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What Every BOV Member Absolutely *has* to Know about FOIA

Do not underestimate the importance of Virginia's Freedom of Information Act (FOIA). This is very serious business. These are *laws* -- not just corporate bylaws or operating protocols that can be disregarded. Violations risk invalidation of board decisions and expose the University and you personally to embarrassment, litigation, and civil penalties of up to \$5,000.¹ The greatest loss, however, is the resulting damage to public confidence in you and the University. In fact, the Governor could publicly request your resignation.

The idea behind FOIA (which was first enacted in 1968) is that the Government's business is the people's business. FOIA ensures that citizens have the right to inspect and copy public records and to attend public meetings.²

FOIA governs many aspects of the operation of Boards of Visitors, and has wide application to conduct of members, even when they are not at meetings. All members must be aware of the basic requirements of FOIA.

This Synopsis and FAQ is designed to give the Board of Visitors ("BOV" or "Board") members a basic understanding of their personal responsibilities under FOIA and to insure that you are aware that FOIA compliance is your responsibility. This material is not comprehensive. It does not cover all aspects of FOIA. Whenever you have any concerns, questions, or uncertainties about FOIA or its application, you should contact your institution's counsel.

¹ § 2.2-3714

² § 2.2-3700

Virginia's Freedom of Information Act: Synopsis

Documents and Email

- FOIA broadly guarantees public access to public records, including your notes and correspondence concerning University business. This includes e-mail, digital documents, and even preliminary drafts of documents.³ There are numerous exemptions, which are all fact-specific.⁴ Always be sensitive to the potential for public disclosure of your written communications. Any request by the press or any person to inspect your documents should be brought immediately to the University's attention to ensure a timely and proper reply. Oral and informal requests to you are considered legitimate FOIA requests. Any request for records, regardless of the request, is a FOIA request.

Meetings

- Unlike the private sector, the public (including employees of the institution) and press have a right to be present at your board and committee meetings.⁵
- All meetings of the BOV, including its committees and subcommittees plus any other group or entity appointed by the BOV to advise it or exercise delegated power, must be conducted in public session with at least three working days advance public notice of meeting time and location.⁶ It does not matter that a meeting involves no actual voting or transaction of business, such as, for example, retreats.⁷ A meeting exists in the eyes of the law whenever three or more Board members meet and discuss any University matter.⁸ Voting on any University action must always be conducted in public session.⁹ Voting by secret ballot or proxy is prohibited.¹⁰
- Once properly convened and in open session, discussions regarding certain limited topics can be held in closed session.¹¹ The justification for closed session does not depend on whether a subject may be very sensitive or delicate or political, or that a confidential setting might better encourage candid exchanges.¹² Closed sessions must be specifically authorized by FOIA.¹³ This can be a difficult adjustment for those of you more accustomed to the corporate boardroom.
- Also, to go into closed session, certain specific procedural steps must be taken, including:¹⁴
 - Advance public notice for the meeting must have been given.
 - During the meeting in public session, the Board must vote on a motion authorizing closed session. This public motion must reasonably identify both the purpose for the closed session and the subject for discussion.
 - While in closed session, the discussion must be related only to the topic identified in the public motion. Take care not to digress into any unrelated areas or other subjects, even if those topics would be eligible for closed session with a proper motion. It is your

³ § 2.2-3700

⁴ See § 2.2-3705.1-3705.8.

⁵ § 2.2-3700

⁶ § 2.2-3707

⁷ § 2.2-3701

⁸ § 2.2-3701

⁹ § 2.2-3711(B)

¹⁰ § 2.2-3710

¹¹ § 2.2-3711

¹² § 2.2-3712

¹³ § 2.2-3712

¹⁴ For "closed session" procedures see: § 2.2-3712.

responsibility both as a matter of law and common sense that you stick to the subject matter described in the motion authorizing the closed session.

