COMMONWEALTH of VIRGINIA

Office of the Attorney General

Education Section

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202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

What Every Board Member Absolutely *has* to Know about FOIA

Do not underestimate the importance of Virginia's Freedom of Information Act ("FOIA"). This is very serious business. These are laws -- not just corporate bylaws or operating protocols that can be disregarded. Violations risk invalidation of board decisions and expose the institution and you personally to embarrassment, litigation, and civil penalties. The greatest loss, however, is the resulting damage to public confidence in you and the institution. In fact, the Governor could publicly request your resignation.

The idea behind FOIA (which was first enacted in 1968) is that the Government's business is the people's business. FOIA ensures that citizens have the right to inspect and copy public records and to attend public meetings.

FOIA governs many aspects of the operation of boards, and has wide application to the conduct of members, even when they are not at meetings. All members must be aware of the basic requirements of FOIA.

This Synopsis and FAQs are designed to give the Board of Visitors, Trustees, and Directors ("Board") a basic understanding of their personal responsibilities under FOIA and to ensure that you are aware that FOIA compliance is your responsibility. It is not comprehensive. It does not cover all aspects of FOIA. Whenever you have any concerns, questions, or uncertainties about FOIA or its application, you should contact the FOIA Officer or legal counsel.

VIRGINIA'S FREEDOM OF INFORMATION ACT: SYNOPSIS

Documents and Email

- 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.

Meetings

- Unlike the private sector, the public (including employees of the institution) and press have a right to be present at your board and committee meetings.

- All meetings of the Board, including its committees and subcommittees, in addition to any other group or entity appointed by the Board to advise it or exercise delegated power, must be conducted in an open meeting with at least three working days advance public notice of meeting time and location. It does not matter that a meeting involves no actual voting or transaction of business, such as, for example, retreats. A meeting exists in the eyes of the law whenever three or more Board members meet and discuss any Institution matter. Voting on any Institution action must always be conducted in open session. Voting by secret ballot or proxy is prohibited.

- Once properly convened and in open session, discussions regarding certain limited topics can be held in closed session. The justification for closed session does not depend on whether a subject may be very sensitive or political, or that a confidential setting might encourage more candid exchanges. Closed sessions must be specifically authorized by FOIA.

- Also, to go into closed session, certain specific procedural steps must be taken, including:

    - Advance public notice for the meeting must have been given.
    - During the meeting in open session, the Board must vote on a motion authorizing a closed session. This public motion must reasonably identify both the purpose for the closed session and the subject for discussion.
    - While in closed session, the discussion must be related only to the topic identified in the public motion. Take care not to digress into any unrelated areas or other subjects, even if those topics would be eligible for closed session with a proper motion. It is your responsibility both as a matter of law and common sense that you stick to the subject matter described in the motion authorizing the closed session.
    - Any action the Board wishes to take as a result of discussions in closed session must be voted on in open session.

- 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 matter that prevents his or her physical attendance.. The Board must vote to approve the member's participation under these conditions. In addition, the Board must have: (1) adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation. The policy must be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member making the request or the matters to be considered or voted on during the meeting; (2) there is a quorum of the Board or committee physically assembled at the primary meeting location; and (3) the Board makes arrangements for the voice of the remote participant to be heard by all persons at the primary meeting location. Whenever a member wants to participate by telephone (or other means of electronic communication), please consult with counsel.

- The Board of certain public bodies, which include any permanent or interim legislative study or advisory commission, committee, or subcommittee, other than a standing committee of the General Assembly to which bills and resolutions are referred during a legislative session, may meet electronically without the requirement for a quorum physically assembled in one location if the meeting is being held solely to receive presentations, updates, public comment, or conduct other forms of information gathering; however, if a quorum is not physically assembled the legislative study or advisory commission, committee, subcommittee board or council shall not take any votes o make any formal recommendations at such meeting. *The legislative grant of authority for this for this waiver of the FOIA physical quorum meeting requirements is temporary as it is either based on the Acts of the Assembly or an Appropriation Act; consult with your counsel to learn whether the authority has expired or been altered.*

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.

FOIA also requires that all public records (with some limited exceptions) be made available upon request to members of the public for inspection and copying.

All public records and meetings are *presumed* open, and the Board and the institution have the burden always of being prepared to prove that there was a legitimate reason for closing meetings or withholding records.

FOIA also requires that its open government provisions be liberally construed, and its exemptions be narrowly construed. This means that you should always err on the side of leaving meetings open rather than closing them and releasing documents rather than withholding them.

