

# VIRGINIA BOARD OF ACCOUNTANCY

## ADMINISTRATIVE POLICY & PROCEDURE

**Policy Name:** Virginia Freedom of Information Act (FOIA)

**Effective Date:** November 1, 2011

**Authority:** Code of Virginia, § 2.2-3704 et. seq.

**Introduction:** The General Assembly ensures the public access to public records generated by the Virginia Board of Accountancy (the Board) and admittance to meetings wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless the Board specifically elects to exercise an exemption or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

**Purpose:** FOIA promotes an increased awareness by citizens of governmental activities and affords every opportunity to witness the operations of government. Public records are not withheld or meetings closed unless specifically made exempt by the Code of Virginia. The purpose of FOIA is to encourage the free discussion by government officials or employees of public matters with citizens of the Commonwealth.

**Definitions:** A "meeting" is defined as work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, Code of Virginia, as a body or entity, or as an informal assemblage of (i) as many as three Board members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body where the business of the public body is being discussed or transacted.

The "public" is defined as citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

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A "public record" is any writing or recording, including draft, preliminary or final versions, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

### **Policy:**

It is the policy of the Board to give the public access to public records held by the Board. The Board will make reasonable efforts to reach an agreement with the public concerning the production of the records requested. The Board posts notice to the public in advance of scheduled meetings.

### **Public Records:**

**Rights of the Public under FOIA.** The public has the right to:

1. Inspect and receive copies of records subject to FOIA and generated by the Board.
2. Be made aware of charges for the requested records in advance.
3. Request records by postal mail, fax, email, in person or by phone.

**Requests for Public Records.** The request need not make specific reference to FOIA or order to invoke its provisions. Follow these standards in making a request for public records.

1. **Written or Verbal.** FOIA does not require that a request be in writing and the Board cannot refuse to respond to a verbal request, but it is helpful to put a request in writing to create a record of the request. A written request reduces the potential of verbal misunderstandings.
2. **Reasonable Specificity.** The request must contain "reasonable specificity," a common-sense standard. The request must be detailed enough to allow the Board to identify and locate the particular records.
3. **Volume.** There is no limit to the volume or number of records being requested.
4. **Existing Records.** The request must apply to records already in existence. FOIA does not require the Board to create a record that does not exist. However, the Board may abstract or summarize information as agreed to with the public making the request.

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5. **Format of Requested Records.** The request must identify how the records are to be received. Any format used by the Board in the regular course of business is available (scanned document attached to an email or printed copy via pickup or postal mail).
6. **Attitude of Cooperation.** Cooperation between the public and the Board is necessary to ensure that the spirit of FOIA is followed.

### Responsibilities of the Board under FOIA.

1. **Five Business Days.** The Board must respond to a FOIA request within five business days of receiving it. Day 1 is considered the day after the request has been received.
2. **Required Information.** The reason for the request is irrelevant and the Board may not inquire the reason behind the request. The Board requires a legal name and postal address before processing the request.
3. **Appropriate Responses.** Within the five-day period, the Board must provide one of the following responses to a FOIA request:
  - The requested records are provided in their entirety.
  - None of the requested records are provided. An entire record may be withheld if it is subject to a Code of Virginia exemption. The Board must provide a written response to the public identifying the subject matter, volume and Code of Virginia section number that contains the FOIA exemption.
  - A portion of the requested records are provided and a portion withheld. The Board may not withhold an entire record if only a portion of it is subject to an exemption. Thus, the exempted portion is redacted and the non-exempted portion is provided. The Board must provide a written response to the public identifying the Code of Virginia section number that contains the FOIA exemption.
  - The requested records could not be found or do not exist. If the Board knows that another public body has the requested records, the Board will include contact information for the other public body in its

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response to the public request.

- If the Board deems it impossible for practical reasons to respond to the request within the five-day period, the Board may request a seven-day extension (for a total of 12 business days). The written request must explain the conditions that make the five-day response time impossible. Large volume requests may require discussion with the public regarding a reasonable response time. The Board may petition the court for additional time (beyond the 12 days) to respond to large volume requests; however, FOIA requires that the Board make a reasonable effort to reach an agreement with the public before involving the courts.
- The Board must respond in writing to a request for records when the response is 2–5, above.

