



**TOWN OF BOWLING GREEN
TOWN COUNCIL WORK SESSION**

A G E N D A

**Thursday, April 04, 2024
6:00 PM**

CALL TO ORDER AND QUORUM ESTABLISHED:

BUSINESS:

- [1.](#) Freedom of Information Act (FOIA) Training, Jeff Gore, Town Attorney

INFORMATIONAL ITEMS:

2. Legislative Priorities Discussion, India Adams-Jacobs, Town Manager

ADJOURNMENT:

ACTION ITEMS:

Virginia Freedom of Information Act

Town of Bowling Green
Town Council Training

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Jeff Gore, Town Attorney
Hefty Wiley & Gore, PC

April 4, 2024

BASIC PURPOSE OF FOIA AND PRESUMPTION OF OPENNESS

FOIA :

- Ensures citizens ready access to “public records” in the custody of public bodies.
- Ensures free entry to meetings of public bodies where “business of the people” is being conducted

PRESUMPTION OF OPENNESS:

- All public records are open to inspection unless specifically exempted by law.
- Requester’s purpose in asking is NOT relevant.

WHAT IS COVERED BY FOIA?

- **Citizens' access to :**
 - **Public Meetings**
 - **Public Records**



“PUBLIC BODY” Defined Broadly

"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; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.

Committees and sub-committees of a public body have to follow the same rules for meeting notice, closed sessions, and access to records as the parent public body.

(Va. Code § 2.2-3701)

WHAT RECORDS ARE “PUBLIC”?

Very Broad Definition

“Public records” means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, 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)

- Meant to cover everything, including drafts⁽¹⁾ new technologies, text messages, voice mail recordings, Facebook posts, etc.

(1) FOIA Council Opinions AO-3-00, AO-05-09.

BASIC REQUIREMENTS

FOR RECORDS DISCLOSURE

- Request need not be in writing or refer to FOIA.
- Have 5 working days to respond.
 - Can ask for a 7-day extension if need more time (60-day extension if the request is for a criminal incident or investigative file)
 - Can agree with requester to another time frame.
- Must disclose all public records requested, unless a specific exemption exists.
- If only part of a record is exempt, you must redact the exempt part and furnish the rest.
- Must cite the specific FOIA provision allowing or requiring the record (or portion thereof) to be withheld
- Most exemptions are discretionary. FOIA itself does not prohibit any disclosure, though other laws sometimes do.
- Not required to create a new record but must make reasonable efforts to provide records any format under agreed terms of the requester and public body, including the payment of reasonable costs.

(Va. Code §§ 2.2-3704, 2.2-3704.01)

COSTS INCURRED IN RESPONDING TO A REQUEST

- May charge actual costs incurred. Public body shall make all reasonable efforts to supply the requested records at the **lowest possible cost**. Any costs incurred by the public body in estimating the cost of supplying the requested records shall be applied toward the overall charges to be paid by the requester for the supplying of such requested records.
- Public bodies that charge for the production of records may provide for an electronic method of payment.

(Va. Code § 2.2-3704)

COSTS INCURRED IN RESPONDING TO A REQUEST, CONT'D

- May require advance payment (not to exceed the amount of the advance determination) prior to processing request if costs are likely to exceed \$200;
 - if that's done, the time to respond is tolled for the amount of time elapsed between the notice and response of requester.
- Before processing a request, a public body may require the requester to pay any amounts owed for previous requests for records that remain unpaid 30 days or more after billing.

(Va. Code § 2.2-3704)

COMMON EXEMPTIONS FROM RECORDS DISCLOSURE

- Written advice of legal counsel & other records protected by attorney-client privilege (related to litigation, memoranda).
- Working papers of the chief executive officer (town manager).
- Records recorded or compiled exclusively for use in closed meetings.
- Personnel records, generally, but employee can almost always see own records and permit release to others.
- Certain criminal investigation files Juvenile, social services, and medical records.

(Va. Code §§ 2.2-3705.1 through 2.2-3706, 2.2-3706.1)

EMPLOYEE POSITIONS AND SALARIES

The public always has the right to know the name, position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any **officer, official**, or employee of a public body earning more than \$10,000 per year. These are **NOT exempt** personnel records.

(Va. Code §§ 2.2-3705.1(1) and 2.2-3704.)

PUBLIC MEETINGS



DEFINITION OF “MEETING”

- Any discussion of public body’s business by three or more members (or by two if that’s a quorum).
- Includes work sessions, and other informal gatherings.
- Telephone or video conference meetings are not generally allowed. Individual members have some limited options to attend by phone or video, but a quorum must still be physically present at the meeting site.

