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M E M O R A N D U M

TO: ERFC Board of Trustees

FROM: Jenifer Cromwell
Ernest Zhu

DATE: July 21, 2023

RE: 2023 Outline of Major Virginia FOIA Provisions and Recent Cases

This year, there was one minor amendment to VA FOIA applicable to ERFC that allows local public bodies that charge for the production of documents to provide an electronic method of payment to requesters. There were also several Supreme Court of Virginia rulings that clarified the definitions of “public business,” “personnel information,” and the right to “be present,” as those terms are used in VA FOIA. Finally, the Virginia Freedom of Information Advisory Council issued an advisory opinion stating that a public body may provide a cost estimate that consists solely of a lower bound. Relevant changes are described in boldface.

Outline of Major Virginia FOIA Provisions – 2023

Section 3700 is the statement of policy, generally providing to citizens of Virginia a right of ready access to meetings of public bodies and ready access to public records.

Section 3701 contains the definitions.

- Any assembly of three or more members of the ERFC Board is defined as a meeting. Note, however, that the assembly of two or more members of the ERFC

Board at a gathering or event will not be treated as a meeting provided that the purpose of the gathering or event is not to discuss or transact ERFC business and provided further that the gathering or event was not called or prearranged to discuss or transact ERFC business. The Supreme Court of Virginia has held that emails or email chains are generally not considered meetings for purposes of VA FOIA. **The Supreme Court of Virginia recently held that a topic constitutes the “business” of a public body if it relates to a subject either before the public body or likely to come before the body in the foreseeable future, and it does not include matters that conceptually could at some point come before a public body.**

- **All ERFC Board meetings must be “open meetings,” which are defined as meetings at which the public may “be present.” The Supreme Court of Virginia has held that the right to “be present” at meetings contemplates physical presence at in-person meetings. This means that if the ERFC Board conducts a meeting in-person, a member of the public who wants to observe the meeting must be allowed to be in the same room unless that is not feasible because of room size, logistics, or COVID-19 precautions.**
- “Public Records” is defined to include all forms of information “prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.” Note that a Charlottesville Circuit Court held that text messages are public records, and public bodies would have the obligation and duty to retrieve, and recover, text messages even in deleted form.

Section 3702 requires that each person elected, reelected, appointed, or reappointed to a public body covered by FOIA be given a copy of the statute within two weeks following election, etc., and “read and become familiar with the provisions of this chapter.”

Section 3703 contains certain exceptions for public bodies that are not required to comply with FOIA. (ERFC is covered; it is not listed in the exceptions.)

Section 3703.1 provides that nothing in FOIA will have a bearing upon disclosures that are required to be made pursuant to a court order or subpoena.

Section 3704 contains the general requirements that public records be open to public inspection, and that copies be provided to persons requesting them. There are strict time limits for complying with such a request, and rules limiting the amount that may be charged for such copies. A public body must make all reasonable efforts to supply records to the person requesting them at the lowest possible cost. Before conducting a search for records, a public body must notify the person in writing of the public body’s right to make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records, and ask the person whether they would like a cost estimate in advance of the public body supplying of the requested records. A person requesting records can ask for an estimate of charges in advance; the period within which the public body shall respond tolls in the time between notice of the cost estimate and the response of the requester. **The Virginia Freedom of Information Advisory Council stated that a public body may provide a cost estimate that consists solely of a lower bound. VA**

FOIA does not require an estimate to include a high and low range or a maximum amount for charges associated with the production of records. For example, a public body may state an estimate that a document request will cost at least \$500.00 and that the final cost will be above that amount without providing a maximum estimated amount. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed withdrawn. If the estimated charges exceed \$200, the public body may require the requested to pay a deposit not to exceed the estimate. A person requesting records cannot be required to come to the government office to “inspect” records in place, but must be given the option of receiving copies. **Local public bodies, including ERFC, may provide an electronic method of payment, meaning any kind of non-cash payment that does not involve a paper check such as credit cards, debit cards, or direct deposit, through which all payments for the production of such records to such locality may be made.**

Section 3704.01 clarifies that public records should only be withheld in their entirety if all the information in them is excluded from disclosure; if only some of the information is excluded, those portions of the record containing such information should be withheld, but the rest should be disclosed.