- Any action the Board wishes to take as a result of discussions in closed session must be voted on in public session.
 - When discussion in closed session is adjourned, the chair of the meeting should immediately direct the opening of doors and inviting public/staff into the room for open session.
 - Once back in open session, each member of the body will then be required to publicly certify that his or her discussion in closed session was proper and related to the permitted subject set forth in the motion convening the closed session.
 - The law requires that your general counsel or an Office of the Attorney General's representative must be invited to all BOV and committee meetings, including all closed sessions. This also protects the BOV in the event the discussion in closed session is questioned.
- Some BOV members may participate by phone *provided* (1) there is a quorum of the board or committee physically convened at the main location. (2) all locations are announced ahead of time as places the public and press may participate (3) all locations are equipped with speakerphones, and (4) there is no interruption in communication between or among locations.¹⁵ There is a limited exception if unable to attend because you are sick or in another emergency, but state law requires that your illness or the emergency be publicly noted in the minutes.¹⁶

¹⁵ § 2.2-3708(B)

¹⁶ § 2.2-3708.1

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FOIA GENERALLY

What does FOIA do?

In general terms, FOIA defines what a meeting is and requires that all meetings be open to the public.¹⁷ It also prohibits discussion of public business among members outside of meetings.¹⁸ There are, however, exceptions to these general meeting requirements that each member should be familiar with.¹⁹

FOIA also requires that all public records (with some limited exceptions) be made available upon request to members of the public for inspection and copying.²⁰

All public records and meetings are *presumed* open, and the BOV and the institution have the burden always of being prepared to prove that there was a legitimate reason for closing meetings or withholding records.²¹

FOIA also requires that its open government provisions be liberally construed, and its exemptions be narrowly construed. This means that you should always err on the side of leaving meetings open rather than closing them, and releasing documents rather than withholding them.²²

Whenever you have specific questions about FOIA or its requirements, please do not hesitate to contact your counsel with the Attorney General's Office.

FOIA requires that some records be withheld and some meetings be closed, right?

Wrong. The exemptions to disclosure of records and for closed sessions are discretionary, not mandatory. There is no penalty for *releasing* records that *could* be withheld under a FOIA exemption (though other provisions of federal and state law, such as FERPA, may prohibit disclosure). There is also nothing that says a meeting *must* be closed just because it *could* be closed under a meetings exemption under FOIA. Please contact counsel if you have concerns about federal or state law that might prohibit release of information.

Who does FOIA apply to?

FOIA applies to all public bodies. In the context of state colleges and universities, that means that FOIA applies to the institution and all of its officers (including members of the BOV) and employees.²³ It also applies to the operations of the BOV itself together with all of its committees and subcommittees plus any other groups or entities appointed by the BOV to advise the BOV or exercise delegated functions.

¹⁷ § 2.2-3700

¹⁸ § 2.2-3707

¹⁹ §§ 2.2-3707.01 and 2.2-3711

²⁰ § 2.2-3704

²¹ § 2.2-3700(B)

²² § 2.2-3700(B)

²³ § 2.2-3700

MEETINGS

Meetings Generally

Can we meet without telling anyone?²⁴

FOIA requires that all meetings of the BOV or any committee or subcommittee be advertised to the public for at least three working days. The notice requirements of FOIA are very specific. The secretary to the BOV will handle the details of complying with these. Members of the BOV, however, should be aware that any meeting called must be far enough in advance that the secretary has time to properly prepare the notice and advertise the meeting for three work days in the various ways required by FOIA. Also, any materials supplied to the BOV members before the meeting must also be made available for public inspection at the same time the materials are provided to the BOV, with the exception of documents that are specifically exempt under FOIA from disclosure.²⁵ This includes any materials one BOV member sends to all other members!

If your bylaws call for more notice for meetings than FOIA does, you must comply with the stricter provisions of the bylaws.

Can less than a quorum of the BOV - say three or four members - get together informally to discuss affairs of the institution?