(Va. Code §§ 2.2-3701 and 2.2-3708.2)

“Meetings” Continued

The following **DO NOT** qualify as a “meeting”:

1. The gathering of employees of a public body
2. 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.

(Va. Code 2.2-3701)

ELECTRONIC MEETINGS:

Remote Participation by Individual Member of Public Body

1. Quorum of the public body must be present at the same location
2. **Public body must have adopted a policy** that:
 - (i) describes the circumstances under which remote participation is allowed, the process for making requests to use remote participation, approving/denying such requests, and creating a record of such requests; and
 - (ii) a member may not use remote participation due to personal matters more than two meetings per calendar year or 25 percent of the meetings held per calendar year, whichever is greater.

ELECTRONIC MEETINGS:

Remote Participation by Individual Member of Public Body, Cont'd

3. The member must notify the chair in advance the meeting that:

(i) the member has a temporary or permanent disability or other medical condition that prevents the member's physical attendance;

(ii) a medical condition of a member of the member's family requires the member to provide care that prevents the member's physical attendance;

(iii) the member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting; or

(iv) the member is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. (note: restriction of 2 meetings or 25% only applies to personal matters)

ELECTRONIC MEETINGS:

Remote Participation by Individual Member of Public Body, Cont'd

4. If participation by a member through electronic communication means is approved:
 - the public body shall record in its minutes the remote location from which the member participated
 - the remote location need not be open to the public and may be identified in the minutes by a general description.

5. If a member's participation from a remote location is disapproved because it would violate the policy:
 - such disapproval shall be recorded in the minutes.

(Va. Code 2.2-3708.3)

EMERGENCY MEETINGS: EMERGENCY DECLARATION

- Emergency declared by Governor OR local government: a public body, *or joint meetings*, may be conducted electronically *without a physical quorum* provided that:
 1. The catastrophic nature of the declared emergency makes it impractical or unsafe to assemble a quorum in a physical location; and
 2. The purpose of the meeting is to provide for the continuity of operations of the public body **or** the discharge of its lawful purposes, duties, and responsibilities.
 3. Public Bodies meeting through electronic communications means during a state or local declaration of state of emergency must, in addition to providing notice:
 - Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting;
 - Arrange for public access through electronic communication means (including videoconferencing if already used by the public body); and
 - Provide the public with the opportunity to comment at such meetings when public comment is customarily received

● (Va. Code §§ 2.2-3708.2)

FOIA MEETING REQUIREMENTS

- All meetings are open to the public, unless a specific provision allows for a closed meeting.
- Public includes reporters/photographers for media circulating in Virginia.
- Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open.

(Va. Code § 2.2-3707)

FOIA MEETING REQUIREMENTS

CONTINUED

In-Person Access:

- The public must be able to physically attend a meeting. However, physical attendance is not “absolute.”
 - For example, a public body does not have to rent an arena if a topic is likely to generate larger than normal public interest; but it must provide the “normal” in-person access and take steps to allow members of the public who cannot be accommodated in the meeting room access by other means.
 - A public body may not select or arrange a meeting room in a manner that artificially limits or removes the ability of the public to attend in person.

(Suffolk City Sch. Bd. v. Wahlstrom, 886 S.E.2d 244 (Va. 2023))

MEETING NOTICES

- Notice of the date, time, and location of any meeting of a public body must be posted at least three working days before the meeting:
 - in a “prominent public location” where notices are regularly posted,
 - at the office of the clerk/chief administrator.
 - on the body’s official website, if any.
- Exception to three-day rule for special or emergency meetings: “Reasonable” notice under the circumstances must be posted at the same time notice of those meetings is sent to members of the public body.
- Continued meetings now require reposting notice (like for emergency meetings.)
- Virginia citizens and media can request clerk of body to send individual notice of all meetings.
- If an all-electronic meeting related to a Governor or locally declared state of emergency, notice must be provided to the public by the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting
 - Must include date, time, and info on how to access the electronic meeting
- No general requirement for newspaper publication; but that’s required for certain specific actions

OTHER PUBLIC MEETING REQUIREMENTS

- May not vote by secret or written ballot.
- Must keep minutes, which are public records even before body approves them. Meeting minutes must be posted on website within seven working days of final approval.
- Minutes don't need to be a verbatim transcript of the meeting, but must include at minimum:
 - (i) date, time and location of the meeting.
 - (ii) members recorded as present or absent.
 - (iii) summary of discussion on matters proposed, deliberated or decided.
 - (iv) record of any votes taken.
 - (v) if electronic meeting – nature of emergency, that meeting was held electronically, and type of electronic means used
- Audio/video recordings are not mandatory, but if you have them, they are public records.
- Cameras and audio recorders are always allowed.

