

LOCAL GOVERNMENT LAW: WHAT ATTORNEYS NEED TO KNOW
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FAIRFAX

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OPEN MEETING LAWS
9:00-10:00 AM

Why are meetings of certain public officials required to be “open”?

The Virginia Freedom of Information Act (“FOIA”) was adopted by the Virginia General Assembly to ensure the people of the Commonwealth have 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. It further states that “(t)he 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”. There are some exceptions to the open meeting requirement; however, unless the public body or its officers or employees specifically elect to exercise a specific exemption provided by FOIA 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. Virginia Code §2.2-3700(B)

The provisions of FOIA are required to 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. However, FOIA shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth. Virginia Code §2.2-3700 (B)

1. Overview of the Law and to Whom it Applies

- a. *“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. The gathering of employees of a public body shall not be deemed a “meeting” subject to the provisions of this chapter. Virginia Code § 2.2-3701*

- b. *Discussion of public business. All meetings must be open where it is held for the purpose of transacting public business or to hold discussions relating to the transaction of public business.* Virginia Code § 2.2-3707
- c. *"Open meeting" or "public meeting" means a meeting at which the public may be present.* Virginia Code § 2.2-3701
- d. *"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) 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. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.* Virginia Code § 2.2-3701
- e. Virginia Code § 2.2-3703.1 was added in 2014 to address the disclosure of information pursuant to court order or subpoena. — *Nothing contained in this chapter shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena. No discretionary exemption from mandatory disclosure shall be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law.* Virginia Code § 2.2-3703.1

Make sure the reasons are valid for a closed meeting.

- f. Virginia Code § 2.2-3707 states the requirements for meetings to be public; notice of meetings to be made and covers recordings and minutes:
 - A. *All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.*
 - 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.*

C. Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in 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 their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar. Publication of meeting notices by electronic means by other public bodies shall be encouraged. The notice shall be posted at least three working days prior to the meeting. Notices for meetings of state public bodies on which there is at least one member 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.

D. Notice, reasonable under the circumstance, of special or emergency meetings shall be given contemporaneously with the notice provided members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of 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.

G. Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) 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 (ii) 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. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.

H. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. 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, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

I. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

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.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708, minutes of state public bodies shall include (a) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (b) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (c) the identity of the members of the public body who were not present at the locations identified in clauses (a) and (b), but who monitored such meeting through electronic communications means.

- g. If it's a meeting, there must be minutes.

Virginia Code §2.2-3707 I. states:

Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

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2. Required Content of Meeting Notices

For most meetings, the notice provision of FOIA is fairly simple. Virginia Code § 2.2-3707 sets forth the meeting notice requirements:

- a. Notice must state the date, time, and location of the meeting
- b. The notice shall be posted **at least three working days prior** to the meeting.
- c. The **Notice must be posted in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body**, or in the case of a public body that has no clerk, in the office of the chief administrator. **Publication of meeting notices by electronic means by other public bodies shall be encouraged.**

d. All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar.

e. The specific provisions of Virginia Code § 2.2-3707 are as follows:

A. *Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in 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 their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar. Publication of meeting notices by electronic means by other public bodies shall be encouraged. The notice shall be posted at least three working days prior to the meeting. Notices for meetings of state public bodies on which there is at least one member 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.*

B. *Notice, reasonable under the circumstance, of special or emergency meetings shall be given contemporaneously with the notice provided members of the public body conducting the meeting.*

C. *Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.*

3. Exceptions to the Rule

a. The provisions of FOIA are required to 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. FOIA shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth. Virginia Code §2.2-3700 (B)

b. Pursuant to Virginia Code §2.2-3703, FOIA shall not apply to the following:

1. The Virginia Parole Board, except that (i) information from the Virginia Parole Board providing the number of inmates considered by such Board for discretionary parole, the number of inmates granted or denied parole, and the number of parolees returned to the custody of the Department of Corrections solely as a result of a determination by such Board of a violation of parole shall be open to inspection and available for release, on a monthly basis, as provided by § 2.2-3704 and (ii) all records concerning the finances of the Virginia Parole Board shall be public records and subject to the provisions of this chapter. The information required by clause (i) shall be furnished by offense, sex, race, age of the inmate, and the locality in which the conviction was obtained, upon the request of the party seeking the information;

2. Petit juries and grand juries;

3. Family assessment and planning teams established pursuant to § 2.2-5207;

4. The Virginia State Crime Commission; and

5. The records required by law to be maintained by the clerks of the courts of record, as defined in § 1-212, and courts not of record, as defined in § 16.1-69.5. However, other records maintained by the clerks of such courts shall be public records and subject to the provisions of this chapter.

6. Public access to voter registration and election records shall be governed by the provisions of Title 24.2 and this chapter. The provisions of Title 24.2 shall be controlling in the event of any conflict.

