

Freedom of Information Act (FOIA) Training

State Special Education Advisory Committee
(SSEAC)

July 19, 2018

Presented by Susan B. Williams, Assistant Attorney General

SSEAC

- Public body for purposes of FOIA
 - Establishment of committee is required by IDEA
 - Membership is prescribed by IDEA
 - Members are appointed by the Virginia Board of Education
 - Activities are governed by the Virginia Board of Education bylaws for advisory committees

FOIA in General

- Virginia Freedom of Information Act = §§ [2.2-3700](#) through [2.2-3714](#) of the Code of Virginia
- Policy (as set forth in § [2.2-3700](#))
 - All public records and meetings shall be **presumed open**, unless an exemption is properly invoked.
 - Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be **open to the public** and all public records shall be **available for inspection and copying** upon request.

Access to Public Meetings

- **What is a meeting under FOIA?**
 - Gathering of members as a body or entity or as an informal assemblage of
 - (i) as many as three members or
 - (ii) a quorum, if less than three, of the membership
 - Business of the public body is being discussed or transacted
 - Includes work sessions

Access to Public Meetings

- **What is NOT a meeting under FOIA?**
 - Gathering of employees of a public body
 - Gathering or attendance of two or more members of a public body where there is no discussion or transaction of public business (and not called for that purpose)
 - Gathering or attendance of two or more members of a public body at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate

Access to Public Meetings - NEW

- **Participation through “electronic communication means”**
 - Permitted under certain limited circumstances
 - State public bodies may conduct a public meeting through electronic communication means, provided
 - (i) a quorum of the public body is physically assembled at one primary or central meeting location
 - (ii) proper notice of the meeting has been given and
 - (iii) ~~the remote locations are open to the public~~ **members of the public are provided a substantially equivalent electronic communication means through which to witness the meeting (HB 908, 2018)**
 - For the purposes of this subsection, "witness" means observe or listen

Access to Public Meetings - NEW

Participation through “electronic communication means”

HB 908 (2018):

- Public access to the remote locations from which additional members of the public body participate through electronic communication means **shall be encouraged but not required**.
- **However**, if three or more members are gathered at the same remote location, then such remote location shall be open to the public.
- If access to remote locations is afforded, (i) all persons attending the meeting at any of the remote locations shall be afforded **the same opportunity to address the public body** as persons attending at the primary or central location

Access to Public Meetings

- **What does FOIA require if it is a public meeting?**
 - Notice of the meeting
 - Meeting must be open to the public and
 - Minutes of the meeting must be taken and preserved

Access to Public Meetings

- **What is sufficient notice?**
 - Date, time, and location of the meeting is required
 - Helpful (but not required) to include agenda to inform the public generally of what topics will be discussed
 - If a state public body includes at least one member appointed by the Governor, notice must also indicate whether public comment will be received and approximately when

Access to Public Meetings

- **Where to post the notice?**
 - FOIA requires that all public bodies post notices in **two physical locations**:
 - In a prominent public location at which notices are regularly posted, and
 - In the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator.
 - **AND**, a public body must also post notice on its official public government website, if any
 - **AND, state** public bodies must also post notice on a “central, publicly available electronic calendar maintained by the Commonwealth”

Access to Public Meetings

- **Who else is entitled to notice of meetings?**
 - Any person who annually files a written request for notification with a public body is entitled to receive direct notification of all meetings
 - If the person requesting notice does not object, the public body may provide the notice electronically

Access to Public Meetings

- **When to post the notice?**
 - For regular meetings:
 - at least **three working days** prior to the meeting.
 - For special or emergency meetings:
 - FOIA defines emergency as “an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which circumstance requires immediate action.”
 - Notice must be reasonable under the circumstances and given at the same time as it is provided to members

Access to Public Meetings

- **Recording of meetings by public or media?**
 - Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open
 - The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting to prevent interference with the proceedings

Access to Public Meetings

- **Agenda materials available to the public/media?**
 - At least one copy of **the proposed agenda** **and** all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting must be made available for public inspection **at the same time** they are furnished to the members

