



# EMAIL & MEETINGS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. Introduction

As technology advances, new and efficient ways to communicate have evolved. Perhaps the most prevalent advancement in carrying out day-to-day communications at work or at home is electronic mail ("email"). Email can be used to send correspondence on a one-to-one or one-to-many basis over the computer. Each user has an email address, and messages received at that address are stored in electronic mailboxes until the recipient retrieves the message. After reading the message, the user may save it on his computer, print it, forward it to other email addresses, respond to the sender, respond to the sender and other recipients of the same email, or delete it.

The use of email can blur the line between correspondence and a meeting under FOIA. Email is similar to traditional paper correspondence in many ways and is a written form of communication that is by definition a record under FOIA. However, from a practical perspective, email is often used as a substitute for a phone call and can be used to communicate quickly with multiple people at once, making it more akin to a meeting. While FOIA addresses electronic meetings held by audio or audio/visual means, it does not explicitly address the use of email in a meetings context.<sup>1</sup> In 2004, the Virginia Supreme Court, however, examined whether the exchange of emails among members of a city council could constitute a meeting under FOIA. A review of the Supreme Court's decision follows under the heading "II. The Impact of the Virginia Supreme Court Decision in *Beck v. Shelton*." The Court revisited the issue in 2012, examining whether an exchange of emails among School Board members constituted a meeting under FOIA. A review of that decision appears under the heading "III. The Impact of the Virginia Supreme Court Decision in *Hill v. Fairfax County School Board*."

The use of email by public officials is clearly allowed by FOIA. One member of a public body may individually email other members, even if the email relates to public business.<sup>2</sup> Questions arise based on the manner in which a recipient responds to an email

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<sup>1</sup> See § 2.2-3708, which expressly allows state public bodies to hold audio or audio/visual meetings. See also Chapter 704 of the 1997 Acts of Assembly, establishing a pilot program for certain state public bodies to hold audio/visual meetings.

<sup>2</sup> See § 2.2-3710(B). See also 2011 Op. Atty. Gen. Va. 11-096 (August 5, 2011) (Two members of a three-member electoral board may communicate by email without violating FOIA because email lacks the element of simultaneity required for the communication to be considered a meeting under FOIA.); 1999 Op. Atty. Gen. Va. 12 (The meeting provisions of FOIA do not prohibit members of a public body from sending email to other members of the same public body. The decision rests on the fact that the use of email does not result in simultaneous communication like a traditional meeting.); Virginia Freedom of



addressed to three or more members of a public body. When responding to an email, it is possible to "reply to sender" or to "reply to all." If a recipient chooses "reply to all," then three or more members of a public body will see not only the initial email, but also another member's response. Other members could then, in turn, respond to the email or the ensuing responses. In the end, three or more members of a public body could have used the chain of email to discuss, and possibly reach a conclusion about, a matter relating to the transaction of public business.<sup>3</sup>

A meeting, as defined in FOIA, refers to a simultaneous discussion, but the use of email is not necessarily simultaneous among users. If a user only checks his email once a day, 24 hours could pass between an initial email and a response. However, it is also possible for users to be logged into their email system at the same time, and the lag time between emails might only be the time that it takes to compose a response and hit send.

## **II. The Impact of the Virginia Supreme Court Decision in *Beck v. Shelton*<sup>4</sup>**

On March 5, 2004, the Virginia Supreme Court ("the Court") issued an opinion concerning the Virginia Freedom of Information Act ("FOIA," § 2.2-3700 et seq. of the Code of Virginia) (*Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195), with a holding directly relevant to all elected officials in Virginia, from members of the General Assembly to members of local school boards. *Beck* has drawn interest primarily because it is the first authoritative statement of law in Virginia as to whether use of email by public officials could constitute a meeting under FOIA, but it also examines broader issues as to the applicability of FOIA to public officials and the definition of a meeting. The Court held that FOIA does not apply to members-elect of a public body; that generally, use of email by three or more members of a public body to discuss public business is not a meeting; and that a gathering of three members of a public body at a citizen-organized meeting did not violate FOIA. For the purposes of this document, only those portions of the Court's holding related to email and meetings under FOIA will be discussed.<sup>5</sup>

### Facts

Three plaintiffs filed a petition for writ of mandamus and injunction in Fredericksburg Circuit Court against five members of the Fredericksburg City Council. The petition alleged that the defendants used email to discuss and decide public business and that such use of email constituted an improper meeting under FOIA.

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Information Advisory Opinion 19 (2004) (two members of a three-member electoral board may communicate using email without violating FOIA so long as it is not simultaneous communication that would constitute a meeting for FOIA purposes).

<sup>3</sup> For a similar discussion, see Virginia Freedom of Information Advisory Opinion 01 (2001) (finding that the use of a listserv by members of a public body constitutes a meeting if used to discuss or transact public business. A listserv is different from regular email in that users must join a listserv and all messages posted to the listserv are automatically sent to each member of the listserv.)

<sup>4</sup> Excerpted from the Division of Legislative Services' *Virginia Legislative Issue Brief*, No. 37, March 2004, written by Lisa Wallmeyer and Maria J.K. Everett.

<sup>5</sup> For a complete analysis of the *Beck v. Shelton* case, please refer to the FOIA Council's website: <http://foiacouncil.dls.virginia.gov>.



## Holding

The Court considered the question of whether use of email could be a meeting under FOIA. The Court overturned the trial court's decision that use of email to reach a consensus on a matter of public business was a meeting, on the grounds that the emails in question were similar to letters sent via U.S. mail or facsimile.