7. No provision of this chapter or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person (i) incarcerated in a state, local or federal correctional facility, whether or not such facility is (a) located in the Commonwealth or (b) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.) or (ii) civilly committed pursuant to the Sexually Violent Predators Act (§ 37.2-900 et seq.). However, this subsection shall not be construed to prevent such persons from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution. (1999, cc. 703, 726, § 2.1-341.2; 2001, c. 844; 2003, cc. 989, 1018; 2004, cc. 398, 690; 2007, cc. 438, 548, 626.)

c. When is a meeting, not a meeting? **The Rule of Three**

- i. Under Virginia Code § 2.2-3701, a “meeting” is a defined term:

“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. The gathering of employees of a public body shall not be deemed a “meeting” subject to the provisions of this chapter.

- ii. Three or more members of the public body;
- iii. A quorum of the members of any public body;

iv. Does not include employees

- d. Electronic Meetings – As provided in § 2.2-3708, 2.2-3708.1
- e. When it isn’t a “meeting” three or more members of the public body can gather or attend functions.

Virginia Code § 2.2-3707 G states as follows:

Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) 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 (ii) 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. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.

Examples of such gatherings:

- Awards banquets
- PTA meetings
- Candidate debates (interesting exception)
- Community service organization meetings

However, a non-meeting can quickly turn into a meeting if discussions relating to the transaction of public business occur.

f. CLOSED MEETINGS - The Virginia Code sets forth the specific types of discussions that may be conducted in a closed meeting of a public body. Specifically, § 2.2-3711. Closed meetings authorized for certain limited purposes, states as follows:

A. Public bodies may hold closed meetings only for the following purposes:

1. 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.

2. 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 Virginia public institution of higher education 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.

3. 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.

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

5. 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.

6. 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.

7. 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; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. 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.

8. In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

9. In the case of the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia,

discussion or consideration of matters relating to specific gifts, bequests, and grants.

10. Discussion or consideration of honorary degrees or special awards.

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

12. Discussion, consideration, or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

13. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

14. Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

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

16. Deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of Virginia Lottery matters related to proprietary lottery game information and studies or investigations exempted from disclosure under subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

17. Those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed.

18. *Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.*

19. *Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety; 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.*

20. *Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23-76.1, or by the Board of the Virginia College Savings Plan, acting pursuant to § 23-38.80, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system or by the Virginia College Savings Plan or provided to the retirement system or the Virginia College Savings Plan under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment.*

21. *Those portions of meetings in which individual child death cases are discussed by the State Child Fatality Review team established pursuant to § 32.1-283.1, and those portions of meetings in which individual child death cases are discussed by a regional or local child fatality review team established pursuant to § 32.1-283.2, and those portions of meetings in which individual death cases are discussed by family violence fatality review teams established pursuant to § 32.1-283.3.*

22. *Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.*

23. *In the case of the Virginia Commonwealth University Health System Authority, discussion or consideration of any of the following: the acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority; operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority; matters relating to gifts, bequests and fund-raising activities; grants and contracts for services or work to be performed by the Authority; marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority; members of its medical and teaching staffs and qualifications for appointments thereto; and qualifications or evaluations of other employees.*

24. *Those portions of the meetings of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions to the extent such discussions identify any practitioner who may be, or who actually is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.*

25. *Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23 is discussed.*

26. *Discussion or consideration, by the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-*

484.15, of trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted by CMRS providers as defined in § 56-484.12, related to the provision of wireless E-911 service.

27. Those portions of disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation, Department of Health Professions, or the Board of Accountancy conducted pursuant to § 2.2-4019 or 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory boards or conference committees of such boards to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

28. Discussion or consideration of records excluded from this chapter pursuant to subdivision 11 of § 2.2-3705.6 by a responsible public entity or an affected locality or public entity, as those terms are defined in § 33.2-1800, or any independent review panel appointed to review information and advise the responsible public entity concerning such records.

29. 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.

30. Discussion or consideration of grant or loan application records excluded from this chapter pursuant to subdivision 17 of § 2.2-3705.6 by (i) the Commonwealth Health Research Board or (ii) the Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority.

31. Discussion or consideration by the Commitment Review Committee of records excluded from this chapter pursuant to subdivision 9 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

32. [Expired.]