Whenever you have specific questions about FOIA or its requirements, please do not hesitate to contact counsel.

The exemptions to disclosure of records and for closed sessions are discretionary, not mandatory. There is no penalty for *releasing* records that *could* be withheld under a FOIA exemption (though other provisions of federal and state law, such as FERPA, may prohibit disclosure). There is also nothing that says a meeting *must* be closed just because it *could* be closed under a meetings exemption under FOIA. Please contact counsel if you have concerns about federal or state law that might prohibit release of information.

Who does FOIA apply to?

FOIA applies to all public bodies. In the context of public institutions of higher education, that means that FOIA applies to the institution and all of its officers (including members of the Board) and employees. It also applies to the operations of the Board itself together with all of its committees and subcommittees, and any other groups or entities appointed by the Board to advise the Board or exercise delegated functions.

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 of 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 *three or more* members discussing public business. *Two* 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 ***one*** other member at a time in a social environment, outside of a formal meeting.

Three 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 *all* times and in *all* 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?

The Board may take this tour, provided that arrangements are made also for members of the press and public to be present whenever any institutional business is discussed. That means you might need a bus sized to accommodate others if any discussions will take place on the bus.

Our Board members routinely serve on committees or task forces. Must the institution advertise these meetings?

If three or more Board members are on a committee, the meetings must be noticed.

We hold an annual retreat. This is a very informal work/training session. No business is conducted and no action is taken. Do we have to advertise this meeting and allow the press and members of the public to attend?

Absolutely. Any get-together of three or more members at which the business or operations of the institution are discussed is a "meeting" under FOIA. Retreats and work sessions are no exception. They must be properly advertised, and must be open unless an exemption applies to a specific matter under discussion.

Anybody who wants to may attend your meetings. All meetings must be open to the public. Any member of the public (including, of course, press, employees, and students) has a right to attend, listen, and make a video or audio recording of any meeting. The Board can put reasonable restrictions on recording to ensure that actions of the press or public do not disrupt the meeting.

You will, at times, have outside consultants present at your meetings. They will not be familiar with FOIA and may expect or request confidentiality that FOIA does not permit. The Board and staff should provide these consultants with information that will reduce the conflict between their expectations and what FOIA permits.

Do we have to record our meetings?

No. Recording meetings is not required. However, proper minutes must be taken. Draft minutes and final minutes must be posted to the institution's website and the Commonwealth Calendar. The secretary to the Board will ordinarily have this responsibility.

Do we have to take minutes?

FOIA requires that minutes be taken of every meeting, including retreats or work sessions. Minutes must include (a) the date, time, and location of the meeting; (b) the members of the public body recorded as present and absent; and (c) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. Also, minutes, including draft minutes that fairly reflect actions taken, must be posted on the website and the Commonwealth Calendar within 10 days following the 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) ***the personnel exception:*** discussion, consideration, or interviewing of prospective candidates for employment; or the discussion of assignment, appointment, promotion, performance, demotion, salaries, discipline, or resignation of *specific* 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 *specific* employee(s).

(2) ***the scholastic record exception:*** 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) ***the real property exception:*** 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) ***the prospective business or industry exception:*** 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) ***the investment exception:*** 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 affected. This exception might occasionally be invoked during discussion of endowment funds investment.

(6) ***the legal advice exception:*** consultation with legal counsel for legal advice on specific matters 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.

(7) ***the development exception:*** discussion or consideration of matters related to gifts, bequests, and fund-raising activities, and grants and contracts for services or work to be performed by the institution.

(8) ***the honorary degree exception:*** discussion or consideration of honorary degrees or special awards.

(9) ***the terrorism or cybersecurity exception:*** discussions related to plans to protect public safety as it relates to terrorist activity and the response to that activity. This exception also includes discussion of specific cybersecurity threats and vulnerabilities.

(10) ***the contract exception:*** 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." This is so even if the only reason the Board is having the meeting is to go into closed session. A closed session may be held as a small part of a larger open meeting, or a meeting may be called and noticed specifically for the purpose of having a closed session. But in any event, all meetings must first be convened as an open meeting, and then proper procedures must be followed to go into closed session. Closed sessions must be followed by an open session certification that the closed session was proper.

