

City of Alexandria, Virginia

# Laws and Rules for Boards and Commissions

Staff Liaison Training  
September 19, 2018



# What will we discuss?



- ✓ Overall Rules – keeping us straight!
  - FOIA meeting and document rules
  - City rules
  - Robert's Rules
  - Conflicts of interest

# FOIA

## Structure of FOIA



- The Virginia Freedom of Information Act (or FOIA) has two main components:
  - Access to public records.
  - Access to meetings of public bodies.
- The Act is found under Code of Virginia § 2.2-3700 through 2.2-3714.

# FOIA

## Public Records



- What are public records?
  - “[A]ll writings and recordings . . . 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.

# FOIA Public Body



- What is a public body?
  - “[A]ny legislative body, authority, board, bureau, commission, district or agency . . . of any political subdivision of the Commonwealth, including cities, . . . municipal councils, . . . and planning commissions; . . . and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.”
  - “It shall include . . . 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.”

# FOIA

## Public Records Obligations



- Under FOIA what are the City's general obligations related to public records?
  - To retain records related to the public business for the required retention period.
  - And to provide those records for inspection upon request by a citizen.

# FOIA

## Public Records Obligations



- Under FOIA what are the obligations related to board public records?
  - Staff must retain all records related to the business of the board.
  - Board members must retain any record that is not maintained by or provided to them by staff.
  - Examples:
    - Dockets and applications
    - Emails
    - Letters

# FOIA Meetings



- What is a meeting of a public body?
  - A meeting is defined as “. . . when sitting physically, or through electronic communication means pursuant to 2.2-3708.2, as a body or entity, or as an informal assemblage of (i) as many as **three** members . . . of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.”



# FOIA Meetings



- Under FOIA, what are the obligations of board meetings?
  - Any gathering of 3 or more members of the board is a meeting, if the members are discussing board business.
  - In order to hold a meeting under FOIA the following requirements must be met:
    - Public notice must be provided **three** working days prior to the meeting
    - Information being provided to the members must be made available to the public
    - The meeting must be open to the public
    - Minutes of the meeting must be prepared

# FOIA



## Meetings – Physical Assembly

- **Generally FOIA requires the physical assembly of the members and remote participation is prohibited.**
- This means no meetings by conference telephone calls, video-conferencing, or other electronic communications.
- FOIA only allows public bodies that wish to permit one or more of their members to participate in meetings remotely in cases of a personal matter or medical condition when i) a quorum is physically assembled and ii) the public body has adopted an electronic participation policy that complies with FOIA.

# FOIA Meetings - Electronic Communication



- Under FOIA, what are the rules on electronic communication?
  - In Hill v. Fairfax County School Board, the Virginia Supreme Court stated that:
    - “[T]he key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirements of [the] FOIA, and those that constitute a ‘meeting’ under [the] FOIA, is the feature of simultaneity inherent in the term ‘assemblage.’”
    - “[T]he dispositive inquiry to be made by the trier of fact is ‘how the e-mail is used.’”

# FOIA Meetings - Electronic Communication



- This rule is applicable to other forms of electronic communications, including chat rooms, instant messaging, texting, etc.
- The rule means that the closer in time that electronic communications are sent and responded to by 3 or more members of the board, the more likely that a meeting could be found.
- In order to avoid problems, it is advisable:
  - To NOT reply all to emails
  - To NOT respond to or email more than one other board member at a time
  - Alternatively, if you have something you would like to say to the entire board, then you can always wait to and say it at the next board meeting

# FOIA Voting



- No vote of any kind of the board shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of FOIA.
- No public body shall vote by secret or written ballot.