Section 3704.1 applies only to the executive branch of the state government, local governments, and school boards; it requires them to post statements of FOIA rights.

Section 3704.2 requires state and local public bodies to designate a FOIA officer to serve as a point of contact for FOIA requests and to coordinate the body’s compliance with the Act. The name and contact information of the FOIA officer must be made available in a way that is reasonably calculated to provide notice to the public, including posting at the public body’s place of business, posting on its website, or including such information in its publications. The officer must have specific knowledge of the provisions of FOIA and must be trained once during each consecutive period of two calendar years commencing with the date on which the officer last completed a training session, and such training may be received through legal counsel for the public body or the Virginia Freedom of Information Advisory Council or through an online course offered by the Council.

Section 3704.3 requires local elected officials to complete an online training session on the provisions of the Virginia Freedom of Information Act within two months of assuming local elected office, and thereafter, at least once every two years while in office. The provision requires each public body or school board to maintain records that identify the elected officials subject to the training requirement.

Section 3705 describes the records that are exempt from public disclosure, in subject-matter groupings. Those subdivisions, and the exemptions that most frequently apply to ERFC’s business are:

Section 3705.1 – Exclusions of general application to public bodies

1. Personnel information regarding identifiable individuals (except that the person who is the subject of the record is entitled to them). But most records of position, job classification, salary, allowances, and expense reimbursements, to public employees are subject to disclosure, unless the individual's annual rate of pay is \$10,000 or less. **The Supreme Court of Virginia has held that this exemption covers data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity and are private in nature. This means that ERFC would not be permitted to rely on this exemption to withhold all employment information from public disclosure, but rather, only private information. Information is "private" if the disclosure would constitute an "unwarranted invasion of personal privacy" to a reasonable person under the circumstances.** A separate section of the Virginia Code on privacy rights protects other information about public employees, including their ERFC retirement status or amount of retirement benefits.
2. Written advice of legal counsel, and any other records protected by attorney-client privilege.
3. Legal memoranda and other work product compiled for investigations or litigation.
5. Records recorded in or compiled exclusively for a closed meeting that was lawfully held under Section 2.2-3711.
6. Vendor proprietary software.
7. Software developed by or for the public body.
10. Personal contact information, including telephone numbers and e-mail addresses, furnished to the public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members, unless the recipient of such electronic communications indicates their approval for the public body to disclose such information.
12. Records relating to the negotiation and award of a public contract where the release would adversely affect the bargaining position or negotiating strategy of the public body. These records cannot be withheld after a decision is made to award (or not award) the contract.
13. Those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution. This protection applies to any account holder, including a public body.

Section 3705.2 – Records relating to public safety

14. Information about security of buildings and information systems, the disclosure of which would jeopardize the security of any governmental facility or persons using that facility, including:
 - Information about security systems that control access to any data processing or telecommunications system.
 - Information about plans concerning the prevention or response to cyberattacks, to the extent that disclosure would reveal the location or

operation of certain listed equipment or would jeopardize the safety of any person.

- Information about alarm or security systems.
- Vulnerability assessments.
- Requests for certain records excluded under this subdivision should be reported to the Secretary of Public Safety and Homeland Security, or the Secretary's designee.

Section 3705.3 – Records relating to administrative investigations

3. Investigator notes and information furnished in confidence relating to an active investigation of employment discrimination complaints. Information in inactive reports is not exempted, but it should be disclosed in a form that does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation.
5. Investigator notes and information furnished in confidence relating to an investigation of unlawful discriminatory practices under the Virginia Human Rights Act. Information contained in inactive reports should be disclosed in a form that does not reveal the identity of the parties involved or other persons supplying information.
7. Investigator notes and information furnished in confidence to or for an auditor appointed by a school board to conduct any investigation of an officer, department, or program. Records of completed investigations are subject to limited disclosure requirements.

