

# Understanding FOIA



or: How I Learned to Stop Worrying and Love public access laws.

# Freedom of Information Act (FOIA)

## Purpose –

By enacting FOIA, 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.** Va. Code § 2.2-3700.

# FOIA

How FOIA is to be viewed –

**The provisions of FOIA 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.

# If you don't know, now you know

- **§ 2.2-3702. Notice of chapter.**
- Any person elected, reelected, appointed or reappointed to any body not excepted from this chapter shall (i) be furnished by the public body's administrator or legal counsel with a copy of this chapter within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the provisions of this chapter.

# FOIA

The two major pillars of FOIA:

1. Public Records
2. Meetings

# Public records

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.

Access to such records shall not be denied to citizens of the Commonwealth. Va. Code § 2.2-3704.

# Public records

What are “public records”?

*"Public records"* means all writings and recordings, however they are 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.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter. Va. Code § 2.2-3707(I).

The custodian of such records shall take all necessary precautions for their preservation and safekeeping. Va. Code § 2.2-3704.

# FOIA

How do you respond to a FOIA request?

Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing. . . Va. Code § 2.2-3704(B). *See* Va. Code § 2.2-3704(B)(1-4) for permissible responses.

If it is not “practically possible” to produce the requested records in five days, you may secure another seven work days under certain conditions. Va. Code § 2.2-3704(B)(4).

Generally, no public body shall be required to create a new record if the record does not already exist. Va. Code § 2.2-3704 (D).

Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter. Va. Code § 2.2-3704(E).

# FOIA

If FOIA is violated –

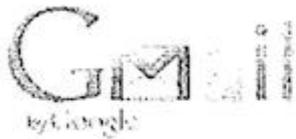
If the court finds the denial to be in violation of FOIA, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case . . . Va. Code § 2.2-3713

# FOIA

## If FOIA is violated (cont'd.) – knowing violation

In a proceeding commenced against any officer, employee, or member of a public body under FOIA, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$ 500 nor more than \$ 2,000. . . For a second or subsequent violation, such civil penalty shall be not less than \$ 2,000 nor more than \$ 5,000. Va. Code § 2.2-3714.

# Bridge-gate



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**Re:**

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David Wildstein <david.wildstein@gmail.com>  
To: Bridget Anne Kelly <bridgetannekelly@yahoo.com>

Tue, Aug 13, 2013 at 7:35 AM

Got it

On Aug 13, 2013, at 7:34 AM, Bridget Anne Kelly <bridgetannekelly@yahoo.com> wrote:

> Time for some traffic problems in Fort Lee.

# Continued...

I feel badly about the kids

I guess

Received 9/10/13 8:05 AM

Received 9/10/13 8:06 AM

Sent 9/10/13 8:11 AM

Sent 9/10/13 8:13 AM

They are the children of Buono voters

Bottom line is he didn't say safety

[REDACTED]

# And server-gate

RELEASE  
IN FULL

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**From:** H <hrod17@clintonemail.com>  
**Sent:** Saturday, December 10, 2011 2:49 PM  
**To:** 'abedin@state.gov'  
**Subject:** Re: Gunmen try to assassinate head of Libyan army (AP)

Did you look at all the ones in the link to the brand? Can you call me at home?

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**From:** Abedin, Huma [mailto:AbedinH@state.gov]  
**Sent:** Saturday, December 10, 2011 02:38 PM  
**To:** H  
**Subject:** Re: Gunmen try to assassinate head of Libyan army (AP)

She did send me link. They are beautiful but way out of my price range!

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**From:** H [mailto:HDR22@clintonemail.com]  
**Sent:** Saturday, December 10, 2011 12:58 PM  
**To:** Abedin, Huma  
**Subject:** Re: Gunmen try to assassinate head of Libyan army (AP)

Did you get info from Chelsea about the wall lamps?

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**From:** Abedin, Huma [mailto:AbedinH@state.gov]  
**Sent:** Saturday, December 10, 2011 11:59 AM  
**To:** H  
**Subject:** Fw: Gunmen try to assassinate head of Libyan army (AP)

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**From:** OpsNewsTicker  
**Sent:** Saturday, December 10, 2011 11:19 AM  
**To:** NEWS-Mahogany  
**Subject:** Gunmen try to assassinate head of Libyan army (AP)

# Takeaways

- When is your email related to this board private?
- When should you not use email?

# FOIA

## Meetings –

All meetings of public bodies shall be open, except as provided by § 2.2-3711. Va. Code § 2.2-3707.

# FOIA

When are you having a meeting?