# FOIA

## Closed Meetings – When Permitted



- Public bodies may only hold closed meetings for the purposes set out in Code of Virginia § 2.2-3711(A).
- Some of the purposes include:
  - Certain specific personnel matters
  - Discussion of the acquisition or disposition of public property
  - Protection of individual privacy in a personal matter not related to the public business
  - Discussions of the negotiation or award of a contract involving the expenditure of public funds, when public discussion would jeopardize the public body's bargaining position
  - Investment of public funds through competition or bargaining, if disclosure would have an adverse financial impact
  - Consultation with legal counsel or briefings by staff about litigation or other specific matters requiring legal advice
  - Discussion or consideration of medical and mental health records excluded from disclosure under FOIA



# FOIA

## Closed Meetings - Procedures

- In no event may any public body take action on matters discussed in any closed meeting.
  - Nothing agreed to in a closed meeting becomes effective unless the board reconvenes in an open meeting and takes a vote of the membership on such matter that has its substance reasonably identified in the open meeting.
- No closed meeting shall be held unless the board 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 and (iii) makes specific reference to the applicable exemption from open meeting requirements.
  - The matters contained in such motion must be set forth in detail in the minutes of the open meeting.
  - The board must restrict its discussion during the closed meeting only to those matters specifically exempted from the open meetings requirements and identified in the motion.
  - Minutes may be taken during closed meetings of a public body. Such minutes are not be subject to mandatory public disclosure.



# FOIA

## Closed Meetings - Procedures

- At the conclusion of any closed meeting, the board must immediately reconvene in an open meeting and take a roll call or other recorded vote to be included in the minutes of the board.
  - Certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under 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 meeting.
  - Any member who believes that there was a departure from the requirements of (i) and (ii) above, shall state such prior to the vote, indicating the substance of the departure that occurred. Such statement shall be recorded in the minutes.
- A member is permitted to attend and observe a closed meeting held by any board committee or subcommittee or a closed meeting of any entity created to perform the delegated functions of or to advise that board. The minutes of the other entity shall include the identity of the member of the parent board who attended the closed meeting.



# FOIA

## Violations of FOIA



- What happens when the City does not comply with FOIA?
  - A single violation of FOIA is enough to trigger the following remedies.
    - If the court finds the denial to be in violation of the provisions of FOIA, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case.
  - Any failure by a public body to follow the procedures established by FOIA shall be presumed to be a violation.
  - A court, if it finds that a violation was willfully and knowingly made, may impose **upon such employee or officer** a civil penalty of not less than \$500 nor more than \$2,000. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000.

# City Rules

## General and Membership



- The following general rules apply unless otherwise specified in the enabling legislation of the board
  - Members are appointed by Council
  - Have 10 year term limits
  - May be removed from the board by Council for neglect of duty or violations of the law
  - Board designates a chair and secretary

# City Rules

## Meetings and Reports



- Must have one regular meeting each year
- An annual report must be made to Council for the previous fiscal year
  - Report goes to Council each fall
  - Report must include:
    - Board members
    - Board's principle activities and
    - Any recommendations to improve the functions and duties of the board

# City Rules/FOIA Agendas



- All agendas must be posted a minimum of **three** working days prior to the meeting
- Must be posted in a prominent place
- Electronic posting on the City's website is highly encouraged
- Agendas must include:
  - Time
  - Date
  - Place and
  - Items to be discussed/considered

# City Rules Attendance



- Members of boards and commissions must attend 75% of all meetings
- Absences can be excused by the chairs
  - Excused absences do not count against the 75% attendance rule
- Members who do not meet the 75% attendance rule are removed by Council for non-attendance

# City Rules/FOIA Open Meetings



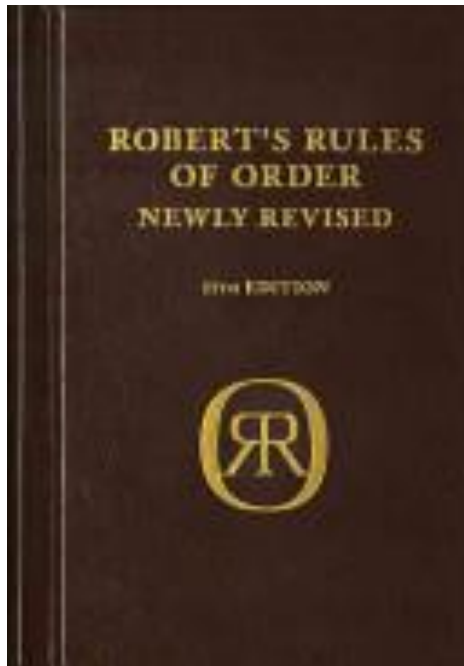
- All meetings of public bodies are open to the public
- Applies to all board meetings, as well as executive committee/subcommittee meetings
- If the meeting is in a public place, then you must provide room for the public to sit in on the meeting

