

The Freedom of Information Act: Meetings

1. 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.

2. Meetings

- A. 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.
- B. 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), and public business is not transacted or discussed.
- C. “Public Business” “means any activity a public body has undertaken or proposes to undertake on behalf of the people it represents.” *Virginia Code § 2.2-3701*.
- D. **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.
- E. If three or more members of a public body **continue discussions** of public business during a recess or after a public meeting adjourns, the gathering is a meeting under FOIA, even if the members are discussing the business with staff.
- F. 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)*:

1. 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.
 2. 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.
 3. The investment of public funds where bargaining is involved and where, if made public initially, would adversely affect the financial interest of the EDA or the County
 4. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probably litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body.
 5. Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel.
 6. The award of public contracts involving the expenditure of public funds, the public discussion of which would adversely affect the negotiating strategy of the EDA regarding the terms of a proposed contract.
 7. Information subject to the exclusion as proprietary information of a private business provided to the EDA under a promise of confidentiality as identified in subdivision 3 of Virginia Code § 2.2-3705.6(3) related to the development or retention of business, trade, or tourism.
- F. 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).
- G. If a **quorum is not established**, the only action the public body may take at a meeting is to adjourn the meeting.
- H. The **date, time, and location** of a public meeting must be posted **3 working days prior to the meeting**.
- I. "Remote Electronic Participation" is permitted for any director who i) has a medical condition that prevents the director's physical attendance, ii) has a family member who has a medical condition that requires the director to provide care such that the director cannot physically attend a meeting, iii) is unable to attend due to a personal matter such as a family event or business commitment, this provision requires specification of the nature of the personal matter and is limited to no more than 25% of the EDA's annual meetings. In order for a director to participate remotely, at least four EDA directors must assemble at the physical meeting location and must approve remote electronic participation. The EDA must adopt a Remote Electronic Participation policy annually.

- J. “All Virtual Meetings” may be called for a Special Meeting or under emergency or dire circumstances in accordance with the EDA’s All Virtual Meeting Policy, which provides for meetings during a declared state of emergency or under an existing Continuity of Government Ordinance. The number of All Virtual Meetings is limited to half of the EDA’s annual meetings and cannot occur consecutively. The EDA must adopt an All Virtual Meeting policy annually.