A detailed motion must be made to go into closed session. That motion, which must be included in the open meeting's minutes, must identify: (1) the closed session's subject matter; (2) the closed session's purpose, i.e., what you are talking about and why; and (3) the specific exemption under § 2.2-3711(A) that applies. General references to FOIA or to the subject matter of the meeting do not suffice.

Please confer with counsel prior to entering closed session.

What if we are in open session with only the Board and an Institution's President, Chancellor, or Executive Director are present, and we want to discuss something that we would ordinarily discuss in closed session.

You certainly may hold the discussion without going into closed session, but there are considerations to that approach, including that minutes would have to be taken, whereas minutes would not be required in a closed session.

What can we discuss in closed sessions?

Once the Board properly goes into closed session, you can discuss only those specific matters identified in the motion to go into closed session. For example, if the Board went into closed session to discuss "personnel matters – specifically the salary of the president, chancellor, or executive director " the Board could not discuss any other matter, not even a different personnel matter, even if that other matter might have been the proper subject of a closed session had it been included in the motion.

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 goes into closed session, it does not mean that everyone other than Board members must be excluded. The Board can allow anyone to attend that the Board believes is necessary to the discussion. That said, it is best to allow *only* those persons deemed necessary to the discussion.

Governing boards are required by law to invite and include legal counsel in all meetings, including closed sessions. The Board is focused on conducting its business, and not focused on making sure it discusses only matters for which it went into closed session. It is very easy to stray from the central discussion, and the lawyer can focus attention on keeping the Board within legal bounds. This is important in that each individual Board member must certify upon leaving closed session that nothing was discussed other than the matter(s) mentioned in the motion to go into closed session. Your counsel can also identify that legal advice may be needed when Board members are unaware that legal issues are implicated.

Who decides when closed session is appropriate?

The Board as a whole is responsible for deciding whether to go into closed session and who should be included and excluded. The Board decides to go into closed session through passage of the motion to do so. As a matter of governance, the Board as a whole also should decide who should stay and not rely solely on the Chair, the secretary to the Board, or the Institution's President, Chancellor, or Executive Director to make that call.

Barring unusual circumstances, for practical reasons, the Institution's President, Chancellor, or Executive Director should remain in most closed meetings.

Can we vote in closed session?

The Board can take non-binding votes to gain insight into the member's thinking on an issue. No "official" vote, however, may be taken. Any action that is required as a result of discussions in closed session must be taken after going back into the open meeting. Members are not legally bound to vote in the open meeting as they indicated they would in closed session.

What do we do when we have finished our closed session discussions?

The Board must reconvene, by motion, in open session following a closed session, even if they have no more business to conduct. After the room is opened and visitors are informed that the meeting is now open, each member of the body must affirm by roll call or recorded vote that only those matters lawfully exempted and identified in the motion to close the meeting were heard or discussed. Any member who believes matters outside the scope of the motion were discussed must say so prior to the vote. A statement that describes the substance of the departure must be included in the minutes.

Board members must take the certification process seriously. Failure to certify that the closed session was held properly does not affect the validity or confidentiality of matters discussed in the closed session or action taken on those matters later in the open meeting. However, a deviation from the proper subject of the closed session and the failure of a unanimous

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 *legal* prohibition against Board members revealing discussions held in closed sessions and the Board itself may not prohibit such. Board members are officers of the Commonwealth, and within legal parameters, each must decide how to best execute their responsibilities to the Commonwealth and the institution. Common sense, professional norms, and individual consciences must dictate Board members' actions. One notable exception from Federal law: FERPA generally prohibits all school officials, including Board members, from revealing information obtained from student records. Other privacy requirements outside of FOIA may exist under federal and state law. Please consult counsel if you have questions.

Should minutes be taken in closed session?

There is no requirement that minutes be taken in closed session. Any minutes that are taken need not be disclosed. They *may* be released, however, in the Board's discretion. In general, a Board may prefer not to take minutes because there would not be any documents that could be released inadvertently.

What is an executive session?

The term executive session no longer has any legal significance. Under FOIA, there is a meeting and you are either in open session or closed session. For that reason, we strongly suggest that Boards abandon using the terminology "executive session." Further, it is common for Board members and others to confuse "executive session" and "executive committee."

Electronic Communication Meetings, or "Electronic Meetings"

May we hold a meeting by telephone or video?

Under FOIA, meetings to discuss or transact public business *generally* may not be conducted by telephone, video, or other electronic communication means. Instead, members must be physically assembled in one place. However, a Board may conduct a meeting through such means, provided that it strictly complies with the special FOIA provisions governing electronic communication meetings. "Electronic meeting" means telephonic or video broadcast or the meeting.

