

M E M O R A N D U M

TO: BOARD AND COMMISSION MEMBERS AND STAFF LIAISONS

FROM: CHRISTINA ZECHMAN BROWN, ASSISTANT CITY ATTORNEY

VIA: JAMES L. BANKS, JR., CITY ATTORNEY

DATE: FEBRUARY 28, 2014

SUBJECT: FREEDOM OF INFORMATION ACT

The City has received a number of Freedom of Information Act ("FOIA") requests for documents that were in the possession of certain City boards and commissions. Given this trend, we thought it might be helpful to review some of the relevant rules to make sure everyone is aware of the requirements.

In the explanations below, I will be referring to the FOIA code sections (Code of Virginia §§ 2.2-3700 et seq.).

WHO IS REQUIRED TO COMPLY WITH FOIA?

Any public body is subject to the requirements of FOIA. Public Body is defined by FOIA as

"...any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) 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. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter." § 2.2-3701.

This clearly includes all City boards and commissions, including advisory boards established for temporary projects.

WHAT DOCUMENTS ARE SUBJECT TO THE FOIA?

All public records, whether generated on a private computer or a City computer, are subject to FOIA. Public records are defined by the state code 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. Records that are not prepared for or used in the transaction of public business are not public records.

§ 2.2-3701.

This includes any written document that is about any public business. Therefore, if a personal email address is used to conduct City business, the emails about City business are subject to FOIA. Additionally, this would include documents that may be considered non-traditional “documents” such as texts, chats, blogs, or postings.

There are certain very specific exemptions to FOIA, including attorney client privileged information. However, there are no exemptions for the majority of documents that would be in the possession of members of boards and commissions. If you want to inquire about whether a specific document is exempt, please feel free to contact the City Attorney’s Office.

PROCEDURES FOR COMPLYING WITH DOCUMENT REQUESTS

When a FOIA request comes in to the City through the City Attorney’s Office, the request is processed through the City’s FOIA software system. The request goes out to the relevant departments through that system, and the departments submit the relevant documents through the system. The City Attorney’s Office reviews the documents and then distributes the documents to the requestor.

Currently, members of boards and commissions do not have City email addresses and are not directly on the City’s FOIA software system. Therefore, when a request comes in that involves a particular board or commission, the City Attorney’s Office will work with its department contacts. Then the individual board or commission members will be asked by City departmental staff to search his or her files and let the department know whether he or she has any relevant documents.

Please note, the Virginia Public Records Act establishes schedules for record retention requirements. Different retention schedules may apply to the retention of emails for different boards or commissions, some dependent upon the work conducted by the board or commission. The majority of the records that you receive as a board or commission member are provided to you by the City staff. Anything that has been provided to you by the City staff is retained by the staff in accordance with the required retention rules. Therefore, you are only responsible to retain any record, in accordance with the required schedule, that is not also within the City’s system. Please contact the City Attorney’s Office regarding the retention schedule that is specifically applicable.

We recommend that board and commission members establish separate email accounts just for the business that they may conduct in their position in order to keep the information separate from either personal email or professional work email.

WHAT IS THE PENALTY FOR NOT COMPLYING WITH FOIA?

The requirements of the FOIA may be enforced by “[A]ny person . . . denied the rights and privileges conferred by this chapter” by filing a civil suit for a mandamus or an injunction in the local General District Court or Circuit Court. The public body bears the burden of establishing, by a preponderance of the evidence, that there was an exemption that allowed them to not disclose the document. In cases where the Court finds there was a willful or knowing violation of the FOIA law, **civil penalties ranging from \$250 - \$5000 may be imposed** on the member of the public body in his or her personal capacity. See § 2.2-3713 and § 2.2-3714 (emphasis added).

TRAINING AND QUESTIONS

If you would like training regarding FOIA or record retention requirements, or if you have any other questions please feel free to contact Christina Zechman Brown, City Attorney’s Office, (703) 746-3750.