No. A gathering of three or more members of the BOV where business is discussed is illegal, unless the gathering has been properly advertised for at least three work days as a meeting. It does not matter that a quorum was not present.²⁶ If more than two BOV members serve on a university-related foundation's board, FOIA will likely be violated.

This prohibition is generally against *three or more* members discussing public business. *Two* members may discuss public business in person, on the phone, or otherwise, with one notable exception. The exemption exists where two members constitute either the entirety or a quorum of a committee or subcommittee, or other group that has been designated by the Board or Rector to advise the BOV or has been delegated some responsibility by the BOV, then any discussions between them must be properly advertised as a meeting. Otherwise, the gathering is an illegal "meeting" under FOIA.²⁷

Can't I even go to a cocktail party or dinner with two (or more) other BOV members?

Yes, of course you can. While there, you may even discuss business with *one other* member at a time.

Three members, however, may *not* jointly discuss public business. Nor may a third member be listening to the conversation.

²⁴ For details *see*: § 2.2-3707.

²⁵ § 2.2-3707F

²⁶ § 2.2-3707

²⁷ § 2.2-3701

Please keep in mind that this prohibition applies at *all* times and in *all* places – including, for example, lunches, dinners, and social occasions held in conjunction with BOV meetings or at annual professional conferences. For example, if a BOV holds a luncheon between the morning and afternoon sessions of a meeting, the BOV must, either advertise the luncheon as a meeting and have the luncheon open to members of the public, or ensure that no public business is discussed. That’s a difficult task, but a mandatory one.²⁸

The BOV wants to take a bus tour of campus and our new facilities during a break at our Board meeting. Any problem with this?

No, no problem – *provided* arrangements are made also for members of the press and public to be present whenever any institutional business is discussed. That means you might need a big bus if any discussions will take place on the bus. (This was a real-life problem at a University recently.)²⁹

Who can come to our meetings?

Anybody who wants to. All meetings must be open to the public. Any member of the public (including, of course, press, employees, and students) has a right to attend, to listen, and to make a video or audio recording of any meeting. The BOV can put reasonable restrictions on recording to ensure that actions of the press or public do not disrupt the meeting.

You will, at times, have outside consultants present at your meetings. They will not be familiar with FOIA and may expect or request confidentiality that FOIA does not permit. The BOV and university staff should provide these consultants with information that will reduce the conflict between their expectations and what FOIA permits.

Do we have to tape record our meetings?

No. Recording meetings is not required. However, proper minutes must be taken and draft minutes, and later final minutes, must be posted to the web. The secretary to the BOV will ordinarily have this responsibility.³⁰

Do we have to have minutes taken?

Yes. FOIA requires that minutes be taken of every meeting, including retreats or work sessions. Also, draft minutes that fairly reflect actions taken must be posted on the web within 10 days following the meeting.³¹

Closed Meetings

What are the exceptions to open meetings? When can we hold a closed meeting?³²

²⁸ § 2.2-3701

²⁹ § 2.2-3700

³⁰ § 2.2-3707

³¹ § 2.2-3707(I)

³² For full list of exceptions *see*: § 2.2-3711(A). The Statute does refer to the exemptions for "closed meetings" but as will be discussed, a more accurate description is that they are a 'closed session' within a meeting. The terminology "closed session" will be used in these FAQs.

FOIA has 45 exceptions to the open meetings requirement, with more being adopted by the General Assembly each year. The exceptions most likely to be utilized by BOVs to justify closed sessions are:

- (1) *the personnel exception*: discussion, consideration, or interviewing of prospective candidates for employment; or the discussion of assignment, appointment, promotion, performance, demotion, salaries, discipline, or resignation of *specific* employees. This exception does *not* apply to discussion of members of the BOV themselves. It is also inapplicable to discussions of general school policy or operations – for example, reorganization – that would refer to reassignment or laying off of employees – unless the discussion centers upon *specific* employee(s).
- (2) *the scholastic record exception*: discussions or consideration of admission or disciplinary matters, or other matters that would involve disclosure of information in scholastic records (as defined in the act) of specific student(s). Generally speaking, however, the student or his lawyer is entitled to attend those closed sessions.
- (3) *the real property exception*: discussion or consideration of the acquisition or disposition of real property where open discussion would adversely affect the bargaining position or negotiating strategy of the institution. This exception does not apply once the real property has been acquired or disposed of, and does not include potential use of real property.
- (4) *the investment exception*: discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the institution would be adversely affected. This exception might occasionally be invoked during discussion of endowment funds investment.
- (5) *the legal advice exception*: consultation with legal counsel for legal advice on specific matters, and briefings by staff members or consultants pertaining to actual or probable litigation.
- (6) *the development exception*: discussion or consideration of matters related to gifts, bequests, and fund-raising activities, and grants and contracts for services or work to be performed by the institution.
- (7) *the honorary degree exception*: the discussion or consideration of honorary degrees or special awards.
- (8) *the terrorism exception*: discussions related to plans to protect public safety as it relates to terrorist activity and response to that activity.
- (9) *the contract exception*: the discussion of the award of a public contract involving the expenditure of public funds where discussion in open session would adversely affect the bargaining position of negotiating strategy of the institution.

You should *always* consult with legal counsel well in advance of going into any closed meeting. The above are brief descriptions of exceptions for going into closed sessions – the “basics”. In each case, there are additional, specific legal criteria or requirements to be considered.

When are we *required* to go into closed session?

You are never required by law to go into closed session. FOIA gives the BOV the option of doing so when the topic of discussion falls within a FOIA open meetings exception.

What must we do to go in order to into closed session?

First, all meetings must have been properly noticed (discussed above). FOIA does not really permit a "closed meeting." All meetings are open, but for limited purposes, you may go

into a "closed session." This is the case even if the only subject of the meeting is proper for closed session. A closed session may be held as a small part of a larger, open meeting, or a meeting may be called and noticed specifically for the purpose of having a closed session. But in any event, all meetings must first be convened as an open meeting, and then proper procedures must be followed to go into closed session. Closed sessions must be followed by an open session certification that the closed meeting was proper.

A detailed motion must be made to go into closed session. That motion, which must be included in the open meeting's minutes, must identify: (1) the closed session's subject matter; (2) the closed session's purpose; and (3) the specific exemption under §2.2-3711(A) that applies. General references to FOIA or to the subject matter of the meeting do not suffice.³³

Your counsel can provide the Rector with a "script" to use for going into closed session.

What if we are in open session with only the Board and President in attendance, and we want to discuss something that we would ordinarily discuss in closed session. Can't we do that without going through the formalities since there is no one we need to exclude?

You certainly may hold the discussion without going into closed session, but there are some shortcomings to that approach, including that minutes would have to be taken, whereas minutes would not be mandated in closed session.³⁴

What can we discuss in closed sessions?

Once the BOV properly goes into closed session, you can discuss only those specific matters identified in the motion to go into closed session. For example, if the BOV went into closed session to discuss "personnel matters – specifically the salary of the president," the BOV could not discuss any other matter, not even a different personnel matter, even if that other matter might have been the proper subject of a closed session had it been included in the motion.³⁵

It's easy to stray from the topic identified in the motion for closed session. One responsibility of your counsel is to watch closely and call any deviation to your attention.

Who is permitted to go into a closed session with the BOV?

Just because the BOV goes into closed session, it does not mean that everyone other than BOV members must be excluded. The BOV can allow any persons to attend that the Board feels are necessary to the discussion. That said, it is best to *only* allow those who are necessary to the discussion.

As of July 1, 2013, BOVs are required by law to always invite and include counsel in all meetings, including closed sessions.³⁶ The BOV is focused on conducting its business, and not focused on making sure they discuss only matters for which they went into closed session. It is very easy to stray from the central discussion, and the lawyer can focus attention on keeping the BOV within legal bounds. This is important in that each individual BOV member must certify upon leaving closed session that nothing was discussed other than the matter(s) mentioned in

³³ § 2.2-3712

³⁴ § 2.2-3712(D)

³⁵ § 2.2-3712

³⁶ § 23-2.02

the motion to go into closed session.³⁷ Your counsel can also identify that legal advice may be needed when BOV members are unaware that legal issues are implicated.

