

BREDHOFF & KAISER, P.L.L.C.

Attorneys & Counselors

Bruce R. Lerner
Andrew D. Roth
Douglas L. Greenfield
Roger Pollak
Anne Ronnel Mayerson
Leon Dayan
Devki K. Virk
Robert Alexander
Matthew Clash-Drexler
Abigail V. Carter
Joshua B. Shiffrin
Jenifer A. Cromwell
Ramya Ravindran
Jacob Karabell
Caitlin Kekacs

805 Fifteenth Street NW – Suite 1000
Washington, D.C. 20005
(202) 842-2600 TEL
(202) 842-1888 FAX
www.bredhoff.com

Elliot Bredhoff
(1921 – 2004)
Henry Kaiser
(1911 - 1989)

Adam Bellotti
Joshua A. Segal
Elisabeth Oppenheimer
Georgina C. Yeomans
April H. Pullium
Dana M. Krohn

Richard F. Griffin, Jr.
Kathleen Keller
Philip C. Andonian
Deva A. Kyle
Of Counsel

Robert M. Weinberg
Julia Penny Clark
Jeffrey R. Freund
Jeremiah A. Collins
Mady Gilson
John M. West
Senior Counsel

M E M O R A N D U M

TO: ERFC Trustees

FROM: Jenifer Cromwell
Deva Kyle

DATE: July 16, 2020

RE: Outline of Major Virginia FOIA Provisions – 2020

There were a few substantive amendments to VA FOIA this year. The most significant change was a budgetary amendment that allows public bodies to meet via electronic communication means when the Governor has declared a state of emergency and the nature of the emergency would make it impracticable or unsafe to meet in one location. Relevant amendments are described in boldface type.

Outline of Major Virginia FOIA Provisions – 2020

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.

- “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.”

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 person requesting records can ask for an estimate of charges in advance; **a 2020 amendment to this section provides that “[t]he period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be 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.

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; 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:

3705.1 – Exclusions of general application to public bodies

1. Personnel records containing 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. 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 for the purpose of receiving electronic mail from the public body, if the e-mail recipient has requested that the public body not 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.

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 his designee.

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.

3705.4 – Educational records

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).

3705.6 – Proprietary records and trade secrets

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 executive 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.

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. As discussed below, ERFC is not included in any of the exemptions that permit meetings to be conducted by telephonic, video, or electronic means. Consequently, absent a declared state of emergency, ERFC Trustees must assemble in person to conduct their business.

Section 3701 also contains the rules on notice of meetings. At least 3 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 recorded, and both draft and final minutes are defined as public records.

Section 3707.01 applies only to meetings of the General Assembly.

Section 3708.2 sets forth the rules on meetings conducted by electronic means.

This Section authorizes public bodies, including ERFC, to permit a member to 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 is unable to attend either:

1. due to a personal matter the nature of which is disclosed and recorded in the minutes; this reason for participating by electronic means cannot be used by one member more than twice in a calendar year;
 2. due to a temporary or permanent disability or other medical condition; or
 3. because the member's principal residence is more than 60 miles from the meeting location. Note that this third exception applies only to members of "regional" public bodies, which does not include ERFC.
- The public body makes arrangements for the voice of the "remote participant" to be heard by all persons at the primary 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. ERFC has adopted a policy complying with this rule. 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.

A 2020 amendment to Section 3708.2(A)(3) revised the rules relating to meeting by means of electronic communications during a state of emergency. As amended, a public body may meet by means of electronic communication without a quorum physically assembled at one location **to conduct statutorily required or other necessary business when the Governor has declared a state of emergency and the nature of the emergency makes it impracticable or unsafe for the public body to assemble in a single location.**

Previously, the statute permitted such meeting by electronic means when the Governor declared a state of emergency, but only if the purpose of the meeting was to address that emergency. **The public body is required to provide notice of the meeting, make arrangements for public access to the meeting, 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.**

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.

Section 3714 specifies the penalties for any violation. The minimum and maximum penalty for the first violation is between \$500 and \$2,000. Also, the minimum and maximum penalty for the second and 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 of the public body 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