# City Rules/FOIA Meeting Minutes



- Written minutes must be kept for every meeting
- Minutes must include:
  - Date
  - Time
  - Location
  - Those present and absent
  - A summary of discussion and
  - A record of votes taken

# Robert's Rules of Order



- Robert's Rules of Order apply unless otherwise specified in the law
- Basic Requirements:
  - Chair presides
  - Members need to be recognized to speak
  - Quorum is a majority of members of the board and is needed for business to be conducted
  - A vote requires a majority of those present unless otherwise specified
  - A tie vote means the motion does not pass



# Robert's Rules of Order



- Motions and Amendments
  - All motions require a second
  - Motions can be amended with an amendment to the motion or a substitute motion
  - Amendments need to have a second and be voted on separately
  - Main motion, as amended is then on the table for consideration

# Robert's Rules of Order



- Motion to Amend and Substitute Motion
  - Similarities
    - Requires a second
    - Debatable
    - Must be germane to main motion
    - Requires majority vote
  - Differences
    - Substitute Motion - Changes the main motion by substituting an entire sentence or paragraph

# Robert's Rules of Order



- **Motion to Lay on the Table**
  - Lays aside the pending question temporarily when something else of immediate urgency has arisen or when something else needs to be addressed before consideration of the pending question
  - Not debatable
  - Applies to main motions, appeals, and reconsiderations
  - Can be brought back by a motion to take from the table
- **Motion to Postpone to a Certain Day**
  - Debatable only on issue of postponement
- **Motion to Postpone Indefinitely**
  - A matter that has been postponed indefinitely cannot be brought up again during the same meeting except by motion to reconsider the motion to postpone indefinitely

# Robert's Rules of Order



- Amending an approved decision
  - Motion to Reconsider
    - Made at the same meeting
    - Can only be made by a member who voted on the prevailing side of the motion
  - Motion to Rescind
    - Can be made at any time after a decision is made
    - Voting
      - Requires a 2/3 majority vote of those present
      - Majority vote when notice and substance provided in advance
    - Cannot be done if decision has been relied on to do something that cannot be undone

# Conflicts of Interest



- Conflict of interest laws applicable to board members include the State and Local Government Conflict of Interests Act (Act) and certain provisions of the City's Code of Ordinances.
  - Act is found under Code of Virginia § 2.2-3100 through 2.2-3131.
  - City Ordinances are at City Code § 3-3-121 through 3-3-133.

# Conflicts of Interest



- What are the obligations of board members with regard to conflicts of interest?
  - The Code of Virginia and City Code are not codes of ethics but instead merely sets minimum standards of conduct with respect to the interests of board members.
  - They do not protect against all appearances of improper influence.
  - Instead, they place the burden on the individual board member to evaluate whether the facts presented create an appearance of impropriety that is unacceptable or that could affect the confidence of the public in the ability of the board member to be impartial.

# Conflicts of Interest



- What conduct is prohibited under the Act?
  - No board member may accept money or any other thing of value or take other advantages based upon his position as a member of the board.
  - Members cannot have a “personal interest” in a “contract” or “transaction.”
    - A “personal interest” is a financial benefit or liability accruing to a board member or to a member of his immediate family.
    - A “contract” is any agreement to which the City is a party or any agreement on behalf of a City that involves the payment of money appropriated by the City.
    - A “transaction” is any matter considered by the board on which official action is taken or contemplated.

# Conflicts of Interest



- What conduct is prohibited under the City Code?
  - Participation in procurement transactions is proscribed under a variety of circumstances.
    - A procurement transaction is means “[a]ll functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.
  - Participants in a procurement transaction cannot accept or solicit gifts.
  - Participants in a procurement transaction must take certain steps if they desire to take a job with a contractor or potential contractor.
  - Since the question of whether a conflict of interest exists is fact specific, it is advisable to contact the City Attorney’s Office related to a particular situation.





# Questions?

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