**Email as a Public Record.** Records generated by email are public records. Emails generated by the Board are available for public inspection and copying. Work product emails must be retained like other public records subject to the provisions of the Virginia Public Records Act.

### **Costs involved in making a FOIA request for records.**

The Board is allowed to charge for actual costs incurred in accessing, duplicating, supplying, or searching for the requested records. The Board may not charge for general overhead costs. The Board estimates the charges in writing and in advance and communicates with the public before beginning work on the request.

If the Board estimates that the FOIA request will exceed \$100, a deposit of 50 percent will be required. The five-day response period begins after the deposit (if applicable) is paid.

If the Board is owed past-due costs (more than 30 days) from a previous FOIA request, payment of past-due costs is required before the Board will respond to another FOIA request.

### **Making a FOIA request for records from the Board.**

FOIA requests should be directed to the Executive Director of the Board through one of the following avenues of contact:

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- Email: [boa@boa.virginia.gov](mailto:boa@boa.virginia.gov)
- Phone: (804) 367-8505
- Fax: (804) 527-4409
- Postal: 9960 Mayland Drive, Suite 402, Henrico, VA 23233

**Exemptions to FOIA requests.** The Code of Virginia, § 2.2-3705.1, allows the Board to withhold specific records from FOIA disclosure:

1. Personnel records containing identifiable information;
2. Records subject to attorney-client privilege;
3. Attorney work product records;
4. Test or examination for evaluation purposes including qualifications/test scores for licensure;
5. Records used in closed meetings;
6. Vendor proprietary information;
7. Computer software developed for or by a state agency;
8. Appraisals and cost estimates of real property;
9. Records of claims through the Department of Risk Management;
10. Personal information, including electronic mail addresses;
11. Confidential communications and materials;
12. Records related to the negotiation and award of a contract, prior to the contract being awarded; and
13. Account numbers or routing information for credit cards, debit cards or other accounts with a financial institution.

### VBOA Website:

Public records currently available on the VBOA website at [www.boa.virginia.gov](http://www.boa.virginia.gov) are:

- Board annual expenditures;
- Board Biennial Report, FY2009-10;
- Board Strategic Plan, 2010-12;
- Board Report; and
- Board disciplinary actions, beginning in 2011.

### Open Meetings:

**Not Considered a Meeting under FOIA.** The following are not considered meetings under the provisions of FOIA:

1. A gathering of employees of the VBOA.

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2. A gathering or attendance of two or more Board members at any place or function where no part of the purpose is discussion or transaction of public business, attendance was not called and public business is not discussed.
3. A gathering or attendance of two or more Board members at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussion relating to the transaction of public business, although the performance of Board members in the conduct of public business may be a topic of discussion or debate at such public meeting.

**Requirements for Open Meetings.** FOIA requires that notice of the meeting must be given; the meeting must be open to the public; and minutes of the meeting must be taken and preserved.

**Notice of Open Meetings.** Notice must contain the date, time, and location of the open meeting. An agenda may also be included, but it is not required. Governor-appointed Boards, such as the VBOA, must also indicate whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be accepted.

Notice must be posted in two physical locations: the lobby of the Perimeter Center and Suite 402, Board offices. Electronic notice of meetings is encouraged, but not required. The Board posts a notice on its website and the Commonwealth Calendar website.

Any person who makes an annual written request to the Board for notification of meetings is entitled to receive direct notice of meetings. Notwithstanding objection, the Board provides the electronic notice (email).

Notice of regular meetings must be posted at least 3 working days prior to the meeting. Public notice of special or emergency meetings must be contemporaneous with notice to the Board.

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**Electronic recording of open meetings.** The public may photograph, film, record or otherwise reproduce any portion of an open meeting. In order to prevent interference with proceedings, the Board governs the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting.

**Minutes of open meetings.** All meeting materials, unless exempt, must be furnished to the public contemporaneous with materials furnished to the Board.

Minutes are only required at open meetings. Minutes, including draft minutes, and all electronic recordings of open meetings are public records.

Minutes must include the date, time, and location of the meeting, Board members present and absent, a summary of matters discussed, and a record of votes taken. Motions to enter into a closed meeting and certification after a closed meeting must also be recorded in the minutes.

As an agency in the Executive branch, the Board is required to post minutes on the Commonwealth Calendar website. Draft minutes must be posted not later than ten working days after the conclusion of the meeting. Approved minutes must be posted within three working days of final approval.