Access to Public Meetings

- **Are minutes required?**
 - Only at open meetings
 - Not required to be taken during closed meetings.
 - Not required to be taken at deliberations of General Assembly/legislative study committees, study committees appointed by the Governor or study committees appointed by local governments/school boards (unless committee includes a majority of the members of the governing body)

Access to Public Meetings

- **What must be included in minutes?**
 - Minutes must include: the date, time, and location of the meeting; members present and absent; summary of matters discussed; and record of any votes taken
 - Motions to enter into a closed meeting and certification after a closed meeting
 - Minutes and all other records of open meetings (including audio/video recordings) are public records and must be released upon request

Access to Public Meetings

- **When and where must minutes be posted?**
 - All boards, commissions, councils, and other public bodies created in the executive branch and subject to FOIA must post minutes of their meetings on their official public government website and on a central electronic calendar maintained by the Commonwealth
 - Draft minutes of meetings must be posted as soon as possible but no later than 10 working days after the conclusion of the meeting.
 - Final approved meeting minutes must be posted within three working days of final approval

Access to Public Meetings

- **What about voting and polling?**
 - Any and all votes taken to authorize the transaction of any public business must be taken and recorded **in an open meeting**
 - A public body may not vote by secret or written ballot
 - Nothing in FOIA prohibits “polling” or separately contacting members for the purpose of ascertaining a member’s position with respect to the transaction of public business
 - Such contact may be done in person, by telephone, or by electronic communication, provided that the contact does not constitute a meeting as defined in FOIA

Access to Public Meetings

- **What about closed meetings?**
 - Can take place only within the context of an open meeting, even if the closed meeting is the only agenda item
 - Public body must take an affirmative recorded vote in an open meeting approving a motion that:
 - Identifies the subject matter for the closed meeting
 - States the purpose of the closed meeting and
 - **Cites** the applicable exemption from the open meeting requirements
 - Public body must restrict its discussions during the closed meeting to those matters **specifically exempted** from the provisions of FOIA **and identified in the motion**

Access to Public Meetings

- **What happens at the end of a closed meeting?**
 - Public body must immediately reconvene in an open meeting to certify (by a roll call or other recorded vote) that they restricted their discussion during the closed meeting to those matters **(1) specifically exempted from the provisions of FOIA and (2) identified in the motion**
 - The vote must be included in the minutes of the open meeting
 - Any member who believes that there was a departure from the requirements above must state so prior to the vote and indicate the substance of the departure

Access to Public Meetings

- **When do decisions made by a public body in a closed meeting become official?**
 - When the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation, or motion agreed to in the closed meeting
- Otherwise, no resolution, ordinance, rule, contract, regulation, or motion adopted, passed, or agreed to in the closed meeting is effective

Access to Public Records

- **What is a public record under FOIA?**
 - Any writing or recording, in any format, prepared or owned by, **or in the possession of** a public body or its officers, employees or agents in the transaction of public business.
 - The definition of “public record” **does not distinguish** between draft or preliminary versions and final versions, so both are considered public records under FOIA

Access to Public Records

- **Who may request records under FOIA?**
 - Citizens of the Commonwealth
 - Representatives of newspapers and magazines with circulation in the Commonwealth and
 - Representatives of radio and television stations broadcasting in or into the Commonwealth

Access to Public Records

- **What does a FOIA request look like?**
 - The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response
 - Request is not required to be in writing
 - A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request
 - A public body may require a requester to provide his/her name and legal address before processing a FOIA request

Access to Public Records

- FOIA requests may be made
 - In person
 - By telephone
 - By email
 - By sending a letter
- Therefore, any time you understand that a requester wants to **inspect or receive a copy** of a record, IT IS A FOIA REQUEST!!!

