

The Virginia Freedom of Information Act

The Virginia Conflict of Interests Act


Andrew R. McRoberts
amcroberts@sandsanderson.com
804-783-7211



1

Virginia Freedom of Information Act (FOIA)

©2024 Sands Anderson PC



2

Purpose of FOIA

- Ready access to public records.
- Free entry to meetings of public bodies.

All public records and meetings shall be presumed open unless an exemption is properly invoked.

©2024 Sands Anderson PC



3

What is a “Meeting?”

“Meeting” includes the formal and informal meetings of public bodies (including work sessions), either physically or by electronic communication means pursuant to §§ 2.2-3708.2 and 2.2-3708.3, of as many as **THREE MEMBERS** (or a quorum, if less than 3) of the public body, wherever held, with or without minutes being taken, and whether or not votes are cast.

Note: A committee of a public body is itself a public body. Thus, for example, if 2 of 3 committee members of the governing body or planning commission gather, this is a “meeting” since 2 of 3 is a quorum.

©2024 Sands Anderson PC



4

What is NOT a “Meeting?” – By Definition

- A gathering of members of a public body (regardless of number) at any place or function where no part of the purpose of such gathering is the discussion or transaction of any public business, and such gathering was not pre-arranged with any purpose of discussing or transacting public business.
- A public forum, candidate appearance, or debate to inform the electorate is not a meeting... unless discussion or transaction of any public business by a quorum of a public body occurs.
- *Gloss v. Wheeler* – Va. Supreme Court opinion

©2024 Sands Anderson PC



5

What is NOT a “Meeting?” – Common Examples

- Social events/parties
- Sporting events
- Dinners, banquets, awards ceremonies
- Religious functions/services
- Retirement receptions
- Public forums
- Candidate appearances/debates

(The above are not meetings provided that the purpose is to inform the electorate and not to transact or hold discussions concerning public business, even if the performance of members of the public body is a topic of debate.)

©2024 Sands Anderson PC



6

Meeting Requirements – Open and In Person

- All meetings of public bodies shall be **open** to the public, unless the meeting is subject to an exception that allows for a closed meeting.
- All meetings must be conducted **in person** where members are **physically assembled** except as provided by §§ 2.2-3708.2 and 2.2-3708.3. This has been amended since COVID to expressly allow electronic meetings without a quorum physically assembled in cases of state or local emergency.

©2024 Sands Anderson PC



7

Meeting Requirements – Electronic Participation

Pursuant to **§ 2.2-3708.2(B)**, a member of a public body may participate in a meeting by **electronic communication** means if:

- They notify the chair of the public body; and
- The public body has adopted a remote attendance policy under § 2.2-3708.2(D); and
 1. *The member has a temporary or permanent disability or other medical condition that prevents the member's physical attendance; **or***
 2. *A medical condition of a member of the member's family requires the member to provide care that prevents the member's physical attendance; **or***
 3. *The member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting; **or***
 4. *The member is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. However, the 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 rounded up to the next whole number, whichever is greater; and*
- If the public body **approves** the remote attendance, the meeting shall record in its minutes the remote location from which the member participated; however, the remote location need not be open to the public and may be identified in the minutes by a general description. The minutes must also identify which condition (1, 2, 3, or 4 above) applies and identify the nature of the personal matter if approved under 4.
- If the public body **disapproves** the remote attendance, the disapproval shall be recorded in the minutes with specificity.

Be sure to list all requirements in the minutes of the meeting.

©2024 Sands Anderson PC



8

Meeting Requirements – Electronic Meetings

Pursuant to **§ 2.2-3708.3**, an entire public body may participate in a meeting by **electronic communication** means if:

- **Either a state or local state of emergency has been declared;**
- **Emergency makes it impractical or unsafe to meet;**
- **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**

The public body convening the meeting shall:

- **Give public notice using the best available method and give it contemporaneously with the notice provided to members of the public body conducting the meeting;**
- **Make arrangements for public access to such meeting through electronic communication means, including videoconferencing if already used by the public body;**
- **Allow public access and comment, including video if available to public body;**

Minutes must say nature of emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held.

©2024 Sands Anderson PC



9

Meeting Requirements – NOTICE and VOTES

Every public body shall give notice of the date, time and location of its meetings and make available a **copy of the agenda**.