Section 3705.4 – Educational records

Section 3705.5 – Health and social services records

1. Health records are exempt from disclosure to all persons except the subject of the records (with limited exceptions).

Section 3705.6 – Proprietary records and trade secrets

Section 3705.7 – Records of specific public bodies and other limited exemptions

12. Information held by a local retirement system relating to securities or ownership interests that are not traded on a public exchange, if disclosure of the information would reveal confidential analysis whose disclosure would have an adverse effect on the value of the investment. This exemption does not shield from disclosure the identity of an investment that the system holds, the present value of the investment, or the performance of any asset classes or subclasses.
- 24a. This exemption permits local retirement systems to withhold information relating to “the pursuit of particular investment strategies, or the selection or termination of investment managers prior to the execution of such investment strategies or the selection or termination of such managers, if disclosure of such information would have an adverse impact on the financial interest of the retirement system.” A similar

exemption in the open meetings section permits these matters to be discussed in closed session. Note that these exemptions do not permit ERFC to withhold the identity or amount of any investment held by ERFC, or the present value and performance of asset classes and subclasses.

Section 3705.8 – Limitation on record exclusions

This Section assures public access to the nonexempt portions of any consultant's report if it has been provided to members of a local public body or the local public body has scheduled any action on the subject of that report.

Section 3706 describes limits on the disclosure of criminal records.

Section 3707 contains the general rule requiring that the meetings of public bodies be open to the public and be conducted in person unless an exception applies that allows a meeting to be conducted through electronic means. Section 3708 permits certain public bodies, including ERFC, to meet electronically following the declaration of a state of emergency, and also in other circumstances provided that certain requirements are met.

Section 3701 also contains the rules on notice of meetings. At least three working days in advance, notice of meetings must be published on ERFC's website, and by placing notice "in a prominent public location at which notices are regularly posted" and also at the ERFC office. If a meeting is continued, notice of the continuation must be given to the public at the same time the Trustees are notified. Copies of agenda packets (except for materials exempt from disclosure under Section 3705) must be made available for public inspection at the same time they are provided to the Trustees. Any person may make sound or film recordings of the meeting, and meetings may not be held in a location that does not allow sound or film recordings. Minutes must be taken, and both draft and final minutes are defined as public records.

Section 3707.02 requires, with certain exceptions that do not apply to ERFC, local public bodies to post meeting minutes on its official public government website within seven working days of final approval of the minutes. "Official public government website" means any Internet site controlled by a public body and used, among any other purposes, to post required notices and other content on behalf of the public body. This means that ERFC will be required to post final approved minutes on the ERFC website within seven working days of final approval.

Section 3708.2 sets forth the rules on meetings conducted by electronic means. This section only addresses meetings conducted by electronic means during declared states of emergency. This Section authorizes public bodies, including ERFC, to meet by means of electronic communication without a quorum physically assembled at one location to conduct statutorily required or other necessary business when a locality in which the public body is located has declared a local state of emergency, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to provide for the continuity of

operations of the public body or the discharge of its lawful purposes, duties, and responsibilities. The public body is required to provide notice of the meeting; make arrangements for public access to the meeting through electronic communication means, including videoconferencing if already used by the public body; provide the public with the opportunity to comment at such meetings when public comment is customarily received; make a recording or transcript of the meeting available on its website; note in the meeting minutes that the meeting was held by electronic communication means and state the type of electronic communication means used; and distribute minutes of the meeting by the same method used to provide notice of the meeting.

The rules set forth in this Section apply only for the duration of the declared state of emergency.

Section 3708.3 sets forth the rules on meetings conducted by electronic means in situations other than declared states of emergency, and sets forth the rules on an individual's participation by electronic means.

This Section encourages public bodies to provide public access to public meetings, both in person and through electronic means.

This Section requires public bodies, including ERFC, to adopt a policy before conducting all-virtual public meetings, as described below, or allowing members to use remote participation instead of attending a meeting in person. The policy applicable to all-virtual meetings and individual remote participation must be adopted in advance by recorded vote at a public meeting. The policy must be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting.

