

Hot Topics in FOIA

VSBA receives numerous questions from school board members regarding the Virginia Freedom of Information Act (FOIA). Three of the most frequently considered topics are discussed below.

Committees

FOIA applies to “public bodies.” In school divisions, the most high-profile “public body” is the school board. But, FOIA defines “public bodies” to include not only school boards, but also “any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body.” Va. Code § 2.2-3701.

In other words, any committee of the school board, or any committee created to advise the school board, is a public body in its own right and is subject to FOIA. Some school board members are under the mistaken impression that a committee that has fewer than three members is not subject to FOIA. That is not true; the number of members on the committee is irrelevant in determining whether the committee is subject to FOIA.

Motions To Go Into Closed Session

FOIA requires three things to be in each motion to go into closed session. It states “[n]o closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting as authorized in subsection A of [Va. Code] § 2.2-3711 or other provision of law and (iii) cites the applicable exemption from open meeting requirements provided in subsection A of [Va. Code] § 2.2-3711 or other provision of law. . . A general reference to the provisions of [FOIA], the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.” Va. Code § 2.2-3712.

In other words, motions such as “move to go into closed session,” or “move to go into closed session for personnel” do not satisfy FOIA.

Each time a school board member makes a motion to go into closed session, or votes on such a motion, the member should be sure that the requirements of FOIA are met. Clerks and superintendents who assist school board members with drafting motions to go into closed session should also be sure that the motions they draft contain each of the three required elements.

Electronic Communications (Emails, Text Messages, Social Media Posts, etc.) as Public Records

FOIA defines “public records” as “all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code § 2.2-3701.

Nothing in that definition limits “public records” to records held on a server, device, or account owned by a public body. Indeed, the definition explicitly states that it applies to records “however stored.”

Thus, emails, text messages, and social media postings that relate to public business are public records and must be produced when requested under FOIA. Using division-owned devices and accounts enables those records to be housed on the division’s servers, which makes it easier for staff to retrieve them when they are needed for any purpose, including to respond to FOIA requests. School board members who create and/or receive public records on personal devices and/or accounts must be prepared to make those devices and accounts available to division staff when the records are needed.

If you have any questions about this Policy Page, please contact Elizabeth Ewing at 434-295-8722 or ewing@vsba.org.