Notice must be posted:

- In a prominent, public location where notices are regularly posted; and
- In the office of the clerk of the public body or the chief administrator; and
- On the official government website, if any.

Notice must be provided to anyone who has requested in writing.

Notices must be given at least **THREE WORKING DAYS** in advance.

Votes of a public body must be taken in an open public meeting.

No votes may be taken in closed meeting. Polling only. NO EXCEPTIONS!

©2024 Sands Anderson PC



10

Meeting Requirements – Recording and Minutes

Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. Physical access to meeting room is typically mandated.

Minutes must be taken at all **open** meetings, must be in **writing**, and must:

- Include date, time, and location of meeting.
- Include members of public body present and absent.
- Summarize discussion on matters considered (**topic minutes not adequate, but no requirement for verbatim minutes**).
- Record, by member, all votes taken.
- Include motions/certifications for closed meeting.

©2024 Sands Anderson PC



11

Meeting Requirements – Emergency Meetings

For special, emergency, or continued meetings, notice **reasonable under the circumstances** must be given to the public contemporaneously with notice to the members of the public body.

©2024 Sands Anderson PC



12

Closed Meetings – Common Permissible Purposes

- Personnel matters (§ 2.2-3711(A)(1))
Includes appointments to boards and commissions and interviews for employment as well as for appointed positions
- Real property (acquisition or disposition—disclosure would adversely affect bargaining position) (§ 2.2-3711(A)(3))
- Business and industry development (prospective or expansion where no previous announcement made) (§ 2.2-3711(A)(5))
- Investment of public funds (bargaining is involved and disclosure would adversely affect interest) (§ 2.2-3711(A)(6))
- Consultation with legal counsel (§ 2.2-3711(A)(7) **pending or probable** litigation)
(§ 2.2-3711(A)(8) specific legal matters; advice of counsel)
- Award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors (§ 2.2-3711(A)(29) (where discussion in open session may affect bargaining position)

©2024 Sands Anderson PC



13

Closed Meetings – The Motion

A motion followed by a successful vote of the public body

The motion must include **three items**:

- The applicable FOIA exemption citation from Va. Code (incl. subsection); and
- What part of the exemption applies – the purpose (words from Act); and
- The **subject** to be discussed.

Note: The FOIA statute gives you the first two of the three. The third (the **subject**) must be something **more** than what's in the statute, but need not be specific enough to negate the reason for the closed session in the first place.

©2024 Sands Anderson PC



14

Closed Meetings – The Motion

Examples of closed session motion's mandated mandated 3 items:

- The applicable exemption cite (Va. Code sec. 2.2-3711(A)(8)).
- What part of the exemption applies – the purpose (“to receive advice of legal counsel”).
- The **subject** to be discussed (“regarding case X v. Y” or “regarding the X case,” or perhaps “regarding a specific pending CUP case” if concerned about public disclosure of the specific case name. Another example: “regarding a specific town employee” so as to not identify the specific person by name).

©2024 Sands Anderson PC



15

Closed Meetings – Certification

Following a closed meeting, the public body must immediately reconvene into open meeting and take a roll call or other recorded vote **certifying** that to the best of each member's knowledge:

- Only public business matters lawfully exempted from open meeting requirements under the Act were heard, discussed, or considered in the meeting by the public body; and,
- Only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed, or considered in the meeting by the public body; and

Remember: No action may be taken during closed meeting. Other than polling the members (“straw vote”), must wait until open meeting. Nothing binding the public body until a proper vote in open meeting.

©2024 Sands Anderson PC



16

Closed Meetings – Protocols

A public body may permit **nonmembers** (i.e., staff, consultants, counsel, other non-Council members) to attend a closed meeting if such persons are deemed necessary or if their presence will aid the public body in its consideration of a topic that is the subject of the closed meeting.

Materials prepared for use in and reviewed during closed meeting may remain confidential and exempt from FOIA. (§ 2.2-3705.1(5))

©2024 Sands Anderson PC



17

Public Records

Public records are **OPEN** to the public and must be produced upon proper request, **unless an exception applies**.

Parties entitled to public records in Virginia:

- Citizens of the Commonwealth.
- Newspapers and magazines with circulation in the Commonwealth.
- Radio and television stations broadcasting in or into the Commonwealth.