COMMON REASONS FOR CLOSED MEETINGS/SESSIONS

- **Personnel Matters:** Discussion/consideration of prospective candidates for employment; performance, demotion, individual salaries, disciplinary matters, etc. Must be about specific people, not general policies.
- **Legal Counsel:** Consultation with legal counsel and briefings by staff pertaining to actual or probable litigation. Also other matters requiring advice of counsel.
- **Real Property:** Discussion/consideration of a real property acquisition or disposition, where the discussion in open meeting would adversely affect bargaining position or negotiation strategy.
- Other purposes stated in FOIA (Va. Code § 2.2-3711)

HOW DOES A PUBLIC BODY CONVENE A CLOSED MEETING?

- By affirmative vote in open meeting approving a motion that:
 - (i) identifies the subject matter
 - (ii) states the purpose of the meeting and
 - (iii) makes specific reference to the applicable exemption from open meeting requirements provided by statute

Examples:

I move that the Board of Supervisors convene in closed session pursuant to **Va. Code Sec. 2.2-3711A(1)** to discuss a **personnel matter** involving the **annual performance evaluation of the town manager**.

I move that the Board of Supervisors convene in closed session pursuant to **Va. Code Sec. 2.2-3711A(8)** for **consultation with the town attorney** regarding **specific [contract dispute/negotiations] legal matters** requiring the provision of legal advice by such counsel.

(Va. Code § 2.2-3712)

DURING CLOSED MEETING

- Discussion is restricted to the matters contained in motion.
- Minutes are not required.
- Ok to “poll” the members on a closed meeting topic; but that is never binding until a formal vote is taken in an open meeting.

(Va. Code § 2.2-3712)

CONCLUSION OF THE CLOSED MEETING

- **Certification:** At the conclusion of the closed meeting, the public body shall immediately reconvene in open meeting and certify by roll call vote that it
 - “heard, discussed or considered only public business matters lawfully exempted from open meeting requirements under the Virginia Freedom of Information Act and only such public business matters as were identified in the motion by which the closed meeting was convened.”
 - “Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.”

(Va. Code § 2.2-3712(D))

ADMINISTRATIVE REQUIREMENTS

- 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. (Va. Code § 2.2-3702)



- **Designated FOIA Officer required of each public body.**
 - Contact information to be made available (posted on website, etc.).
 - Training and reporting requirement .
- **Posting of rights and responsibilities required of all localities.**
 - “Plain English” explanation .
 - Examples of typical public records and common exemptions used by the public body.
 - Link to FOIA Council online citizen complaint form
 - (i) explain how fees are assessed for accessing or searching for requested records and (ii) note the current fee charged, if any, for accessing and searching for such requested records

(Va. Code § 2.2-3704.1)

ADMINISTRATIVE REQUIREMENTS: REQUIRED TRAINING

➤ **Designated FOIA Officer**

- Training by FOIA Advisory Council or public body's legal counsel
- At least once every 2 years
- Form to be submitted to FOIA Advisory Council
- Va. Code §2.2-3704.2

➤ **Members of Town/City Councils, County Boards of Supervisors/ Constitutional Officers/ Members of Economic/Industrial Development Authorities/EDA/IDA Director**

- Training by FOIA Advisory Council or the Local Government Attorney
- Within 2 months of taking office, and every 2 years thereafter
- Online or in person
- Clerk of locality (or school board) to keep records 5 years
 - Va. Code §2.2-3704.3

PENALTIES FOR VIOLATIONS

- Civil penalty for willful and knowing violation \$500-\$2000 for first violation, up to \$5000 for each additional violation. Individual violators must pay with their own funds
- Separate \$1000 penalty for improper certification of closed meeting
- Separate penalty for destroying or altering records to avoid FOIA disclosure
- If court finds a violation it must order public body to pay attorney fees
- A petitioner need only to *substantially prevail* on the merits of the case, meaning, the petitioner has to be successful regarding the main object of his or her suit

OTHER POTENTIAL CONSEQUENCES..

- Berry v. Bd. of Supervisors of Fairfax County (884 S.E.2d 515 Va. 2023):
 - Unless another state code section specifically overrides the open meeting provisions of the Freedom of Information Act and conflicts with those provisions, any meeting, including electronic meetings, **must follow the open meeting requirements set forth in the Freedom of Information Act.**
 - The Supreme **voided** a revamped zoning ordinance vote that occurred during the COVID-19 pandemic, because the Court found that neither the Freedom of Information Act, the continuity of government ordinance, nor the 2020 budget allowed votes to be taken in electronic meetings on matters that were not “time-sensitive,” or necessary for the “continuity of operations.”

Questions?