The Court examined the definition of a meeting at § 2.2-3701, which includes *an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership*. The Court noted that email can be similar to traditional forms of written correspondence, in that there may be significant delay between the time the communication is sent and received, or when a response is sent. In the instant case, the shortest interval between any two emails was more than four hours, and the longest was over two days. The Court agreed with the trial court that the dispositive consideration in examining email is how the email is used. In reviewing this standard, the Court focused on the language in the definition of a meeting that includes "an informal assemblage." "Assemblage," the Court concluded, means to bring together at the same time and inherently entails simultaneity. The Court held that there is no "virtually simultaneous interaction" when email is used as the functional equivalent of a letter communicated by U.S. mail, courier, or facsimile transmission<sup>6</sup>. In further support of this conclusion, the Court noted that the Attorney General of Virginia had previously found that "transmitting messages through an electronic mail system is essentially a form of written communication."<sup>7</sup> While not binding, the General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>8</sup>

It is important to note that the Court did not hold that use of email could never be a meeting under FOIA. Instead, the Court indicated that the dispositive determination in examining email under the meeting provisions of FOIA was to look at how the email was used. The trial court answered this question by reviewing the end result - i.e., that email was used to reach a consensus. According to the Supreme Court, this question is more appropriately answered by reviewing whether the email was used as a functional equivalent of traditional correspondence.

This opinion clarifies that members of a public body need not refrain from using email, but they should be cautioned against using email among three or more members of the public body that is akin to using the telephone or the functional equivalent of an in-person gathering and has an element of simultaneity. The court did not establish a time frame as to when the use of email may be considered simultaneous, nor did it address the use of chat rooms, instant messaging, or listservs.

This decision does not alter the fact that the records generated by email fall under FOIA's definition of a public record. Emails concerning public business are available for

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 11 (citing 1999 Op. Atty. Gen. 12).

<sup>8</sup> *Id.* at 12 (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E. 2d 603, 605-06 (1983)).



inspection or copying upon request, unless a specific statutory exemption allows a particular email or contents thereof to be withheld. Furthermore, emails must be retained like other public records subject to the provisions of the Virginia Public Records Act (§ 42.1-76 et seq).

### Conclusion

The Court's holding has implications for members of all public bodies in the Commonwealth. With email, the user must consider whether the email is being used akin to traditional correspondence, or whether the email has an element of simultaneity and is more like a telephone call between three or more members of the public body. This decision of the Court was fact-specific. Although no bright-line rules emerged in establishing what is or is not a meeting, the ruling underscores the notion that all meetings are presumed open under FOIA. Determining whether a particular email discussion falls outside the parameters of a meeting must be considered carefully, on a case-by-case basis, examining all relevant facts.

### **III. The Impact of the Virginia Supreme Court Decision in *Hill v. Fairfax County School Board***

On June 7, 2012, the Virginia Supreme Court ("the Court") issued an opinion concerning the Virginia Freedom of Information Act ("FOIA," § 2.2-3700 et seq. of the Code of Virginia) (*Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75). This case revisited the issue of whether the use of email could constitute a public meeting subject to FOIA. The Court held that the email in this case did not constitute a meeting under FOIA. The plaintiff had also alleged violation of FOIA in regard to a request for public records, but only the Court's holding regarding email as a meeting will be addressed here.

### Facts

The plaintiff alleged that the school board had conducted a closed meeting about the closure of a local school in violation of FOIA through the use of email. The circuit court received copies of various emails into evidence and heard testimony that revealed that the school board members had communicated with each other by email, by telephone, and in person to consider the school closing. The circuit court expressly found that the time intervals between the exchange of emails were much shorter than was the case in *Beck*, but emails were exchanged between only two members at a time. The circuit court held that the exchange of email in question did not constitute a meeting because simultaneous communication between three or more school board members did not occur.

### Holding

The Court affirmed the decision of the circuit court that the email exchange in question did not constitute a meeting under FOIA because it did not involve simultaneous communication between three or more school board members. The Court emphasized that it was applying the same analysis in *Beck* and that the circuit court's decision below was entirely consistent with *Beck*.



## Conclusion

The Court's holding has implications for members of all public bodies in the Commonwealth, as it reaffirms the holding and analysis of *Beck* as applied to a different fact pattern. In *Beck*, the email exchange at issue involved a sufficient number of members to constitute a meeting, but it lacked the necessary element of simultaneity. In *Hill*, the emails were exchanged much more closely in time, but lacked the necessary number of members involved to be considered a meeting subject to FOIA. Together these cases make clear that in order to constitute a meeting under FOIA, an exchange of emails would have to involve a sufficient number of members ("three or more, or a quorum if less than three") and would have to occur within a time period short enough to be considered a simultaneous assemblage of the public body.

## **IV. Tips for Using Email**

Keep in mind the following tips:

- Remember the underlying principle of the open meeting provisions of FOIA: the public has the right to witness the operations of government. If you question whether your email communication might lead to the deliberation of public business by three or more members of a public body in real time (i.e., has an element of simultaneity), then you may be better served by saving that communication for a public meeting.
- If you receive an email sent to three or more recipients who are members of the same public body, and you wish to respond, choose "respond to sender" instead of "respond to all." One-on-one communications are clearly allowed under FOIA, and this will avoid an email discussion among three or more members.
- When composing an email to send to three or more members of a public body, enter the recipients' addresses in the "blind carbon copy" (bcc) field instead of in the "to" field. By doing this, an individual recipient will not be able to automatically respond to anyone but you.
- Use staff to send emails on behalf of members to ensure the exchange of emails will not be a simultaneous communication among three or more members which could constitute a meeting.

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