

The Virginia Freedom of Information Act

Presented by

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Local Roots, Global Reach

ISLE OF WIGHT
COUNTY, VIRGINIA

Introduction

- Purpose of this training
 - To provide the Board of Supervisors, the new County Administrator, the County's FOIA Officer and general public with a greater understanding of the Virginia Freedom of Information Act requirements.
 - To help you each recognize potential issues
 - To give you some helpful tips on how to avoid potential issues and conflicts

Scope of Presentation

- A broad overview of FOIA (intermixed with some other laws that may be applicable)
- This presentation **DOES NOT** cover every aspect of the Act, but rather is intended to give you a working knowledge of it
- While this presentation does provide some general guidance, PLEASE NOTE – this is not specific advice
 - If you need specific advice, call me!

Virginia Freedom of Information Act (FOIA)

- To ensure the “people of the Commonwealth” have ready access to *public records* in the custody of the public body or its officers/employees **AND** *free entry to meetings* of public bodies where the business of the people is conducted
- To afford citizens the opportunity to witness the operations of government and to increase awareness of governmental activities
- BOTTOM LINE – FOIA is intended to provide for a better informed electorate

Requests for Public Records Under FOIA

- Generally, requests do not need to be in writing nor do they have to cite the Act or call the request a “FOIA request.”
- The motive of the requestor in making the request is irrelevant under the Act, even if the request is made solely to harass or impede daily operations
- However, a records request must identify the records sought with “reasonable specificity.”

STEP 1: Identify your requester

- Has the requester identified him/her/itself as a Virginia resident, or can you make that inference from the address?

REMEMBER: FOIA was enacted to provide access to the “people of the Commonwealth”*

* In 2013, the United States Supreme Court upheld a Virginia county’s refusal to respond to a FOIA request made by an individual from out-of-state. *McBurney v. Young*, 133 S.Ct. 1709 (2013).

STEP 2: Identify the request

- Is the request for a public record or something else?
 - What is a public record? Three elements are needed:
 - A public record is a writing or recording, set down or stored in any physical form
 - Prepared or owned by, or in possession of, a public body or its officers/employees/agents
 - Created in the transaction of public business

STEP 2: Identify the request (cont.)

- Not sure what the request is for? (i.e., it is overly broad in scope, unclear, etc.)
- **SEEK CLARIFICATION!**
 - Benefits:
 - Narrowed scope = narrowed response
 - Saves time
 - Saves money

STEP 3: Respond

- FOIA gives the County five (5) work days to make an initial response to the requestor
 - The day on which the request was received *does not* count
- FOIA provides for the following ways to respond:
 - Produce the records within 5 work days;
 - Notify the requester that the records are being withheld by law (i.e., records are exempt from mandatory disclosure);
 - Produce some records but notify the requester that other are being withheld as provided by law;
 - Notify the requester that the records do not exist or cannot be found; or
 - Notify the requester that you will need an additional 7 days to respond.

What if...

- The request is not seeking a public record but rather information pertaining to public business
 - Contrary to what you might think, you DO NOT have to treat a request for information as a FOIA request

REMEMBER: FOIA APPLIES TO EXISTING RECORDS ONLY

- You do not have to prepare a document/record to respond to a FOIA request

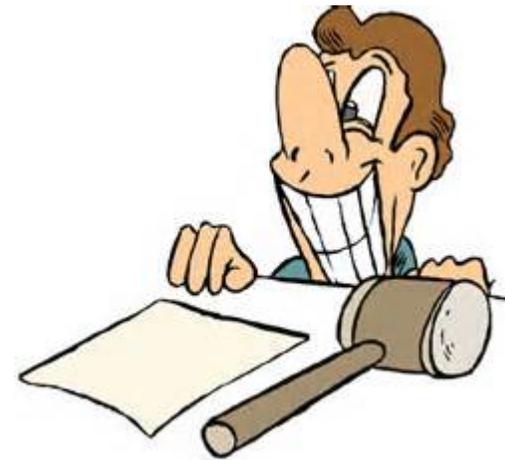
EXEMPTION TO FOIA

- There are some exemptions that allow the County to withhold certain public records from disclosure. The most common are:
 - Personnel records*
 - Legal papers (legal advice, attorney work product, etc.)
 - Records compiled to use exclusively in closing meetings
- Other laws may trump FOIA:
 - HIPPA (Health Insurance Portability and Accountability Act)
 - Data Collection Practices Act

* Does not apply to employee salary information, allowances, or contracts

STEP 4: County Attorney's Office

- Primary role is to ensure that confidential and/or proprietary information is not released by
 - Utilizing FOIA exemptions when applicable
 - Utilizing other laws/statutes



STEP 5: Prepare a bill

- FOIA provides for the recoupment of expenses incurred in responding to a FOIA request to include:
 - Staff time (prorated hourly wage/salary)
 - Photocopy expenses
 - Postage
 - Data storage devices (e.g., CD, flash drives, etc.)
- The role for such bills is to:
 - Recoup County costs

STEP 5: Prepare a bill (cont.)

