



## VIRGINIA 'S FREEDOM OF INFORMATION ACT: SYNOPSIS

FOIA broadly guarantees public access to public records, including your notes and correspondence concerning educational or cultural institution (institution, college, council, commission, center, institute, or museum) business. This includes e-mail, digital documents, and even preliminary drafts of documents. There are numerous exemptions, which are all fact-specific. Always be sensitive to the potential for public disclosure of your written communications. Any request by the press or any person to inspect your public records should be brought immediately to the Institutions attention to ensure a timely and proper reply. Oral and informal requests to you are considered legitimate FOIA requests. Any request for public records, regardless of the request, is a FOIA request.

Unlike the private sector, the public

- When discussion in closed session is adjourned, the chair of the meeting should immediately direct the opening of doors and inviting public/staff into the room for open session.
- Once back in open session, each member of the body will then be required to certify publicly that his or her discussion in closed session was proper and related to the permitted subject set forth in the motion convening the closed session.
- The law requires you to invite your general counsel to all Board and committee meetings, including all closed sessions. This also protects the Board in the event the discussion in closed session is questioned.

Some Board members may participate in a meeting by phone, provided that (1) there is a quorum physically assembled at one primary meeting location; (2) notice of the meeting has been given at least three working days in advance; and, (3) members of the public are provided a substantially equivalent way to listen to or observe the meeting. The notice must include the electronic communication means by which members of the public may witness the meeting and which remote locations, if any, are open to the public. Public access to remote locations is encouraged, but not required.

Another way Board members may participate by telephone (or other electronic communication means) is if before or on the day of the meeting, a board member notifies the chair that a board member notifies the chair that (1) the member has a temporary or permanent disability or other medical condition, (2) a family member has a medical condition which requires the member to provide care or (3) the member has a personal

## FOIA GENERALLY

What does FOIA do?

In general terms, FOIA defines what a meeting is and requires that all meetings be open to the public. It also prohibits discussion of public business among members outside of meetings. There are, however, exceptions to these general meeting requirements that each member should be familiar with.

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## MEETINGS

### Meetings Generally

FOIA requires that all meetings of the Board or any committee or subcommittee be advertised to the public for at least three working days. The notice requirements of FOIA are very specific. The secretary to the Board will handle the details of complying with these. Members of the Board, however, should be aware that any meeting called must be far enough in advance that the secretary has time to prepare the notice properly and advertise the meeting for three working days in the various ways required by FOIA. Any materials the institution supplies to Board members before the meeting also must be supplied to the public at the same time, with the exception of documents that are specifically exempt under FOIA from disclosure. This includes any materials one Board member sends to all other members.

If your bylaws call for more notice for meetings than FOIA does, you must comply with the stricter provisions of the bylaws.

Can less than a quorum of the Board – say three or four members – get together informally to discuss affairs of the institution?

No. A gathering of three or more members of the Board where business is discussed is illegal, unless the gathering has been properly advertised for at least three working days as a meeting. It does not matter that a quorum was not present. If more than two Board members serve on an institution-related foundation's board, FOIA will likely be violated.

This prohibition is generally against \_\_\_\_\_ members discussing public business. \_\_\_\_\_ members may discuss public business in person, on the phone, or otherwise, with one notable exception. If those two members constitute either the entirety or a quorum of a committee or subcommittee, or other group that has been designated by the Board or Board Chair to advise the Board or has been delegated some responsibility by the Board, then any discussions between them must be properly advertised as a meeting. Otherwise, the gathering is an illegal "meeting" under FOIA.

You may even discuss business with \_\_\_\_\_ other member at a time in a social environment, outside of a formal meeting.

\_\_\_\_\_ members, however, may not discuss public business together, and a third member may not listen to the conversation of the other two.

Please keep in mind that this prohibition applies at \_\_\_\_\_ times and in \_\_\_\_\_ places – including, for example, lunches, dinners, and social occasions held in conjunction with Board meetings or at annual professional conferences. For example, if a Board holds a luncheon between the morning and afternoon sessions of a meeting, the Board must advertise the luncheon as a meeting and have the luncheon open to members of the public, or ensure that Board members do not discuss any public business during the luncheon. That's a difficult task, but a mandatory one.