Who decides when closed session is appropriate?

The BOV as a whole is responsible for deciding whether to go into closed session and who should be included and excluded. The BOV decides to go into closed session through passage of the motion to do so. As a matter of governance, the BOV as a whole should also actively decide who should stay and not rely solely on the rector, the secretary to the BOV or the President to make that call.³⁸

Barring unusual circumstances, for practical reasons, the President should remain in most closed meetings.

Can we vote in closed session?

Well, yes and no. The BOV can take non-binding votes – straw-polls, of sorts – to get a sense of how a public vote will go. No ‘official’ vote, however, may be taken. Any action that is required as a result of discussions in closed session must be taken after going back into *open meeting*. Members are not legally bound to vote in open meeting as they indicated they would in closed session.³⁹

What do we do when we have finished our closed session discussions?

The BOV must reconvene, by motion, in open session following closed session, even if they have no more business to conduct. After the room is opened and visitors are informed that the meeting is now open, each member of the body must affirm by roll call or recorded vote that only those matters identified in the motion to close the meeting were discussed. Any member who believes matters outside the scope of the motion were discussed is to say so prior to the vote.

Failure to certify that the meeting was properly held does not affect the validity or confidentiality of matters discussed in the closed session or action taken on those matters later in open session. Deviation from the proper subject of the closed session and failure of a unanimous certification vote could, however, subject the BOV to harsh public criticism and individual members to monetary penalties.⁴⁰

May BOV members talk with other people about matters that were discussed in closed session?

There is no *legal* prohibition against BOV members revealing discussions held in closed sessions; nor may the BOV itself prohibit such. BOV members are officers of the Commonwealth, and within legal parameters, each must decide how to best execute their responsibilities to the Commonwealth and the institution. Common sense, professional norms, and individual consciences must dictate BOV members’ actions. One notable exception from Federal law: FERPA does generally prohibit all school officials, including BOV members, from revealing information obtained from student records. Other privacy requirements outside of FOIA may exist under federal and state law. Please consult counsel if you have questions.

³⁷ § 2.2-3712(C), (F)

³⁸ § 2.2-3712

³⁹ § 2.2-3712 (G)

⁴⁰ § 2.2-3712(D), (E)

Should minutes be taken in closed session?

Not necessarily. There is no requirement that minutes be taken in closed session. Any minutes that *are* taken need not be disclosed. They *may* be released, however, in the BOV's discretion. In general, a BOV may prefer *not* to take minutes, in that there would then be no document that could inadvertently be released.⁴¹

We hold an annual retreat. This is a very informal work/training session. No business is conducted and no action is taken. Do we have to advertise this meeting and allow the press and members of the public to attend?

Absolutely. Any get-together of three or more members at which the business or operations of the institution are discussed is a "meeting" under FOIA. Retreats and work session are no exception. They must be properly advertised, and must be open unless an exemption applies to a specific matter under discussion.⁴²

What is an executive session?

The term executive session no longer has any legal significance. Under FOIA there is a meeting and you are either in open session or closed session. For that reason, we strongly suggest that BOVs abandon using the terminology "executive session." Further, it is common for BOV members and others to confuse "executive session" and "executive committee."

Electronic Communication Meetings, or "Telephone Meetings"⁴³

May we hold a meeting by telephone or video?

Yes. Under FOIA, meetings to discuss or transact public business *generally* may not be conducted by telephone, video, or other electronic communication means. Instead, members must be physically assembled in one place. A BOV may, however, conduct a meeting through those means provided it strictly complies with the special FOIA provisions governing electronic communication meetings. Electronic communication meetings are referred in throughout these FAQs as "telephone meetings."