**Voting in Open Meetings.** All votes to authorize the public business of the Board must be recorded and preserved. The Board may not vote by secret or written ballot.

FOIA allows that the Board members be polled outside of meetings for the purpose of ascertaining a member's position with respect to the transaction of public business, provided the contact does not constitute a meeting as defined in FOIA.

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**Closed Meetings:** **Affirmative Motion Vote.** A closed meeting may only take place within the context of an open meeting, even if the closed meeting is the only agenda item. The Board may conduct a closed meeting during an open meeting by an affirmative motion vote. A general reference to FOIA provisions, authorized exemptions or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting. Details of the motion must be set forth in the minutes of the open meeting to include:

1. Specific subject matter.
2. Purpose of the closed meeting.
3. Reference to the applicable exemption from open meeting requirements found in § 2.2-3711 A, Code of Virginia.

**Discussion in Closed Meetings.** Discussion during a closed meeting of the Board is restricted to matters specifically exempted by FOIA and identified in the motion.

**Recorded Vote in Open Meeting.** At the conclusion of a closed meeting, the Board immediately reconvenes in open meeting and takes a roll call or recorded vote to certify that only exempted matters and matters specifically identified in the motion were heard, discussed, or considered in the closed meeting. The vote must be included in the minutes of the open meeting.

**Decisions in Closed Meetings.** Decisions made in a closed meeting become official when the Board reconvenes in the open meeting and takes a vote on the motion agreed to in the closed meeting. Otherwise, nothing agreed to in the closed meeting is effective.

**Public Objection.** If the public objects to the manner in which the Board has administered the closed meeting, a protest must be verbally stated prior to the vote of the Board explained above. The protest must be accompanied by a statement outlining the objection. This statement must be recorded in the minutes of the open meeting.

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**Grounds for Closed Meetings.** The Code of Virginia, § 2.2-3711 A, contains more than 40 open meeting exemptions. Exemptions of general applicability and the Code of Virginia section numbers are listed below:

- Employees or prospective employees (1)
- Disciplinary matters involving students (2)
- Acquisition and disposition of property (3)
- Privacy of individuals (4)
- Prospective business or industry (5)
- Investment of public funds (6)
- Consultation with legal counsel (7)
- Tests and examinations (11)
- Medical and mental records (15)
- Public safety (19)
- Pending disciplinary actions (27)
- Public contracts involving the expenditure of public funds (29)

### Electronic Meetings:

**Procedural Requirements.** The procedural requirements for electronic meetings are set out in § 2.2-3708, Code of Virginia. The Board may conduct meetings through electronic communication (audio or combined audio and video) where Board members are not physically assembled to discuss or transact public business.

**Quorum and Quorum Exceptions.** A Board quorum of those physically assembled at the primary meeting location is required. The only exception to the quorum requirement is for: 1) electronic meetings held when the Governor has declared a state of emergency; 2) the meeting addresses that emergency; and 3) the meeting otherwise complies with procedural requirements for electronic meetings.

**Remote Location.** The remote location is open to the public. The public attending the meeting at the remote location must be given the same opportunity to address the Board as the public attending the primary meeting location. The only exception to this requirement is contained in § 2.2-3708.1, Code of Virginia and explained below.

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**Notice of Electronic Meetings.** Procedures for giving notice to electronic meetings include the following:

1. **Prior Notice.** Notice must be posted at least three working days prior to the electronic meeting.
2. **Exceptions to Prior Notice.** There are two exceptions to the three-day notice requirement: 1) If an electronic meeting is being held to address an emergency and the Board is not able to meet at a regular session where the Board is physically assembled the three-day notice is not required. The nature of the emergency must be stated in the minutes. Public notice must be contemporaneous with notice to the Board. 2) If an electronic meeting must be continued to conclude the agenda the three-day notice is not required as long as the date, time, place and purpose of the continued meeting are set during the meeting prior to adjournment.
3. **Posting Notice.** Notice must be posted in two physical locations: 1) the lobby of the Perimeter Center and 2) Suite 402, Board offices. Notice must also be posted electronically on the Board website and Commonwealth Calendar website.
4. **Information on Notice.** Notice must include the date, time, purpose and all locations of the meeting. Remote location(s) must post a telephone number of the primary meeting location used to notify such location in case of a broadcast interruption to the remote location(s). Governor-appointed Boards, such as the Board, must also indicate whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be accepted.