Access to Public Records

- **When and how must a public body respond to a FOIA request?**
 - A public body must respond within **five working days** of receipt of the request with one of the five responses allowed by FOIA
 - Provide the requested records
 - Entirely withheld because release is prohibited by law or the custodian has exercised discretion to withhold in accordance with FOIA
 - Provided in part and withheld in part because release of part of the records is prohibited by law or the custodian has exercised discretion to withhold a portion in accordance with FOIA
 - Could not be found or do not exist or
 - Not practically possible to provide the requested records OR to determine whether they are available within the five-work-day period, and the public body needs an **additional seven work days** in which to provide one of the four preceding responses

Access to Public Records

- **What must be included in the response?**
 - If all or any part of the requested records are being withheld, the response must:
 - Be in writing
 - Identify with reasonable particularity the subject matter of withheld records and
 - Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.
 - If the records are being entirely withheld then the response must also identify with reasonable particularity the volume of the withheld records.

Access to Public Records

- If the answer is “we cannot find it” or “it does not exist” the response must:
 - Be in writing and
 - If the public body knows that another public body has the records, it must provide contact information for the other public body.
- If the answer is “we need more time” and the public body would like seven additional working days to respond the response must:
 - Be in writing and
 - Specify the conditions that make production of the records within the five-workday period impossible.

Access to Public Records

- **What about the records provided?**
 - Generally, if a record contains exempt and nonexempt information, the public body must release the record and delete or redact the exempt portion of the record.
 - Generally, no public body is required to create a new record if the requested record does not already exist.
 - When electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information (which is not considered the creation of a new record under FOIA).
 - A public body must provide electronic records in any medium identified by the requester, if that medium is used by the public body in the regular course of business.

Access to Public Records

- **How much may a public body charge for producing records?**
 - Reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.
 - A public body may not charge extraneous fees unrelated to the production of the records. [NOTE: This means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees.]
 - Charges for copies must not exceed the actual cost of duplication.
 - A citizen may request that the public body estimate the cost of supplying the requested records in advance.

Access to Public Records

- **Can a public body require payment in advance?**
 - When a public body determines in advance that the charges for supplying the requested records are likely to exceed \$200, it may require the requester to pay a deposit not to exceed the amount of the advance determination.
 - If a public body asks for a deposit, the five-working-day period to respond to the request will be tolled until the deposit is paid.
- **What if a requester does not pay for records provided under FOIA?**
 - Before responding to a new request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

Access to/Retention of Public Records

- **Is my e-mail a public record?**
 - FOIA governs **access** to records held by state and local government
 - The Virginia Public Records Act (PRA) governs how long a government entity must **retain** certain records
 - Must look at the **text and substance** of the communication to determine whether it is a public record

Access to/Retention of Public Records

- **Do I have to save my e-mail?**
 - Regardless of physical form, recorded information is a public record if it is produced, collected, received or retained in connection with the **transaction of public business**
 - Emails that relate to the public business are public records, **regardless of whether you use your home or office computer, text or other forms of social media.** It is the content of the record, not the equipment used, that controls
 - As such, these emails must be retained as required by PRA
- **Can the public and media access my e-mail under FOIA?**
 - An e-mail **relating to public business** would be accessible just like any other public record, and may be withheld from public disclosure only if a particular exemption applies to the content of the e-mail.

Access to Public Records

- **ALL** public records are **OPEN** to the public **UNLESS** a specific exemption in law allows the record to be withheld
- FOIA is a **mandatory disclosure** law
 - Unless the requested record is excluded by law, you must release it to the requester
- If a requested record is excluded, FOIA still gives you the authority to use your **discretion** to release the record so long as the release is **not prohibited** by some other law.
 - FOIA never prohibits release (but another law may)

Access to Public Records - Exclusions

- [§ 2.2-3705.1](#). Exclusions of general application to public bodies
- [§ 2.2-3705.2](#). Exclusions relating to public safety
- [§ 2.2-3705.3](#). Exclusions relating to administrative investigations
- [§ 2.2-3705.4](#). **Exclusions relating to educational records and certain records of educational institutions**
- [§ 2.2-3705.5](#). Exclusions relating to health and social services records
- [§ 2.2-3705.6](#). Exclusions relating to proprietary records and trade secrets
- [§ 2.2-3705.7](#). Exclusions relating to records of specific public bodies and certain other limited exclusions
- [§ 2.2-3705.8](#). Limitation on record exclusions
- [§ 2.2-3706](#). Disclosure of criminal records; limitations.