How much notice must be given of telephone meetings?

The notice required for telephone meetings is three (3) working days - the same as for other meetings. As with other meetings, the secretary to the Board will ordinarily handle posting the proper notice. Again, if BOV bylaws require more than 3 days' notice, the longer notice period must be met.

There are very specific requirements regarding the notice that require many details about the meeting to be known in advance. For example, the notice must include the specific locations from which all members will participate.

⁴¹ § 2.2-3712(H)

⁴² § 2.2-3701

⁴³ All rules regarding Electronic Communication Meetings can be found in: § 2.2-3708-§ 2.2-3708.1.

May members of the board call in from different locations?

Yes, with some limitations. First, a *quorum* of the body *must* be physically assembled at the main meeting location. If a quorum is not gathered in one place, members may not discuss or transact business. If a quorum *is* gathered in one location, other members may call in from remote locations provided the locations were advertised in the notice and other statutory requirements are met.

May a member call in from wherever he or she happens to be at the time of the meeting?

No. In order to conduct a telephone meeting, each remote location must have been determined in advance and advertised to the public as a remote location of the meeting. Further, each and every location from which any member is participating in the meeting must be open to the public, and must be equipped with a speakerphone so the public can hear and participate. Any person attending the meeting at any of the meeting locations must be given the same opportunity to address the BOV as persons attending the primary location where the quorum is located.

If a remote location is noticed for the convenience of a member, then the member decides to attend at another location, may we then omit the original location?

No. Once a location is noticed as a remote location, public access must be provided at that location unless the entire meeting is cancelled and re-noticed for at least 3 days later.

Is it sufficient to allow public access to the 'main' meeting?

No. Every location of the meeting (that is, every location from which a member of the body participates) must be noticed as a public location and must be provided public access. The public at each location must have full access; that is, they must be able to hear (and see, in the case of video) and fully participate, including comment, to the same extent as the public at the 'main' meeting location. Also, at least one copy of the agenda and materials made available to the members of the body must at the same time be made available for public inspection; and a copy of those advance materials *and* materials distributed to the members of the body at the meeting must be made available for public inspection at *all* meeting locations.

May we use email to communicate between meetings?

The nature of the email use is an important factor in determining whether its use is proper.

There is nothing improper or illegal about using email in and of itself. Email provides a fast, efficient means of communication for you in your public service life, just as it does for you in your personal and professional life. Nothing prohibits the use of standard email for general communication between or among members. This type communication is analogous to mailing copies of a letter or mass distribution by fax, and is not specifically governed by the meeting provisions of FOIA.

It is important to note, however, that the *nature of e-mail use* will determine the legality of its use. No *lawful* meeting may be held by email. That is to say, if three or more members of a public body (or a quorum if less than three) do communicate by *instant* e-mail (otherwise

known as IM, AIM, or 'chat', or if members are present at computers to simultaneously receive and send e-mail, that may well constitute an *illegal* meeting.

Where use of e-mail more resembles traditional communication through ordinary mail, with significant delay between receipt and response, then there is no "meeting" under FOIA. Where an exchange of e-mails resembles an assemblage of members of a public body, in that e-mails are being sent and responded to in quick fashion such that there is a feature of simultaneity, then such an exchange may be a "meeting" under FOIA, albeit an unlawful meeting.

BOV members should exercise *extreme caution* in the use of email. Use of distribution lists (that is, sending the same email to either the entire BOV or even to just two other members) could set the stage for an illegal meeting. Consider, for example, that a BOV member sends an email to all members of the BOV, and two of those members happen to be sitting at their computers - not an unlikely situation. If those two members respond to the message using function "reply all" within a short timeframe, we have an *illegal meeting*, subjecting the members to public criticism and the monetary penalties of FOIA.

Keep in mind, though, that emails are "records" under FOIA and must be produced in response to a request. (See below under "Records.") Be careful what you write!

What types of meetings may be held by telephone?