The policy must:

- Describe the circumstances under which an all-virtual public meeting and remote participation will be allowed, and the process the public body will use for making requests to use remote participation, approving or denying such requests, and creating a record of such requests; and
- Fix the number of times remote participation for personal matters or all-virtual public meetings can be used per calendar year, not to exceed the limitations set forth in this Section.
 - Remote participation for personal matters – A member may not use remote participation due to personal matters more than twice in a calendar year or 25 percent of the meetings held that calendar year rounded up to the next whole number, whichever is greater.
 - All-virtual public meetings – A public body may not conduct all-virtual public meetings more than two times per calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole number, whichever is greater. Additionally, an all-virtual public meeting may not be held consecutively with another all-virtual public meeting.

A committee, subcommittee, or other entity designated by a public body to perform delegated functions of the public body may also adopt a policy permitting individual remote participation and all-virtual public meetings.

A member may participate in a meeting by electronic means under the following limited circumstances:

- A quorum of the board is physically assembled in one place.
- A member notifies the chair of the public body in advance of the meeting that the member is unable to attend either:
 - due to a personal matter the nature of which is disclosed and recorded in the minutes; as noted above, this reason for participating by electronic means cannot be used by one member more than twice in a calendar year or 25 percent of the meetings held that calendar year rounded up to the next whole number, whichever is greater;
 - due to a temporary or permanent disability or other medical condition;
 - due to a family member's medical condition that requires the member to provide care for such family member; or
 - because the member's principal residence is more than 60 miles from the meeting location.
- The public body records in its minutes the remote location from which the member participated and either the specific nature of the personal matter or the fact that the member was prevented from attending due to disability or medical condition.
- The public body has adopted a written policy allowing for and governing participation of its members by electronic means. Such policy must include an approval process for participation by electronic means, and the policy must be applied strictly and uniformly. If a member's request to participate from a remote location through electronic means is disapproved because such participation would violate the policy allowing for and governing such participation, the disapproval must be recorded in the minutes.

Section 3708.3(C) provides that certain public bodies, including ERF, may hold all-virtual public meetings (during which all members of the public body who participate do so remotely rather than being assembled in one physical location) under the following limited circumstances:

- In advance of the public meeting, the public body has adopted a policy permitting all-virtual public meetings.
- An indication of whether the meeting will be an in-person or all-virtual public meeting is included in the required meeting notice along with a statement notifying the public that the method by which a public body chooses to meet will not be changed unless the public body provides a new meeting notice at least three working days prior to the meeting;
- Public access to the all-virtual public meeting is provided via electronic communication means;
- The electronic communication means used allows the public to hear all members of the public body participating in the all-virtual public meeting and, when audio-visual technology is available, to see the members of the public body as well;

- A phone number or other live contact information is provided to alert the public body if the audio or video transmission of the meeting provided by the public body fails, the public body monitors such designated means of communication during the meeting, and the public body takes a recess until public access is restored if the transmission fails for the public;
- A copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting is made available to the public in electronic format at the same time that such materials are provided to members of the public body;
- The public is afforded the opportunity to comment through electronic means, including by way of written comments, at those public meetings when public comment is customarily received;
- No more than two members of the public body are together in any one remote location unless that remote location is open to the public to physically access it;
- If a closed session is held during an all-virtual public meeting, transmission of the meeting to the public resumes before the public body votes to certify the closed meeting;
- The public body does not convene an all-virtual public meeting (i) more than two times per calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole number, whichever is greater, or (ii) consecutively with another all-virtual public meeting; and
- Minutes of all-virtual public meetings held by electronic communication means are taken and include the fact that the meeting was held by electronic communication means and the type of electronic communication means by which the meeting was held. If a member's participation from a remote location pursuant to this subsection is disapproved because such participation would violate the policy adopted, such disapproval shall be recorded in the minutes with specificity.

At the September 2022 Board of Trustee meeting, the Board adopted revisions to the Board Procedures that allow for all-virtual meetings and for certain other changes relating to Trustee participation in meetings by electronic means.

