.gov).
- The VPRA requires that all “public records” be preserved for designated periods of time and publishes a series of schedules setting forth the required retention periods. Va. Code § 42.1-86.1.
- The VPRA also requires that records be destroyed appropriately and timely. Va. Code § 42.1-86.1.

# The Virginia Public Records Act

- You can find links to the various retention schedules and other relevant information about the VPRA at:
  - <https://www.lva.virginia.gov/agencies/records/>
- I recommend that you preserve all public documents that you have in your possession and that are not otherwise managed by the County (e.g. County email) throughout the duration of your service and that you not destroy them thereafter until you consult with Heather.
- Talk to Heather if you need guidance on the best way to preserve public documents in your possession such as text messages.

# State and Local Government Conflict of Interest Act (COIA)

- Virginia Code §§ 2.2-3100 – 2.2-3132
- Elected officials, EDA members and other individuals who are required to file the disclosure reports must complete training within 60 days of assuming office and every 2 years thereafter. Va. Code § 2.2-3132.
- Training that complies with this requirement is available through the Virginia Conflict of Interest and Ethics Advisory Council:  
<http://ethics.dls.virginia.gov/>
- Three basic components:
  - Gifts
  - Contracts/Transactions
  - Disclosure Reports

# GENERAL PROHIBITIONS

- These rules apply to any “officer or employee of a state or local governmental or advisory agency” regardless of filing status:
- Generally you cannot:
  - Accept anything of value for your services to the government except your compensation, expenses or other remuneration provided by the agency, Va. Code § 2.2-3103(1),
  - Accept anything of value in exchange for getting someone a job or a contract with the agency, Va. Code §§ 2.2-3103(2) & 2.2-3103(3),
  - Use confidential information you acquired as the result of employment with a government agency to your economic benefit, Va. Code § 2.2-3103(4),
  - Accept money, loans, things of value, etc., and business or professional opportunities that you know will or have a tendency to influence you in the performance of official duties, Va. Code §§ 2.2-3103(5) & 2.2-3103(6),
  - Accept certain honoraria and gifts, Va. Code §§ 2.2-3103(7), 2.2-3103(8) & 2.2-3103(9), or
  - Use your public position to retaliate or threaten to retaliate for expressing views on matters of public concern or exercising a right protected by law. Va. Code § 2.2-3103(10).

# GIFTS

- These rules apply to any “officer or employee of a state or local governmental or advisory agency” regardless of filing status:
- You are generally prohibited from accepted gifts with a value in excess of \$100 (adjusted for inflation) or a combination of gifts with an aggregate value in excess of \$100 from:
  - Registered Lobbyists, Va. Code § 2.2-3103.1(B)(i),
  - Lobbyist’s principal, Va. Code § 2.2-3103.1(B)(ii), or
  - “A person, organization, or business who is or is seeking to become a party to a contract with the local agency of which he is an officer or an employee.” Va. Code § 2.2-3103.1(B)(iii).

There are some exceptions to this rule:

- Certain gifts involving attendance at “a widely attended event” and associated with such event. Va. Code § 2.2-3103(D).
- Certain gifts accepted from foreign dignitaries if the gift is accepted on behalf of the County and archived according to guidelines established by the Library of Virginia. Va. Code § 2.2-3103.1(E).
- Gifts that arise because of a “personal friendship” Va. Code § 2.2-3103.1(F).
- Certain gifts of travel after you have received a waiver of the restrictions from the Virginia Conflict of Interest and Ethics Advisory Council. Va. Code § 2.2-3103.1(G).

# PERSONAL INTERESTS IN CONTRACTS/TRANSACTIONS

- There are rules that apply to “officers and employees of local governmental agencies” and those are set forth in Va. Code § 2.2-3109.
- The focus for today is on the rules that apply to members of County Boards of Supervisors
- You are prohibited from having a personal interest in:
  - any contract with [the] governing body
  - any contract with any governmental agency that is a component part of [the] local government and which is subject to the ultimate control of the governing body of which [you are] a member, or
  - any contract other than a contract of employment with any other governmental agency if [your] governing body appoints a majority of the members of the governing body of the second governmental agency.

Va. Code § 2.2-3109(A).

# PERSONAL INTERESTS IN CONTRACTS/TRANSACTIONS, cont'd

- You are also required to disqualify yourself from participating in certain other transactions in which you have a personal interest. Va. Code § 2.2-3112.
- There are exceptions to the rules prohibiting personal interests in contracts and transactions. Va. Code §§ 2.2-3109, 2.2-3110 & 2.2-3112.
- The application of these rules and exceptions is often very highly factually specific.
- If you have questions, you can contact me. I can provide a formal opinion, but you must provide all relevant facts. If you rely on my opinion, you can introduce that opinion as evidence if you are prosecuted. Va. Code § 2.2-3121(C).
- You can also seek an advisory opinion from the Commonwealth Attorney or the COIA Council, either of which provides stronger protection from prosecution if you act in accordance with the advice given. Va. Code § 2.2-3121(B).

# DISCLOSURE FORMS

- Each member of the Board of Supervisors and the EDA , as well as the County Administrator, and candidates for the Board of Supervisors are required to file a disclosure statement of their personal interests and other information as is required on the form prescribed by the Council. Va. Code § 2.2-3115(A).
- Certain other individuals are also required to file disclosures of real estate interests in the County. Va. Code § 2.2-3115(G).
- Other disclosures as are required by COIA must also be filed – e.g. disclosure of the nature of conflicts that require disqualification. Va. Code § 2.2-3115(H).
- These forms must be filed with the Clerk of the Board of Supervisors as a condition of assuming office and by February 1<sup>st</sup> of each subsequent year while holding the office. Va. Code § 2.2-3118.2.
- The forms are public records and subject to release, but the Clerk is required to redact “any residential address, personal telephone number, email address, or signature contained on such form.” Va. Code § 2.2-3115(J).
- The Clerk is required to report late filings to the Commonwealth Attorney and such late filings are subject to a civil penalty of \$250. Va. Code § 2.2-3124.

# COIA PENALTIES

- Specific violations of COIA related to conflicts and gifts are misdemeanors and can also subject you to civil penalties. Va. Code § 2.2-3120.
- Knowing violations can constitute malfeasance in office. Va. Code § 2.2-3122.
- Some violations arising out of COIA issues, such as false statements (perjury), bribery, etc. could subject you to felony charges, as recently happened to the Chair of the Charlotte County Board of Supervisors.

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