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, 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.

## Definition cont...(2015)

- Neither the gathering of employees of a public body nor 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, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body . . . shall be deemed a "meeting" subject to FOIA.

# Key Requirements for Meetings

- **§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.**
- A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.
  - § 2.2-3707.01 – Meetings of the General Assembly.
  - § 2.2-3707.01 – Closed meetings. But, there is a set of procedures you must take BEFORE going into closed meeting.
- B. No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708, 2.2-3708.1 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

# More Requirements

- C. Every public body shall give notice of the date, time, and location of its meetings by:
  - 1. Posting such notice on its official public government website, if any;
  - 2. Placing such notice in a prominent public location at which notices are regularly posted; and
  - 3. Placing such notice 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.
- All state public bodies subject to the provisions of this chapter shall also post notice of their meetings 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.
- And there are more steps that must be taken in addition to those.

# When meeting always required

- § 2.2-3710. Transaction of public business other than by votes at meetings prohibited.
- A. Unless otherwise specifically provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter.

## But...

- B. Notwithstanding the foregoing, nothing contained herein shall be construed to prohibit (i) 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, whether such contact is 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 this chapter

# Electronic meetings

- § 2.2-3708. Electronic communication meetings; applicability; physical quorum required; exceptions; notice; report.
- A. No board or subgroup created by that board shall conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled.
- Ways to do it involve quorum of members physically assembled.

# Subcommittees, private sector members, etc.

"Public body" means any legislative body, authority, **board**, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth . . . ; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. [...] -- Code § 2.2-3701.

# FOIA

- Hypo: At a public meeting, the board votes to create a subcommittee of two board members to confer and create recommendations for cost-share. Any problem?
- The two subcommittee members agree to meet over the telephone and discuss business, but they report to the board their discussions? Allowed?

# FOIA

- Hypo: At a charity cocktail hour, you see two committee members standing by the bar. You pleasantly greet them as you order a drink. Meeting under FOIA? Can you reminisce together about the March meeting?

# FOIA

- Hypo: A bike trail developer offers a helicopter tour to any committee members who wish to view the construction of a new bike trail at a state park in Maryland. You and two other members take the helicopter tour. Meeting under FOIA?

# FOIA

- Hypo: You write an email to all the other members raising a concern about a dam safety issue. A fellow member responds all. Yet another member quickly responds all on the same topic.
- Meeting for FOIA purposes?
- How about opening an instant message chat online between three members?
- What if only two?

# FOIA

- Answer: an improper closed meeting occurs where the feature of simultaneity inherent in the term "assemblage" arises; the e-mails involve some sort of back-and-forth exchange of the three required members; the messages generate group conversations or responses with multiple recipients.
- From Hill v. Fairfax County Sch. Bd., 284 Va. 306 (2012).

## Hypo cont.

- the inquiry is whether a series of electronic communications of whatever type constitutes a meeting of a public body for purposes of applying the FOIA.
- Can a blog be a meeting? "the key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirements of [the] FOIA, and those that constitute a 'meeting' under [the] FOIA, is the feature of simultaneity inherent in the term 'assemblage.' "
- In Hill, emails were written by one member to one recipient. Court upheld finding of no meeting.

# Beck v. Shelton

- In Beck, more than three members of City Council corresponded with each other concerning specific items of public business by use of e-mail. The shortest interval between sending a particular e-mail and receiving a response was more than four hours. The longest interval was well over two days.
- While such simultaneity may be present when e-mail technology is used in a "chat room" or as "instant messaging," it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission.
- Court found no meeting because no feature of simultaneity.

# FOIA

- What about making decisions by vote over email?
- What prevents this?

# FOIA

- That's right. Code § 2.2-3710 prohibits the transaction of public business other than by votes at meetings.

# RECAP

- 1) can't transact public business without meeting--no voting, no deciding.
- 2) can't conduct an electronic meeting discussing public business (except if you follow certain requirements like quorum present).
- 3) can "separately" contact members to ascertain position so long as communication doesn't become a meeting. Can't have feature of simultaneity with quorum or three members.

# Best practices

- Remember that what you put in writing is a public record subject to FOIA.
- Think first. If unsure, reach out and ask questions.
- Use a separate account for your public business.
- Pick up the phone.
- If in writing, send emails to staff for distribution.

# FOIA

Questions about FOIA?

Please contact the “Virginia Freedom of Information  
Advisory Counsel”

Toll free: 866-448-4100

Email: [foiacounsel@dls.virginia.gov](mailto:foiacounsel@dls.virginia.gov)