33. Discussion or consideration of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 18 of § 2.2-3705.6.

34. *Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 19 of § 2.2-3705.6.*

35. *Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-625.1.*

36. *Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of records excluded from this chapter pursuant to subdivision A 2 a of § 2.2-3706.*

37. *Discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of records or confidential matters excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.*

38. *Discussion or consideration by the Virginia Port Authority of records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6.*

39. *Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, by the Investment Advisory Committee appointed pursuant to § 51.1-124.26, by any local retirement system, acting pursuant to § 51.1-803, by the Board of the Virginia College Savings Plan acting pursuant to § 23-38.80, or by the Virginia College Savings Plan's Investment Advisory Committee appointed pursuant to § 23-38.79:1 of records excluded from this chapter pursuant to subdivision 25 of § 2.2-3705.7.*

40. *Discussion or consideration of records excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.6.*

41. *Discussion or consideration by the Board of Education of records relating to the denial, suspension, or revocation of teacher licenses excluded from this chapter pursuant to subdivision 12 of § 2.2-3705.3.*

42. *Those portions of meetings of the Virginia Military Advisory Council or any commission created by executive order for the*

purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, during which there is discussion of records excluded from this chapter pursuant to subdivision 12 of § 2.2-3705.2.

43. Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of records excluded from this chapter pursuant to subdivision 29 of § 2.2-3705.7.

44. Discussion or consideration by the Virginia Tobacco Indemnification and Community Revitalization Commission of records excluded from this chapter pursuant to subdivision 23 of § 2.2-3705.6.

45. Discussion or consideration by the board of directors of the Commercial Space Flight Authority of records excluded from this chapter pursuant to subdivision 24 of § 2.2-3705.6.

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue bonds by general or special law, to identify a business

or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.

- g. The closed meeting must meet the specific exemptions or the discussion must be held in an open meeting. In the Virginia Supreme Court case of *White Dog Publishing v. Culpeper Bd. of Sup.*, 272 Va. 377, 377, 634 S.E.2d 334, ___ (2006), the Supreme Court ruled that in considering a newspaper publishers' application for a writ of mandamus, the circuit court erred in finding that a county board of supervisors (BOS) did not violate the Virginia Freedom of Information Act (FOIA) by going into a closed session at a particular meeting and erred in failing to award reasonable costs and attorney's fees under the Act. The purpose of the Culpepper BOS's closed session was not the formation or modifications of a procurement contract and did not fall within FOIA's statutory public contract exemption under Code § 2.2-3711(A)(30). Special circumstances did not make an award of fees and costs unjust.

4. Email and Electronic Communications (Yes, texts count as communication)

"Electronic communication" means any audio or combined audio and visual communication method. Virginia Code § 2.2-3701.

Same rule as to a discussion of public business applies to group emails, texts, chat rooms and blogs. If more than two (the general rule) members of a public body engage in an online discussion of public.

Advising members of a public body on the proper use of email and electronic correspondence is perhaps one of the biggest challenges of a local government attorney. The art of writing a formal letter is quickly fading and the desire to be responsive and reply quickly to the public creates enormous pressure to discuss and resolve issues of public concern in an expedited fashion. It can also be used for purposes that quickly run afoul of the FOIA open meeting requirement. If three or more members of a public body engage in a contemporaneous email dialogue, exchange or discussion of a public matter, it could very likely violate the open meeting requirement.

In the Virginia Supreme Court case of *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004), petitioners filed an application for a writ of mandamus, alleging multiple incidents of alleged violations of FOIA relating to emails and street corner meetings. The gravamen of the complaint was that the defendants "deliberately e-mailed each other in a knowing, willful and deliberate attempt to hold secret meetings, avoid public scrutiny" and "discuss City business and decide City issues without the input of all the council members and the public." It was also asserted that various exchanges of e-mail, face-to-face meetings, and one public gathering on the streets of Fredericksburg constituted "meetings" under FOIA for which there was no notice

pursuant to Code § 2.2-3707 and no emergency or other exception which would relieve the Defendants from the obligations imposed upon them concerning public meetings. The Supreme Court held that when two elected members of the public body met on the street with a member-elect to discuss public business, FOIA did not apply because it does not apply to “members-elect”. The Supreme Court ruled that Under Virginia Code § 2.2-3710(B) it is anticipated that some electronic communication may constitute a “meeting” and some may not. The key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirements of FOIA, and those that constitute a “meeting” under FOIA, is the feature of simultaneity inherent in the term “assemblage.” In *Beck v. Shelton*, the Court ultimately held the email exchange in question between members of the City Board of Supervisors did not constitute a meeting because it was only to exchange and circulate information.

More recently in *Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75 (2012), the Virginia Supreme Court reviewed the propriety of the exchange of emails between local school board members and held that certain exchanges of e-mails between members of a local school board did not constitute a “Meeting” within the meaning of Code § 2.2-3701 and, thus, did not violate the notice and open meeting requirements of the Act. In *Hill v. Fairfax County School Board* the Court considered whether emails between members of the school board related to the closing of an elementary school. The Court reiterated its analysis in *Beck v. Shelton* and emphasized the terms “assemble” or “assemblage” of public body members requires the quality of simultaneity. Accordingly, the simple exchange of information via email between members of a public body does not necessarily constitute a meeting in the context of FOIA.