- Billing estimates may be requested in advance of a response
- Advance estimates are encouraged when a request appears to require a lot of time which means a big bill on the back end of the response

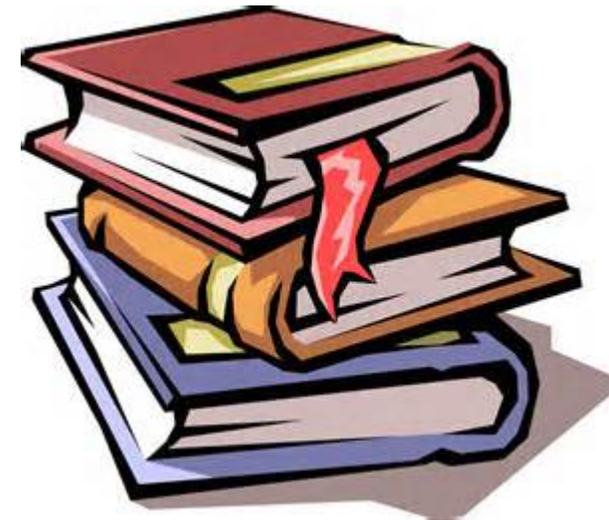


Enforcement of FOIA

- If someone believes a public body or official has violated the Act, they may file suit in general or circuit court, which will be heard within 7 days of the filing
 - The public body has the burden of establishing by a preponderance of the evidence that a record is exempt under FOIA.
 - Any failure to follow the procedures established in the Act shall be presumed a violation
 - Court may enjoin future violations and award attorney's fees
 - If an official willfully or knowingly violates the law, the court is required to impose a civil penalty of at least \$500, but no more than \$2,000 for a first offense and at least \$2,000, but not more than \$5,000 for subsequent offenses

Conclusions about FOIA record requests

- FOIA is an avenue by which citizens of the Commonwealth can gain access to public records
- Access to public records DOES NOT mean records must be created to respond to an inquiry – if it doesn't exist, it doesn't exist!
- Direct all FOIA requests and information gathered in response to such requests to our FOIA Compliance Officer, Mr. Don Robertson, and the County Attorney's Office to ensure an accurate and legal response



Public Meetings

- FOIA defines a “public body” to include, among other things:
 - Any political subdivision
 - Governing bodies of counties, school boards and planning commissions
 - Any committee, subcommittee, or other entity however designated, of the public body created to perform designated functions of the public body or to advise the public body.



What is a meeting?

- A meeting is a body of people sitting physically together to discuss public business
 - Requires at least three members or a quorum, if less than three
 - Includes regular meetings and work sessions
- DOES NOT include meetings of staff members
- Electronic meetings are allowed but only under specific circumstances
 - Emergency or personal matter; or
 - A state of emergency declared by the Governor

What if there is a social function and there are two or more members of the body/committee there?

- Not a “meeting” and thus, not prohibited IF:
 - No part of such a gathering involves the discussion or transaction of any public business
 - It is not called or arranged with any purpose of discussing or transacting any business of the public body or committee
 - It constitutes a public forum for candidate appearances or debate, the purpose of which is solely to inform the public



FOIA Meeting Requirements:

- All meetings are open to the public, unless subject to a specific provision for a closed meeting
- The “public” includes the media
- Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open
- A public body may not vote by secret or written ballot
- A public body may not take action (vote) in closed meeting, however, it may discuss a matter and then vote on the matter upon returning to open meeting

Do you have to tell anyone that you are having a meeting?

- Notice of the date, time and location of meetings is required
- The notice shall be posted at least three working days prior to the meeting in a “prominent public location”, where regularly posted, and with the clerk/chief administrator
- Exception is for special or emergency meetings where notice must only be given “contemporaneously” with the notice provided to the members of the body
- Any person may file a written request for notifications, which entitles the person to written notice of all meetings
- One copy of all agenda packets shall be made available for public examination

Conclusions about FOIA meeting requirements:

- As a general rule, all meetings must be properly posted to inform the public of time, date and location
- If there is a question as to whether a meeting is public or not, always err on the side of caution and deem it to be a public meeting
- Make sure that you check with the County Attorney's Office to ensure that you have met all of the public meeting notice requirements





QUESTIONS?