

Important Issues for Small Town Leaders

- I. It is the policy of the Commonwealth to promote openness. FOIA is liberally construed in favor of openness both of documents and public meetings.¹
- II. Freedom of Information Act² and public documents.
 - a. Notice: Every newly elected or appointed public officer must receive a copy of the Freedom of Information Act (FOIA) and the Virginia Public Records Act (VPR) from either the chief administrator or legal counsel to the public body.³ FOIA generally controls public access to records. VPR generally controls which records need to be kept, and for how long. Two other laws, the Government Data Collection and Dissemination Practices Act (GDCDPA)⁴ and the Protection of Social Security Numbers Act⁵ also contain provisions related to what information a public body can collect and how it should manage its data.
 - b. Recognizing a FOIA document request: The first, most important thing for any officer or employee who regularly interacts with the public is to be able to recognize what is and is not a FOIA request.
 - i. What is a FOIA request: Any request for anything recorded in any tangible format—including paper, email, computer files, and text messages—relating to the transaction of public business.⁶ The request does not need to mention FOIA, in order to be a FOIA request. It includes oral requests.
 - ii. What is not a FOIA request: A request for information. Questions are generally not FOIA requests, although they may be answered by production of a document. For instance, “what is the Council going to talk about next Wednesday night?” is not, technically, a FOIA request. But it might be answered by handing (or emailing) the person a copy of the Council agenda package.
 - c. What to do when you get a FOIA document request: Get it off your desk (or out of your inbox!).
 - i. Send it to the FOIA Officer, immediately. If you receive the request orally, put it into an email and shoot it over. Make sure to get the person’s contact information. Do so immediately—your public body only has five business days to respond unless you get an extension (which may be up to seven additional business days).

¹ Va. Code § 2.2-3700.

² Chapter 37, Title 2.2, Code of Virginia, 1950, as amended.

³ Va. Code §§ 2.2-3702, 42.1-76.1.

⁴ Chapter 38, Title 2.2, Code of Virginia, 1950, as amended.

⁵ Chapter 38.1, Title 2.2, Code of Virginia, 1950, as amended.

⁶ Va. Code § 2.2-3701.

- ii. Every public body must have a FOIA Officer,⁷ and you should make sure you know who it is (if it isn't you). This is an individual who receives annual training in how to administer FOIA and is listed on the website of both your public body and the State Freedom of Information Advisory Council as the public body's FOIA Officer.
- iii. The FOIA Officer must give a response to the request, even if the public body has nothing, or everything it has is exempt from disclosure. The FOIA Officer will coordinate finding the documents, communicate with the requester, and send a response.

III. Freedom of Information Act and public meetings.

- a. As a local leader, you will probably have more FOIA issues in meetings than you will with documents. You must make sure that you get training within two months of election or appointment, and at least every two years thereafter.⁸ Either the FOI Advisory Council and your friendly town attorney would be glad to do it for you.
- b. What is a meeting? Any time three or more members of a public body (or a quorum, if less than three⁹) meet to discuss or transact public business, that is a meeting.
 - i. Is something a public body? Not only is your Town Council a public body, but so is your Planning Commission, IDA/EDA, etc. Regional bodies such as your planning district commission are also public bodies. If a public body formally designates a committee to carry out some function (e.g., designating the mayor and vice mayor to meet with the chair and vice chair of the board of supervisors regularly) or advisory committee, that is also a public body, even if most of the members are citizens. It is the designation and appointment that matters.
 - ii. What is transaction of public business? This used to seem simple, but the Virginia Supreme Court and the General Assembly have made it more complicated in the last year. To make it really basic: If three or more of you are talking about something that your public body is or might be involved with in the foreseeable future, you are probably having a meeting.¹⁰ If you

⁷ Va. Code § 2.2-3704.2.

⁸ Va. Code § 2.2-3704.3.

⁹ This generally only applies to electoral boards and the Highland County Board of Supervisors, but could also apply to advisory committees.

¹⁰ This year, the Supreme Court of Virginia decided that if three or more members of a public body go to an event to hear comments on an item that will foreseeably be on their agenda in the near future, they are "considering" public business and therefore holding a meeting. *Gloss v. Wheeler*, 302 Va. 258 (2023). The General Assembly disagrees, and adopted curative legislation effective July 1, 2024, providing that attending a meeting without participating as a group, including attending a meeting of another public body (e.g., your board of supervisors) is not a meeting of your public body (e.g., the council).

are chatting about whether UVA will beat Tech this year, or that great sermon you heard last Sunday, then you probably aren't.¹¹