**Agenda in Electronic Meetings.** An agenda and any materials distributed to the Board at the primary location must be forwarded to all remote location(s) and made available to the public in sufficient time for duplication.

**Minutes of Electronic Meetings.** Minutes must be kept for electronic meetings as required for meetings where the Board is physically assembled.

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Minutes of electronic meetings must include:

1. The identity of Board members at each remote location identified in the notice;
2. The identity of Board members physically assembled at the primary meeting location; and
3. The identity of Board members who were not present at either the remote location(s) or the primary meeting location but who monitored the meeting through electronic communication means.

**Voting in Electronic Meetings.** Votes must be recorded by name in a roll-call fashion and be included in the minutes of the electronic meeting.

**Closed Electronic Meeting.** A closed electronic meeting may be held provided procedures for closed meetings are followed. There is no limitation to the number of electronic meetings the Board may hold provided at least one meeting annually is at one location where members are physically assembled and where no Board members participate electronically. If there is an interruption in either the audio or visual broadcast of the meeting, the meeting must be suspended until repairs are made and public access is restored to all meeting sites.

**Annual Report.** The Board must submit a report by December 15 of each year to the Virginia Freedom of Information Advisory Council and the Joint Commission of Technology and Science. The report must include:

1. Total number of electronic meetings held during the preceding year.
2. Dates and purposes of such meetings.
3. Number of locations for each meeting.
4. Types of electronic communication used for each meeting.
5. Number of participants, including members of the public, at each meeting location.
6. Board members recorded as present and absent at each meeting location.
7. Summary of public comment received about electronic meetings.

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8. Written summary of the Board's experience with electronic meetings, including logistical and technical details.

**Individuals participating in electronic meetings.** The Code of Virginia, § 2.2-3708.1, outlines procedures for individuals prevented from physical participation in a Board meeting. Individuals may participate electronically in an open meeting under the following conditions: a medical or personal emergency; permanent physical disability or condition; or the principal residence of the individual is 60 or more miles from the primary meeting location.

1. The remote location of individual must not be open to the public.
2. A Board quorum of those physically assembled at the primary meeting location is required.
3. The voice of the individual must heard by all assembled.
4. The individual must notify the Board chairperson on the day of the meeting.
5. The individual must identify the reason for remote participation of the meeting. Identify the condition, emergency, or disability (if applicable).
6. The individual's remote participation must be approved by majority vote of the Board physically assembled.
7. The location of the individual and reason for remote participation must be recorded in the minutes of the meeting.
8. Remote participation due to emergency is limited to two meetings per year or 25% of Board meetings, whichever is less.

**Email Meetings.** The Virginia Supreme Court has ruled that the use of email to sustain simultaneous discussion, reach a consensus and/or make a decision between three or more Board members constitutes a meeting under FOIA and is thereby subject to meeting requirements under FOIA.

### **Additional Information:**

The public may contact the Virginia Freedom of Information Advisory Council with any questions concerning FOIA requirements with the Following contact information:

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- Local: (804) 225-3056
- Toll free: 1-866-448-4100
- Email: [foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov) or [foiacouncil@leg.state.va.us](mailto:foiacouncil@leg.state.va.us)
- Website: <http://foiacouncil.dls.virginia.gov>

If the public believes that there has been a departure from FOIA requirements, a petition may be filed in district or circuit court to compel compliance with FOIA.

**Scope:**

The policy and procedures provided herein apply to classified and hourly-wage employees, contractors, and at-will appointees of the Board.

**Policy Review:**

The FOIA Policy of the VBOA was initiated on March 1, 2011 and reviewed on November 1, 2011.

**Staff Awareness:**

Board employees are made aware of this policy through initial orientation and staff meeting review.

**Override Provision:**

State law, Board regulations and/or policies of the proponent agency override this policy, where applicable. Local ordinance that conflicts with this policy is void.

**Supersession:**

This policy supersedes the FOIA Policy, dated March 1, 2011.

*Wade A. Jewell*

**Wade A. Jewell, Executive Director**

*November 1, 2011*

Date Approved / Reviewed