If email is being used as the functional equivalent of letter communication, it does generally not violate FOIA; however, if it is the functional equivalent of a chat room, instant messaging, simultaneity may be present.

How long should a member of a public body wait before hitting reply all?

The emails are still generally public record and even if an email exchange does not qualify as a meeting, the substance may be publically disclosed.

5. Electronic Meetings

§ 2.2-3708. Electronic communication meetings; applicability; physical quorum required; exceptions; notice; report.

- a. *Except as expressly provided in subsection G of this section or § 2.2-3708.1, no local governing body, school board, or any authority, board, bureau, commission, district or agency of local government, any committee thereof, or any entity created by a local governing body, school board, or any local authority, board, or commission 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. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

- b. Except as provided in subsection G or H of this section or subsection D of § 2.2-3707.01, state public bodies may conduct any meeting wherein the public business is discussed or transacted through electronic communication means, provided (i) a quorum of the public body is physically assembled at one primary or central meeting location, (ii) notice of the meeting has been given in accordance with subsection C, and (iii) the remote locations, from which additional members of the public body participate through electronic communication means, are open to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location.*

If an authorized public body holds an electronic meeting pursuant to this section, it shall also hold at least one meeting annually where members in attendance at the meeting are physically assembled at one location and where no members participate by electronic communication means.

- c. Notice of any meetings held pursuant to this section shall be provided at least three working days in advance of the date scheduled for the meeting. The notice shall include the date, time, place, and purpose for the meeting; shall identify the locations for the meeting; and shall include a telephone number that may be used at remote locations to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting to the remote locations. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.*
- d. Agenda packets and, unless exempt, all materials that will be distributed to members of the public body and that have been made available to the staff of the public body in sufficient time for duplication and forwarding to all locations where public access will be provided shall be made available to the public at the time of the meeting. Minutes of all meetings held by electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through electronic communication means shall be recorded by name in roll-call fashion and included in the minutes.*
- e. Three working days' notice shall not be required for meetings authorized under this section held in accordance with subsection G or that are continued to address an emergency or to conclude the agenda of the meeting for which proper notice has been given, when the date, time,*

place, and purpose of the continued meeting are set during the meeting prior to adjournment. Public bodies conducting emergency meetings through electronic communication means shall comply with the provisions of subsection D requiring minutes of the meeting. The nature of the emergency shall be stated in the minutes.

f. Any authorized public body that meets by electronic communication means shall make a written report of the following to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science by December 15 of each year:

- 1. The total number of electronic communication meetings held that year;*
- 2. The dates and purposes of the meetings;*
- 3. A copy of the agenda for the meeting;*
- 4. The number of sites for each meeting;*
- 5. The types of electronic communication means by which the meetings were held;*
- 6. The number of participants, including members of the public, at each meeting location;*
- 7. The identity of the members of the public body recorded as absent and those recorded as present at each meeting location;*
- 8. A summary of any public comment received about the electronic communication meetings; and*
- 9. A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.*

In addition, any authorized public body shall make available to the public at any meeting conducted in accordance with this section a public comment form prepared by the Virginia Freedom of Information Advisory Council in accordance with § 30-179.

g. Any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single

location and (ii) the purpose of the meeting is to address the emergency. The public body convening a meeting in accordance with this subsection shall (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the public body conducting the meeting; (b) make arrangements for public access to such meeting; and (c) otherwise comply with the provisions of this section. The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.

§ 2.2-3708.1. Participation in meetings in event of emergency or personal matter; certain disabilities; distance from meeting location for certain public bodies.

A. *A member of a public body may participate in a meeting governed by this chapter through electronic communication means from a remote location that is not open to the public only as follows and subject to the requirements of subsection B:*

1. *If, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that such member is unable to attend the meeting due to an emergency or personal matter and identifies with specificity the nature of the emergency or personal matter, and the public body holding the meeting records in its minutes the specific nature of the emergency or personal matter and the remote location from which the member participated. If a member's participation from a remote location is disapproved because such participation would violate the policy adopted pursuant to subsection B, such disapproval shall be recorded in the minutes with specificity.*

Such participation by the member shall be limited each calendar year to two meetings or 25 percent of the meetings of the public body, whichever is fewer;

2. *If a member of a public body notifies the chair of the public body that such member is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance and the public body records this fact and the remote location from which the member participated in its minutes; or*

3. *If, on the day of a meeting, a member of a regional public body notifies the chair of the public body that such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting and the public body holding the meeting records in its minutes the remote location from which the member participated. If a member's participation from a remote location is disapproved because such participation would violate the policy adopted pursuant to subsection B, such disapproval shall be recorded in the minutes with specificity.*

B. Participation by a member of a public body as authorized under subsection A shall be only under the following conditions:

1. The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting;

2. A quorum of the public body is physically assembled at the primary or central meeting location; and

3. The public body makes arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.