

Appendix C

The Freedom of Information Act: Meetings

Introduction

The Virginia Freedom of Information Act (“FOIA”):

[E]nsures the people of the Commonwealth . . . 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.

Virginia Code § 2.2-3700(B). FOIA requires that the meetings of a locality’s boards, commissions, and committees appointed by the governing body be open to the public. *Virginia Code § 2.2-3700 et seq.* Open government is the overriding policy of FOIA. *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991). FOIA also requires that records of a public body are public records available for public inspection and copying, unless an exception prohibits their disclosure or allows the public body to not disclose some or all of a particular record.

Meetings

1. A **meeting may exist when three or more members** of a public body are physically assembled for the purpose of discussing or transacting business; if a quorum of the public body is less than three, then a meeting exists whenever a quorum is established.
2. A **meeting does not exist when three or more members** of a public body are physically assembled, but not for the purpose of discussing or transacting business of the public body, and the gathering or attendance was not called or prearranged with any purpose of discussing or transacting business of the public body (*e.g.*, at a dinner or a VDOT informational meeting).
3. **Electronic communications** such as e-mail communications between three or more members of a public body may be an unlawful meeting if the communications are conducted in real time; e-mail communications where there are periods of time between each correspondence are unlikely to constitute a meeting.
4. If three or more members of a public body **continue discussions** of public business after a public meeting has adjourned, the gathering is a meeting under FOIA, even if the members are discussing the business with staff.
5. Public meetings are the rule; **closed meetings are the exception**; a closed meeting is permitted only when an express statutory exemption from the public meeting requirement applies. For example, the following discussions may be conducted in a closed meeting under Virginia Code § 2.2-3711(A):
 - a. 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.
 - b. 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. A meeting may be established under FOIA **even though a quorum is not established** (*e.g.*, 3 members of a 7-member public body may establish a meeting under FOIA, even though 4 members are required to be present to establish a quorum).

7. If a **quorum is not established**, the only action the public body may take at a meeting is to adjourn the meeting.
8. The **date, time, and location** of a public meeting must be posted **3 working days prior to the meeting**.

Closed Meeting Motions and Certification

Each motion to go into a closed meeting must state the subject, the purpose, and the specific statutory reference authorizing the exemption from the public meeting requirement.

Closed Meeting Motion (Consultation with legal counsel – actual or probable litigation)

I move that the [Council/Board/Commission] go into a closed meeting pursuant Virginia Code § 2.2-3711(A)(7) to consult with legal counsel and briefings by staff members regarding specific legal matters pertaining to actual [or probable] litigation relating to [describe the matter with particularity, *e.g.*, the disapproval of a subdivision plat; the denial of a rezoning.

Closed Meeting Motion (Consultation with legal counsel – specific legal matters)

I move that the [Council/Board/Commission] go into a closed meeting pursuant to Virginia Code § 2.2-3711(A)(8) to consult with legal counsel [retained by the Council/Board/Commission] regarding specific legal matters pertaining to [describe the matter with particularity] requiring the provision of legal advice by legal counsel.

Closed Meeting Certification

I move that the [Council/Board/Commission] certify by a recorded vote that, to the best of each [Council/Board/Commission] member's knowledge, only public business matters lawfully exempted from the open meeting requirements of the Virginia Freedom of Information Act and identified in the motion authorizing the closed meeting were heard, discussed, or considered in the closed meeting.