How much notice must be given of electronic meetings?

The notice required for electronic meetings is three (3) working days – the same as for other meetings. As with other meetings, the secretary to the Board ordinarily will handle posting the proper notice. Again, if Board bylaws require more than 3 working days' notice, the longer notice period must be met.

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, and all other materials provided to the Board, unless the information is prepared for a closed session, or otherwise exempt.

If a remote location that is open to the public is noticed, then the member decides to attend at another location, may we then omit the original location?

Once a location is noticed as a remote location, public access must be provided at that location unless the entire meeting is cancelled and re-noticed for at least 3 working days later.

You must hold at least one meeting annually where members are physically assembled at one location and where no members participate by electronic communication means.

Are there any special voting requirements for electronic meetings?

All votes at electronic meetings must be roll-call votes, recorded by name, and included in the minutes. This includes *pro forma* motions, such as motions to adjourn.

Must the electronic meeting be recorded or minutes kept?

There is no requirement that the meeting be recorded. However, minutes must be kept just as with non-telephone meetings.

What if there is some problem with communication during the meeting, such as a video or telephone line failure?

If during the meeting there is any interruption in the audio or video communication, the meeting must be suspended immediately and may not be resumed until repairs are made. The notice of the meeting must include a phone number to notify the primary meeting location of any interruption.

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, provided that the member *only listens*, and does not otherwise participate in any manner. However, the more conservative and safer approach would be to avoid this scenario.

May a Board set up remote sites for public participation without 3 days' notice?

Yes, provided that no member of the Board participates from those remote sites. The electronic meeting provisions of FOIA are designed to limit *member* participation by electronic means, not *public* participation. Public bodies may allow members of the public to call in and may otherwise set up remote sites for public participation. Electronic meeting provisions only apply when a member is participating from a remote location.

What types of meetings may be held by electronic means?

Any otherwise-permitted meeting of the Board, including closed sessions and emergency meetings, may be held as a electronic meeting. Meetings of committees or subcommittees of the Board also may be held as electronic meetings, but must comply with the same requirements as electronic meetings of the entire Board.

May we use email to communicate between meetings?

The nature of the email use is an important factor in determining whether its use is proper.

There is nothing improper or illegal about using email in and of itself. Email provides a fast, efficient means of communication for you in your public service life, just as it does for you in your personal and professional life. Nothing prohibits the use of standard email for general communication between or among members. This type communication is analogous to mailing copies of a letter or mass distribution by fax, and is not specifically governed by the meeting provisions of FOIA.

It is important to note, however, that the *nature of e-mail use* will determine the legality of its use. No *lawful* meeting may be held by email. That is to say, if three or more members of a public body (or a quorum if less than three) communicate by instant e-mail or texts, or if members are present at computers to receive and send e-mail simultaneously, that may well constitute an *illegal* meeting.

When the use of e-mail more resembles communication through ordinary mail, with significant delay between receipt and response, there is no "meeting" under FOIA. In contrast, when the exchange of e-mails resembles an assemblage of members of a public body, in that e-mails are being sent and responded to in quick fashion, such that there is a feature of simultaneity, then such an exchange may be a "meeting" under FOIA, albeit an unlawful meeting.

Board members should exercise extreme caution in the use of email. Consider, for example, that a Board member sends an email to all members of the Board, and two of those members happen to be sitting at their computers – not an unlikely situation. If those two

members respond to the message using function "reply all" within a short timeframe, such action may constitute an *illegal meeting*. 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.")

Emergency Meetings

What if the Institution or Board has an emergency? Can we meet without three days' notice?

The public body must give notice that is "reasonable under the circumstances." In an emergency, notice must be given to the public and to Board members at the same time. An "emergency" is an unforeseen circumstance rendering the notice requirement impossible or impracticable and which circumstance requires immediate action. Delay or procrastination on the part of the Board or institution does not constitute an "emergency" under FOIA.

Pursuant to new law adopted in 2021, a public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when a locality in which the public body is located has declared a local state of emergency. This is allowed <u>if</u> (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location <u>and</u> (ii) 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. Under prior law, public bodies could only meet in such manner when the Governor declared a state of emergency, and only for the purpose of addressing the emergency. The law does require public bodies meeting through electronic communication means during a local or state declaration of a state of emergency to (a) make arrangements for public access to such meeting through electronic communication means, including videoconferencing if already used by the public body, and (b) provide the public with the opportunity to comment at such meetings when public comment is customarily received.