Any otherwise-permitted meeting of the BOV, including closed sessions and emergency meetings, may be held as a telephone meeting. Meetings of committees or subcommittees of the BOV may also be held as telephone meetings, but must comply with the same requirements as telephone meetings of the BOV itself.

May we hold all of our meetings as telephone meetings?

No, not all. You must hold at least one meeting annually where members are physically assembled at one location and where no members participate by electronic communication means.

Are there any special voting requirements for telephone meetings?

Yes. All votes at telephone meetings must be roll-call votes, recorded by name, and included in the minutes. This includes *pro forma* motions such as motions to adjourn.

Must the telephone meeting be tape recorded or minutes kept?

There is no requirement that the meeting be tape recorded. However, minutes must be kept just as with non-electronic meetings.

What if a phone goes out or there is some other problem with communication during the meeting?

If initial connection is not made with the remote location (e.g., member does not call in), then the meeting may not take place. The meeting may take place if the correction is made and available to the public even if the member is not at the location.

If, during the meeting, there is any interruption in the audio or video communication at any location – whether the primary location or a remote location – the meeting must be suspended immediately and may not be resumed until repairs are made.

May a member call in on the telephone and participate in discussion at a meeting so long as the member does not vote?

No. Not unless all the requirements for a telephone meeting are met, including 3 days' notice and public access. The *discussion or transaction* of public business by telephone is prohibited unless all requirements are met. A member may, however, call in from a location that has not been noticed provided the member *only listens*, and does not otherwise participate in any manner. However, the more conservative, and safer, approach would be to avoid this scenario.

May a BOV set up remote sites for public participation without 3 days' notice?

Yes, provided no *member* of the body participates from those remote sites. The telephone meeting provisions of FOIA are designed to limit *member* participation by electronic means, not *public* participation. Bodies may allow members of the public to call in; and may otherwise set up remote sites for public participation. Telephone meeting provisions do not apply unless a *member* is participating from a remote location.

What if a member is sick or has another emergency and can't be at the meeting?

A member who is sick and unable to attend, or who is otherwise prevented from attending because of an emergency, may call in without having given notice of the location to the public and without public being permitted to attend the remote location, provided (1) the BOV votes to permit the member to participate and (2) the minutes reflect specifically the illness, disability or emergency suffered by the member.⁴⁴ An obvious example of "emergency" would be a snowstorm that made roads impassable or hazardous; but there are countless other possibilities.

Emergency Meetings

What if the University or BOV have an emergency? Can we meet without three day's notice?

Yes. Notice that is "reasonable under the circumstances" must be given. In an emergency, notice must be given to the public and to BOV members at the same time. While "emergency" is not defined under FOIA, an emergency is best thought of an extremely urgent situation beyond the BOV's control. Delay or procrastination on the part of the BOV or institution does not make for an "emergency" under FOIA.⁴⁵

⁴⁴ § 2.2-3708.1

⁴⁵ § 2.2-3707(D)

If we have an emergency, may we have a telephone meeting without 3 days' notice?

Yes. An "emergency" is an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable, and which requires immediate action. If an emergency telephone meeting is called, reasonable notice under the circumstances must be provided the public. Generally, that would mean providing notice to the same persons as in a non-emergency by the most expedient method possible. Notice must be given the public contemporaneously with that given members of the body.⁴⁶

If an emergency telephone meeting is held, must public access be provided?

Yes. At an emergency telephone meeting, public access must be provided at all locations, just as in a non-emergency. Except for the requirement of 3 day's notice, bodies must meet all other telephone meeting requirements; for example, minutes must be kept. (See above.) Further, the minutes of the meeting must state the nature of the emergency.⁴⁷

RECORDS

What does FOIA require regarding public records?

In general, FOIA requires that unless an exception applies, all records in the possession of a public employee or officer (including BOV members) that relate to public business must be made available to Virginia citizens and members of the media upon request. They are entitled to read and inspect the document and to make copies. (Generally, institutions find it easier to simply provide requestors with copies rather than requiring the requestor to make the copies.) We generally refer to a request for public records as a "FOIA request."⁴⁸

What is a "public record"?