- c. What do I have to do to hold a meeting?
 - i. In general, you need to give three full business days' public notice of the meeting. The notice must be placed on your public body's website, in the office of your clerk or town manager, and in another prominent public place (e.g., courthouse, library). You also need to give notice to citizens or media outlets that request it.
 - ii. Emergency meetings may be held with less notice, but the public body still must provide public notice as soon as possible, and in any event no later than the time the public body itself gets notice.
 - iii. You do not need to have an agenda, or anything else, unless required by your bylaws. However, if you do, you must put it (and any backing materials) up on the website no later than the time it is distributed to the public body.
 - iv. Take minutes. 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. Must be posted to the website within seven days after they are approved, typically at the next meeting.
- d. Where can I hold it? The meeting can be held literally anywhere, so long as it is stated in the public notice. However, it must be in an ADA-accessible space, where a reasonable number of citizens can attend to observe the proceedings, and the public must be allowed to photograph or tape the proceedings.
- e. Public hearings: Many special actions require public hearings with long advertising timelines. Work with your clerk, town manager, and/or town attorney to schedule and give proper notice. Some examples of items requiring public hearings:
 - i. Conveyance of land away from the town;
 - ii. Rezonings, amendments to zoning, subdivision ordinance, or comprehensive plan language, and action on a CUP/SUP;
 - iii. Adoption of a budget or tax rate, or amendment that increases the total amount appropriated by more than 1%;
 - iv. Granting of a franchise, lease, or easement;

¹¹ This can get nuanced. Three town councilors from the Town of Blacksburg could easily get talking about Town business (e.g., parking and traffic) from a conversation about Tech's chances in the ACC tournament. Talking about a sermon that was particularly topical to local politics might shade over into public business. Use your judgment.

- v. Setting or changing fees (utility or for government services);
 - vi. Issuance of a bond.
- f. Closed sessions: The sensitive stuff. Virginia Code § 2.2-3711 has a list of items that a public body may go into a non-public session, called a closed session, to discuss. In order to have a closed session, you must be able to put your finger on a specific, clear reason to go into closed session. While § 2.2-3711 lists 54 reasons to go into closed session, only a few of them will ever come up for a town council. The biggies are:
- i. Subsection A.1: Discussion of personnel, where names will be named. Discussion of the pay bands for town staff, or the town personnel budget, is a matter for open session. Discussion of the performance and compensation of the town manager is for closed.
 - ii. Subsection A.3: Discussion of the acquisition or disposition of real property, where discussion in open session would adversely affect your bargaining position or negotiating strategy.
 - iii. Subsection A.4: Protection of privacy of individuals on matters not related to public business. If a member of council is going to be less engaged than usual because of a personal health concern, this is an opportunity to let other councilors know.
 - iv. Subsection A.5: Discussion of a prospective business or industry, or expansion of a business or industry, where no previous announcement of the business or industry's interest has been made.
 - v. Subsection A.6: Discussion of the investment of public funds where, if initially made public, the financial interest of the town would be affected.
 - vi. Subsection A.7: Consultation with legal counsel and/or briefings from staff on dealing with actual litigation, or litigation that has been threatened.
 - vii. Subsection A.8: Consultation with legal counsel to obtain legal advice. This must be for legal advice. The mere fact that the town attorney is in the closed session, or even participates in the discussion, is not enough to qualify under this exemption.
 - viii. Subsection A.29: Discussion of the scope, terms, or award of a public contract. However, you cannot go into closed session to discuss performance of a contractor once the contract already exists. You could, however, probably go into closed session under this exemption to discuss the scope and terms of a change order.
- g. The motion to into closed session must include (1) the statutory exemption, (2) the subject, and (3) the purpose of the closed session. A couple of examples:

- i. I move, pursuant to subsection A.1 of Section 2.2-3711 of the Code of Virginia, to enter closed session for the purpose of discussion and consideration of the performance of the Town Manager, in order to discuss his annual review.
 - ii. I move, pursuant to subsection A.3 of Section 2.2-3711 of the Code of Virginia, to enter a closed session for the purposes of discussion of the acquisition of real property where discussion in open session would adversely affect the Town's bargaining position or negotiating strategy, related to a property near the bypass on the west end of Town.
 - iii. I move, pursuant to subsection A.7 of Section 2.2-3711 of the Code of Virginia, to enter a closed session to consult with the Town Attorney on a specific legal question related to the rezoning item coming up next on the agenda.
- h. "Votes" in closed sessions are straw polls. They are not binding, and no official act can be legally authorized in closed session. That said, a town manager or town attorney may obtain direction on how best to take administrative steps that they already have the legal authority to take in closed session in order to advance the interests of the town.
- i. All closed sessions must be certified, after convening back in open session, with a motion that follows substantially the following language: "I move to certify, by a roll call vote, that to the best of each member's knowledge (i) only public business matters lawfully exempted from the open meetings requirements of FOIA and (ii) 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 closed session." The clerk should then call the roll for the vote.