Access to Public Records

- **Scholastic records**

- Defined in Va. Code §§ 22.1-289 and 2.2-3701
- Records directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution
- Includes documentation pertinent to the educational growth and development of students as they progress through school, student disciplinary records, achievement and test data, cumulative health records, reports of assessments for eligibility for special education services, and IEPs.

Access to Public Records - NEW

- **SB 512 (2018):**
 - The custodian of a **scholastic record shall not** release the address, phone number, or email address of a student in response to a FOIA request **without written consent of parent/legal guardian or eligible student.**

Access to Public Records

- **Directory information**

- Defined by FERPA
- Designated by schools/divisions
- Includes such information as a student's name, sex, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height as a member of an athletic team, dates of attendance, degrees and awards received

Access to Public Records - NEW

- **HB 1 (2018)**
 - **Directory information** may be disclosed in accordance with federal and state law and regulations provided that the school has given **notice to the parent or eligible student of**
 1. the types of information that the school has designated as directory information;
 2. the right of the parent or eligible student to refuse the designation of any or all of the types of information about the student as directory information, and
 3. the period of time within which the parent or eligible student must notify the school in writing that he does not want any or all of the types of information about the student designated as directory information
- **HOWEVER ...**

Access to Public Records - NEW

- **HB 1 (2018), Continued**

However, no school shall disclose the address, telephone number, or email address of a student pursuant to FERPA or FOIA unless the parent or eligible student has **affirmatively consented in writing** to such disclosure.

= OPT IN instead of OPT OUT!!!

Enforcement of FOIA

- Any person denied the rights and privileges conferred by FOIA may file a **petition for mandamus or injunction**, supported by an affidavit showing good cause.
- The petition shall be heard within **seven days**, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing.
- If the court finds the denial to be in violation of FOIA, the petitioner is entitled to **recover reasonable costs** (including fees for expert witnesses and attorneys' fees) from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.
- The public body shall **bear the burden of proof** to establish an exclusion by a preponderance of the evidence.
- Any failure by a public body to follow the procedures established by FOIA is **presumed to be a FOIA violation**.

FOIA Penalties

- If the court finds that a violation was **willfully and knowingly made**, the court shall impose a civil penalty of not less than \$500 nor more than \$2,000
 - upon such officer, employee, or member **in his individual capacity** (not imposed upon the public body)
 - regardless of whether a writ of mandamus or injunctive relief is awarded
 - amount is paid into the State Literary Fund
- For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000

Virginia FOI Advisory Council

foiacouncil.dls.virginia.gov

Virginia Freedom of Information Advisory Council

Announcing 2018 Freedom of Information (FOIA) "Records" Training

About the Council
[Services of the Council](#)
[FOIA Council Policies](#)
[Join Mailing List](#)
[Members](#)
[Staff](#)

FOIA Officers Information
[FOIA Officer Form \(online version\)](#)
[FOIA Officer Form \(Word format\)](#)
[Free online training](#)
[List of FOIA Officers](#)

Legal Resources
[2018 Freedom of Information Act](#)
[2018 Legislative Update](#)
[Exemptions of General Applicability](#)

Contact Information
Pocahontas Building, 10th Floor
900 E. Main Street
Richmond, VA 23219
E-Mail: foiacouncil@dls.virginia.gov

Meetings and Studies
[FOIA Council Meetings](#)
[2018 Subcommittees](#)
[HJR No. 96 \(2014\) FOIA Study](#)
[Annual Reports](#)
[Archives](#)

Publications
[Forms and Sample Letters](#)
[Reference Materials](#)
[Searchable Advisory Opinions](#)

Other Resources

Last updated July 10, 2018

9:43 AM
7/12/2018