If we have an emergency, may we have an electronic meeting without 3 days' notice?

Yes. If an emergency electronic meeting is held, reasonable notice under the circumstances must be provided to the public. Generally, that would mean providing notice to the same persons as in a non-emergency by the most expedient method possible. Notice must be given to the public contemporaneously with that given members of the Board.

If an emergency meeting is held, must public access be provided?

Public access to the primary meeting location is required. Public access to remote locations is encouraged, but not required. The Board must meet all other electronic meeting requirements; for example, minutes must be kept. Furthermore, the minutes of the meeting must state the nature of the emergency.

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 generally refer to a request for public records as a "FOIA request."

What is a "public record"?

Public records are basically anything the institution and its officials and employees use to transact public business and record data, whether produced by them or others. Records include (among other things) paper documents such as copies of letters, contracts, memos, etc. Also included are video tapes and audio tapes; digital documents on computer hard drives and servers; and text messages on cell phones – in short, anything that records or documents public business is a public record. If it is about public business, it's a public record. This includes anything in a member of the Board's home or work computer or otherwise in his or her possession.

Do FOIA requests have to be in writing?

Any request made for records is a FOIA request, whether made orally, by letter, or by email. Additionally, the person requesting records need not use any magic words, such as "records," or "FOIA." The requestor is not required to tell you why he or she is asking for the records or what they intend to do with them and you should not ask.

Whenever anyone asks you for anything related in *any way* to the business of your institution, you should report it immediately to the institution's FOIA officer – even if you do not have any records you believe to be responsive to the request. Others within the institution may have responsive records, and the institution is under a very tight time frame within which to produce the records or object to production.

Are there exceptions to the requirement that we produce requested records?

In fact, there are well over a hundred exceptions. However, it is important that you, as a Board member, report any request for records to your institution's FOIA officer or counsel. They will help you and others determine what exemptions might apply and how best to respond to the request. The role of the FOIA officer is to assist in document collection to be responsive. Legal questions should be directed to legal counsel.

How long do I have to produce records in response to a FOIA request?

The institution has only 5 working days to respond initially, thus the importance of reporting any request immediately to the institution's FOIA officer. The FOIA officer will assist you and others in gathering documents and properly responding to the request. Even if the institution invokes the permitted extension of time, the initial response still must be made within

5 working days, and a final response must be made within 12 working days of the initial request, unless other arrangements are worked out between the FOIA officer and the requestor.

It is important that you not attempt to respond to a FOIA request on your own without consulting your FOIA Officer or counsel.

Would a FOIA request require me to give an account of some event I witnessed, for example, write a description of a discussion I had with another Board member?

FOIA requires the production of already-existing public records. It does not require that a record be created. (Please note that pulling data from an existing database or other structured collection of data is not creating a record.) At times, an institution may find it preferable for any number of reasons to create a new document rather than producing the existing documents that were requested. That's fine, as long as the requester agrees.

What about my personal documents, including for example, handwritten notes such as those from meetings or discussions with alumni, email at home on my personal computer, etc.?

First, please understand that *any* record (letter, memo, scribbled note, email, text messages, audio recording, or any other) that in any way relates to the business of the institution is *not* a personal document or record, it is a *public record*. This is the case no matter where it is located. Therefore, if the institution, officers, or employees receives a FOIA request, records may have to be produced if responsive to the request.

Must my personal contact information be available or shared with the public?

The law provides that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members is excluded from the mandatory disclosure provisions of FOIA, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. Currently, the law provides protections for personal contact information provided to a public body, not to its members; only applies to electronic mail; and requires the electronic mail recipient to request the public body not to disclose his personal contact information in order for the information to be exempt from mandatory disclosure.

PENALTIES

First, members of the Board are entrusted with the public confidence, and a FOIA violation is breach of that trust. The General Assembly has determined that, with specific exceptions, the public's right to open government is not to be violated. Extreme embarrassment to the Institution and you personally can result from FOIA violations.

Beyond that, any citizen can file a complaint in court if he believes that the institution has violated FOIA. It is up to the officer or employee to prove that an exception to FOIA was cited appropriately. However, if not successful, the offending officer or employee can be fined personally. In addition to these penalties, any officer or employee that alters or destroys requested records with the intent to avoid complying with a FOIA request can be fined personally for each record that is altered or destroyed.

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.