Section 3710 prohibits the transaction of public business by any means other than votes at a meeting conducted in accordance with FOIA. Written ballots (whether secret or not) are forbidden. You may contact another member of the Board of Trustees to ascertain that Trustee's position with respect to some matter of public business, as long as it is not done on a basis that constitutes a meeting.

Section 3711.A lists the subjects that may be discussed in closed session. The exceptions that are most often applicable to ERFC are:

1. Discussion of personnel matters involving information about individuals. This exception does not extend to discussion of compensation matters that affect the membership of a body or board collectively.
4. Protection of the privacy of individuals in matters not related to public business.

6. Discussion of investments of public funds where competition or bargaining is involved and where the financial interest of the public body would be adversely affected by disclosure. See also exemption number 20, which is very similar, but relates to investments that are not traded on a securities exchange (e.g., private equity), if the discussion concerns confidential information that, if disclosed, would adversely affect the investment's value.
7. Consultation with legal counsel and briefings by staff or other consultants about actual or probable litigation, if public disclosure would adversely affect the negotiating or litigating posture of ERFC.
8. Consultation with legal counsel on specific legal matters requiring the provision of legal advice by such counsel.
16. Discussion or consideration of medical or mental health records. (This is likely to apply only infrequently, if the Trustees have to consider an appeal from denial of a disability pension application based on a determination that the member is not disabled.)
19. Discussion of reports or plans relating to the security, including cybersecurity, of any governmental facility or the safety of persons using that facility.
29. Discussion of the award of a contract or terms of a contract where the public body's bargaining position or negotiating strategy might be adversely affected by disclosure.

Section 3711.B requires that any action taken in closed meeting be reaffirmed after reconvening in open meeting, in a form that "reasonably identifies" the "substance" of the action taken.

Section 3712 contains the other procedures for convening a closed meeting. There must be an affirmative recorded vote (in open session) making reference to the "subject matter" that is to be discussed, the "purpose" of the closed session, and a citation to the section of the Virginia FOIA that authorizes the closed meeting, and following the session there must be an affirmative recorded vote (in open session) confirming that during the closed meeting no other subjects were discussed. The public body may permit persons who are not members to attend a closed meeting if their presence is deemed necessary or if their presence will aid the public body in its consideration of the topic of the closed meeting. Subsection G gives each member of a public body the right to attend and observe a closed meeting of any committee or subcommittee of that public body. It also gives the same right for a member of a public body to attend and observe a closed meeting of "any entity, however designated, created to perform the delegated functions of or to advise that public body."

Section 3713 describes the procedures by which citizens or the Commonwealth Attorney may enforce the FOIA requirements. **A Virginia trial court has discretion to enter an injunction based upon a single violation of VA FOIA.**

Section 3714 specifies the penalties for any violation. The minimum and maximum penalty for the first violation is between \$500 and \$2,000. The minimum and maximum penalty for the second and any subsequent violation is between \$2,000 and \$5,000. A court may impose a penalty of up to \$100 per record on any officer, employee, or member of the public body that the court finds failed to provide requested records because the officer, employee, or member altered or destroyed the record with the intention of avoiding the

provisions of FOIA. Additionally, a court may impose a fine of up to \$1,000 on a public body if the court finds that the public body failed to certify a closed meeting in accordance with the requirements of subsection D of Section 2.2-3712. Subsection D provides that at the conclusion of a closed meeting, a vote must be taken to certify that only matters lawfully exempted from the open meeting requirements and the matter identified in the motion to convene the closed session were heard, discussed, or considered in the closed meeting. The court may consider mitigating factors in determining whether a civil penalty is appropriate for a violation of the closed meeting certification requirements

Section 3715 provides that any officer, employee, or member of a public body who is alleged to have committed a willful and knowing violation pursuant to Section 3714 but relied on an advisory opinion of the Freedom of Information Advisory Council may introduce a copy of the advisory opinion as evidence that he or she did not willfully or knowingly commit the violation if the alleged violation resulted from the individual's good faith reliance on the advisory opinion.

Enclosure: Virginia Freedom of Information Act