©2024 Sands Anderson PC



18

What is a Public Record?

Includes ALL Documents

- All writings and recordings in the possession of a public body.
- No matter the form or official status.

Does NOT Include Answers to Questions (documents only).

Note: An irony of FOIA is that the Freedom of Information Act does not entitle a citizen to info... only meetings & documents.

©2024 Sands Anderson PC



19

Exceptions to Disclosure

There are more than **135+ exceptions** under FOIA that permit a public entity or body to withhold documents.

Most exceptions give the public entity or body the ability to EITHER:

1. DENY producing the records; or
2. DISCLOSE the records in the discretion of the public body, UNLESS disclosure is prohibited by law.

©2024 Sands Anderson PC



20

Categories of Exceptions

- Exclusions of general applicability (§ 2.2-3705.1)
- Public safety records (§ 2.2-3705.2)
- Administrative investigations (§ 2.2-3705.3)
- Health and social service records (§ 2.2-3705.5)
- Proprietary records and trade secrets (§ 2.2-3705.6)
- Miscellaneous exclusions (§ 2.2-3705.7)
- Law Enforcement Records (§ 2.2-3706)

©2024 Sands Anderson PC



21

Common Exclusions

- Personnel records regarding specific individual (personnel file)
- Attorney-client privileged information
- Records compiled for litigation (work product)
- Records compiled for closed meeting
- Records relating to exempt purposes (contracts, bargaining)
- Personal information (account numbers, addresses, email addresses)
- Public safety records and information about systems
- Public utility account information
- Local parks and recreation information relating to minors
- **Confidential working papers and correspondence of local government manager or administrator (not Mayor, Chair or member of public body)**

©2024 Sands Anderson PC



22

When Is a FOIA Request Made?

A request for public records must identify the requested records with **reasonable specificity**.

The request does not have to:

- Be in writing, or
- Make reference to the Freedom of Information Act

A requester has the right to either inspect the document or receive a copy, or both, **at their election**. Requester may specify a particular format, if it is one public body uses.

©2024 Sands Anderson PC



23

How Do You Respond to a Request?

5 Days - 5 potential mandated responses in writing:

1. Provide the responsive requested records in their entirety.
2. Withhold the records in their entirety, with volume and subject matter of withheld records, and specific cite to FOIA allowing nondisclosure.
3. Provide in part, withhold in part (including redaction), with subject matter of withheld records, and specific cite to FOIA allowing nondisclosure.
4. Records could not be found or do not exist. If you know that another public body or official has records, must advise the requester.
5. Either invoke the 7-day extension if not “practically possible” to produce or determine response, or request a longer extension (court or by agreement with requester).

©2024 Sands Anderson PC



24

How Do You Respond to a Request?

- All responses must be made **in writing**.
- **Withheld** records - in whole or in part
 - If whole, identify the volume and subject matter of withheld records; if in part, identify the subject matter
 - Must cite the exception (the Code section) relied upon to withhold the records.
- Portions excluded from disclosure may be **redacted**.
- **Extension**
 - entitled to seven (7) days automatically upon notice
 - the public body must explain in notice why not practically possible to respond within the timeframe required by FOIA
 - additional time may be granted by a petition to the court or agreement with requester

©2024 Sands Anderson PC



25

How Do You Respond to a Request?

All FOIA requests should be handled by the public body's **FOIA Compliance Officer**

Public Bodies shall have a FOIA Compliance Officer:

- Must be trained at least once during each consecutive period of two years commencing on date of last training session.
- Contact information for FOIA Compliance Officer must be provided to FOIA Council.
- Public may make comments on quality of assistance provided by FOIA Compliance Officer.

©2024 Sands Anderson PC



26

Timeline for Responding to FOIA Requests

5 work days to respond

- Produce
- Entirely withheld
- Provide in part, withhold in part
- Records not found or do not exist
- Notice of extension

7 work day extension

- Only if not practicably possible to respond in the initial 5 days and reasons must be given.

Petition the Court

- Extraordinary volume requested
- Extraordinarily lengthy search
- **And**, responding to the request will keep public body from meeting its operational responsibilities.