May the Board take a bus tour of campus and our new facilities during a break at our Board meeting?

## Closed Meetings

May we hold a closed session without the public attending?

FOIA has several exceptions to the open meetings requirement. The exceptions most likely to be utilized by Boards to justify closed sessions are:

(1) discussion, consideration, or interviewing of prospective candidates for employment; or the discussion of assignment, appointment, promotion, performance, demotion, salaries, discipline, or resignation of employees. This exception does not apply to discussion of members of the Board themselves. It is also inapplicable to discussions of general policy or operations – for example, reorganization – that would refer to reassignment or laying off of employees – unless the discussion centers upon employee(s).

(2) discussions or consideration of admission or disciplinary matters, or other matters that would involve disclosure of information in scholastic records (as defined in FOIA) of specific student(s). Generally speaking, however, the student or his lawyer is entitled to attend those closed sessions.

(3) discussion or consideration of the acquisition or disposition of real property where open discussion would adversely affect the bargaining position or negotiating strategy of the institution. This exception does not apply once the real property has been acquired or disposed of, and does not include potential use of real property.

(4) **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.**

(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 institution would be adversely af

(10) the discussion of the award of a public contract involving the expenditure of public funds, where discussion in open session would adversely affect the bargaining position or negotiating strategy of the institution.

You should always consult with legal counsel well in advance of going into any closed session. The above are brief descriptions of exceptions for going into closed sessions – the “basics”. In each case, there are additional, specific legal criteria or requirements to be considered.

You are never required by law to go into closed session. FOIA gives the Board the option of doing so when the topic of discussion falls within a FOIA open meeting exception.

What must we do to go into closed session?

First, all meetings must have been properly noticed. FOIA does not permit a “closed meeting.” All meetings are open, but for limited purposes, you may go into a “closed session.”



It's easy to stray from the topic identified in the motion for closed session. One responsibility of your counsel is to watch closely and call any deviation to your attention.

Who is permitted to go into a closed session with the Board?

Just because the Board

certification vote could subject the Board to public criticism. Furthermore, if a court finds that a public body voted to certify a closed session it should not have certified, a court may impose a penalty on the public body.

May Board members talk with other people about matters that were discussed in closed session?

There is no prohibition against Board members revealing discussions held in closed sessions and the Board itself may not prohibit such. Board

There are very specific requirements regarding the notice that require many details about the meeting to be known in advance. For example, the notice must include the remote locations that are open to the public and the electronic communication means by which members of the public may listen to or observe the meeting. It is a good idea to consult with counsel prior to issuing the notice that includes electronic meeting participation.

May members of the board call in from different locations?

A quorum of the body must be physically assembled at the primary meeting location. If a quorum is not present in one place, members may not transact business. If a quorum is present in one location, other members may participate from remote locations if other statutory requirements are met.

May a member participate wherever he or she happens to be at the time of the meeting?

In order to conduct an electronic meeting, each remote location open to the public must have been determined in advance and advertised to the public as a remote location of the meeting. Public access to remote locations is encouraged but not required. If public access is afforded at a remote location, the location must be equipped with a speakerphone or electronic ability so that the public can hear and participate. Any person attending the meeting at any of the public meeting locations must be given the same opportunity to address the Board as persons attending the primary location where the quorum is located, and members of the public must be provided with the agenda, agenda packets,

May a member call in on the telephone or participate by video and engage in discussion at a meeting so long as the member does not vote?

If the institution cannot satisfy all statutory requirements to conduct an electronic meeting, a member may call in from a location,

members respond to the message using function "reply all" within a short timeframe, such action may constitute an . Please avoid sending a reply to all Board members at the same time.

Also, keep in mind that emails that discuss the transaction of public business are "public records" under FOIA and may be produced in response to a request. (See below under "Records.")

## RECORDS

What does FOIA require regarding public records?

In general, FOIA requires that unless an exception applies, all records in the possession of a public employee or officer (including Board members) that relate to public business must be made available to Virginia citizens and members of the media upon request. They are entitled to read and inspect the document and to make copies. (Generally, institutions find it easier to provide requestors with copies rather than requiring the requestor to make the copies.) We



And as stated previously, if a court finds that a public body voted to certify a closed session it should not have certified, a court may impose a penalty on the public body.