Public records are basically anything the institution and its officials and employees use to transact public business and record data, whether produced by them or others. Records include (among other things) paper documents such as copies of letters, contracts, memos, etc. Also included are video tapes and audio tapes; digital documents on computer hard drives and servers; and text messages on cell phones - in short, anything that records or documents public business - whether written on a digitally stored or chiseled onto a rock, or anything in-between. If it's about public business, it's a public record.⁴⁹ This includes anything in a member of the BOV's home or work computer or otherwise in their possession.

Don't FOIA requests have to be in writing?

Absolutely not. Any request made for records is a FOIA request, whether made orally, by letter, by email, or by carrier pigeon. Nor does the person requesting records have to use any magic words, such as "records," or "FOIA." The requestor is not required to tell you why he or she is asking for the records or what they intend to do with them; nor should you ask.

Whenever *anyone* asks you for *anything* related in *any way* to the business of your institution, you should report it immediately to the institution's FOIA officer - even if you do

⁴⁶ § 2.2-3707, § 2.2-3708

⁴⁷ § 2.2-3707

⁴⁸ § 2.2-3704

⁴⁹ § 2.2-3701

not have any records you believe to be responsive to the request. Others within the institution may have records responsive, and the institution is under a very tight time frame within which to produce the records or object to production.⁵⁰

Are there exceptions to the requirement that we produce requested records?

Yes. In fact, there are well over a hundred exceptions. Your responsibility as a BOV member is to report any request for records to your institution's FOIA officer or counsel. They will help you and others determine what exemptions might apply and how best to respond to the request.⁵¹ The role of the FOIA officer is to assist in document collection to be responsive. Legal questions should be directed to legal counsel.

How long do I have to produce records in response to a FOIA request?

The institution has only 5 working days to initially respond, thus the importance of reporting any request immediately to the institution's FOIA officer. The FOIA officer will assist you and others in gathering documents and properly responding to the request. Even if the institution invokes the permitted extension of time, a final response must be made within 12 work days of the initial request, unless other arrangements are worked out between the FOIA officer and the requestor.

Never attempt to respond to a FOIA request on your own without consulting your counsel.

Would a FOIA request require me to give an account of some event I witnessed, for example, write a description of a discussion I had with another BOV member?

No. FOIA only requires the production of already-existing document. It never requires that a record or document be created. At times, though, an institution may find it preferable for any number of reasons to create a new document rather than producing the existing documents that were requested. That's fine, so long as the requester agrees.

What about my personal documents, including for example, handwritten notes such as those from meetings or discussions with alumni, email at home on my personal computer, etc.?

First, understand that *any* record (letter, memo, scribbled note, email, audio recording, or any other) that in any way relates to the business of the University is *not* a personal document or record, it is a *public record*. This is the case no matter where it resides – whether on campus, in your personal computer, on a computer server in Cyberland, in the glove compartment of your car. So in the event of a FOIA request to you, to the University, or to anyone at the University, those records would have to be produced if responsive to the request.⁵²

⁵⁰ § 2.2-3700

⁵¹ To view the exclusions *see*: 2.2-3705.1-2.2-3705.8.

⁵² § 2.2-3701

PENALTIES⁵³

So what if we violate FOIA? What's the big deal?

First, the big deal is that members of the BOV are entrusted with the public confidence, and a FOIA violation is breach of that trust. The General Assembly has determined that, with specific exceptions, the public's right to open government is not to be violated. Extreme embarrassment to both the University and you personally can result from FOIA violations.

Beyond that, any citizen can file a complaint in court if he believes FOIA has been breached. It is up to the officer or employee to prove that an exception to FOIA was properly applicable. If not successful, the offending officer or employee can be personally fined up to \$2000 for the first occurrence and up to \$5000 for additional occurrences.

⁵³ For violations and penalties *see*: § 2.2-3714.