©2024 Sands Anderson PC



27

Cost of Production – Reimbursement

- **Reasonable charges**
 - **Actual** cost in accessing, duplicating, supplying, or searching for the requested records
 - Not legal fees
 - Prior charges must be paid; if not, requirement to respond to requester pauses until paid
- **If likely to exceed \$200** (estimate)
 - Contact the requester (this stops the clock)
 - May require payment in advance
 - If the actual cost differs, refund balance or bill for additional costs
- **NEW in 2020:** *The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within **30 days** of sending the cost estimate, the request shall be **deemed to be withdrawn**.*

©2024 Sands Anderson PC



28

Violations of the Act

Violation willfully and knowingly made

- The court will impose a civil penalty between \$500 and \$2,000.
- The court may also issue a writ of mandamus or provide injunctive relief.

Second or subsequent violation

- The court will impose a civil penalty between \$2,000 and \$5,000.

Destroying or Altering Records

- The court may impose a civil penalty up to \$100 per record.

Certification of a Closed Meeting Not in Compliance with FOIA

- The court may impose a civil penalty of up to \$1,000.

Penalties imposed against individual members of the public body (i.e., you).

©2024 Sands Anderson PC



29

Violations of the Act – Mitigating Factors

No shield from civil penalty is available, but mitigating factors may include:

- Reliance on opinions of the Attorney General
- Reliance on court cases
- Freedom of Information Advisory Council published opinions
- Even reliance on your local government attorney!

©2024 Sands Anderson PC



30

Virginia Conflict of Interests Act (COIA)

©2024 Sands Anderson PC



31

“Almost everyone in politics nowadays has at least one conflict of interest.”

Kenneth Eade,
Terror on Wall Street,
a Financial Metafiction Novel

©2024 Sands Anderson PC



32

Generally

This presentation is general in nature.

This presentation is NOT a substitution for reading the Act and receiving advice from your attorney or Commonwealth's Attorney or COIA Council.

This presentation is not a substitute for advice on your specific facts.

Consult the COIA Council website: <http://ethics.dls.virginia.gov>.

- The Virginia State and Local Government Conflict of Interests Act.
- Helpful opinions.

COIA is the one and only body of law on conflicts in Virginia. 2.2-3100

©2024 Sands Anderson PC



33

Generally – Personal Interest

Most prohibitions and requirements regarding involvement in transactions (votes) and in contracts center around whether there is a **“personal interest”** in the transaction or contract.

©2024 Sands Anderson PC



34

Definitions – “Personal Interest”

Financial benefit or liability accruing to an officer or employee or a member of his immediate family by virtue of:

- Ownership if the interest exceeds three percent of the total equity of the business, or would result.
- Annual income that exceeds or is reasonably anticipated to exceed \$5,000 from ownership in real or personal property or a business.
- An option to buy real or personal property, or to buy into a business, if the purchase would result in ownership of property valued in excess of \$5,000, or exceed three percent of value of the business.
- Salary, other compensation, fringe benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually.
- Ownership of real or personal property if the interest exceeds \$5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property.
- Personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the total equity of the business.

©2024 Sands Anderson PC



35

Definitions – “Immediate Family”

"Immediate family" means (i) a spouse and (ii) any other person who resides in the same household as the officer or employee and who is a dependent of the officer or employee.

Note: This definition differs from the common understanding of immediate family: for example, adult children living on their own are not “immediate family.” Your adult sibling is not your “immediate family.”

©2024 Sands Anderson PC



36

Definitions – “Transaction”

“Transaction” means any matter considered by any governmental or advisory agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated.

Includes votes but also consideration beforehand if official action may be “contemplated.”

©2024 Sands Anderson PC



37

What to Do

- Conflict and no exception
 - Official action prohibited (discussion and vote).
 - **Disclosure** of the conflict is required.
- Conflict but exception for large groups
 - Affects the public generally – no further action required. (Ex. tax rate, major public works projects, most rezonings unless your land.)
 - Business, profession, occupation, or industry groups of 3 or more - with a **declaration** that you can fully, fairly and in the public interest participate in the vote. Declaration must be made either in full in the minutes or in full in writing with clerk and referenced in minutes.

©2024 Sands Anderson PC



38

The Quorum Exception

How do we ever get a majority vote if many members disqualify themselves from voting pursuant to COIA?

- The “Savings Clause” of 2.2-3112 (C) or (D) allows the remaining members of a body to constitute a quorum to take action if disqualification under the Act would result in fewer than the number of members required to act.
- There must be an actual **disqualification under the Act** and not a mere absence or even recusal for some other reason.

©2024 Sands Anderson PC



39

Disclosure Forms (§ 2.2-3115)

Members of every governing body and school board of counties and cities (and **towns if over 3,500 population**)

- Must file as a condition of assuming office
- Thereafter, must file annually on or before February 1—and no earlier than January 1
- File the Statement of Economic Interests form specified on website: ethics.dls.virginia.gov

Note: These requirements have changed multiple times in recent years, changing filing dates and frequency—Consult the COIA Council website and guidance.

©2024 Sands Anderson PC



40

Disclosure Forms (§ 2.2-3115)

Other local officials are required to file the Real Estate Disclosure (counties, cities and in **towns if over 3500 pop.**) per § 2.2-3115 (G):

- Planning commission members
- Members of boards of zoning appeals
- Real estate assessors
- County administrators and county managers
- City and town managers
- Executive officers

©2024 Sands Anderson PC



41

What Must Be Disclosed?

- Liabilities
- Annual salary and wages
- Interests in real estate/other assets in excess of \$5,000
- Payments for services of more than \$100 in the past year for attending certain talks, meetings, and conferences
- Compensation in excess of \$1,000 for representation of any business before any state governmental agency
- Gifts or entertainment with a value in excess of \$50

©2024 Sands Anderson PC



42

Gifts

- Gifts valued in excess of \$100 are prohibited.
- The \$100 limit is to be adjusted every 5 years.
- Aggregation applies to gifts from the same party.
- No aggregation when each gift is less than \$20.
- Locality may adopt an ordinance regulating gifts (§ 2.2-3104.2).
- Does not apply to gifts from family members and friends other than lobbyist or someone seeking a contract with the locality.

©2024 Sands Anderson PC



43

Gifts – Common Exclusions

- Tickets, admissions, coupons, passes if not actually used.
- Honorary degrees.
- Athletic, merit, need based scholarships.
- Campaign contributions already disclosed due to another Act.
- Gifts related to the recipient's private profession or public service.
- Travel paid for by the federal government or already disclosed due to another Act.
- Food or beverages while attending event in performance of official duties.
- Food, beverages, admissions at event when recipient is a featured speaker or lecturer.
- Plaques, mementos, trophies when unsolicited.
- Travel for official duties.
- Devise or inheritance.
- Gifts less than \$20 in value.
- Attendance at reception where food can be conveniently consumed while standing and walking.
- Door prizes - raffles

©2024 Sands Anderson PC



44

Violations

- Knowingly violating any part of the Act constitutes a **Class 1 misdemeanor**. (Certain violations constitute **Class 3 misdemeanor** for local officers).
- Knowing and intentional misstatement on the Statement of Economic Interests (Long Form) is a **Class 5 Felony!**
- Above violations of the Act constitute **malfeasance in office**.
- Contracts or purchases made in violation of the Act may be declared void and rescinded by the governing body.
- Forfeiture of monies or profits by transactions in violation of the Act.

©2024 Sands Anderson PC



45

What if You Think You Have a Conflict?

Ask for a **written opinion** of the **Commonwealth's Attorney** or the **Conflicts of Interests and Ethics Advisory Council**.

Virginia Code § 2.2-3121 provides that no officer or employee shall be prosecuted if their actions were made in good faith reliance upon the written opinion issued by either after a full disclosure of the facts.

Advice of local government attorney is evidence of good faith and can be introduced in evidence, to either support a defense of lack of willfulness or reduce the fine. However, it is not a shield from prosecution.

©2024 Sands Anderson PC



46

Training

§ 2.2-3132 was amended in 2019 to require all local elected officials to take training on the provisions of the State and Local Government Conflict of Interests Act **within 2 months of assuming office and at least once every two years.**

The COIA Advisory Council may provide such training by online means. Check out the COIA Advisory Council website – home/index page – for details.

©2024 Sands Anderson PC



47

Questions?

THANK YOU!!

Andrew R. McRoberts, Esq.
amcroberts@sandsanderson.com
804-783-7211

Sands Anderson PC
1111 E. Main Street, Suite 2400
Richmond, VA 23219

©2024 Sands Anderson PC



48