

INDEX | Board Member Manual 2019-2020

This manual is designed to provide you with materials for reference during your term as a board member. This manual contains:

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- **Board Meetings Overview**
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 - ◆ Administrative Process Act (APA)
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Agency History

Protecting the health, safety, and welfare of Virginians by regulating certain professions and occupations dates back to the seventeenth century, when harbor pilots navigating the Commonwealth's waterways gave "branches" to show a ship's captain they were capable of safely directing the ship to safe harbor. In 1670, Virginia's House of Burgesses formalized the regulation of this profession, and in 1783, the House of Delegates created the Board for Branch Pilots.

The Commonwealth regulated selected occupations through independent boards until 1948. At that time, the Department of Professional and Occupational *Registration* (DPO) was formed by legislative action and charged with the responsibility of providing administrative support to more than 10 boards and commissions.

Over the next 29 years, the General Assembly added 15 more regulatory programs to DPO, and also created the Commission of Professional and Occupational Regulation as an advisory body for the umbrella administrative agency. From 1974-1978, the Commission (the predecessor to the current Board for Professional and Occupational Regulation) evaluated 13 professions to determine the need for regulation.

In 1977, the legislature re-named DPO to the Department of Commerce. At the same time, the General Assembly transitioned the Board for Contractors and the Athletic Commission from independent bodies to the growing number of boards supported by the Department.

Throughout the 1980s, the Department gained and lost a number of regulatory programs, as the legislature added regulation of professions including auctioneers, asbestos workers, and appraisers to its responsibilities; transferred psychology, social work and other health-related professions to the Department of Health Regulatory Boards (now Department of Health Professions); re-assigned librarians to the State Library and commercial driver training schools to the Department of Motor Vehicles; and de-regulated state licensure of employment and collection agencies.

In 1993, the General Assembly christened the agency with its current name, the Department of Professional and Occupational Regulation (DPOR).



Timeline of DPOR Regulatory Programs

	YEAR	
Branch Pilots	1783	
	1920	Architects, Professional Engineers & Land Surveyors*
Real Estate*	1924	
	1928	Accountancy*
Athletic Commission*	1934	
	1938	Contractors*
Dept. of Professional & Occupational Registration (DPO) created	1948	Branch Pilots, APELS, Real Estate & Accountancy assigned to DPO
	1954	Opticians
Barbers	1962	Cosmetology
Polygraph Examiners	1968	
	1970	Hearing Aid Dealers + Fitters
Water & Wastewater Works Operators	1971	
DPO re-named Dept. of Commerce (DOC)	1977	Contractors assigned to DOC (no longer independent)
	1980	Landscape Architects added to APELS
Auctioneers	1983	
	1984	Geologists
Asbestos Contractors + Workers	1988	
	1989	Soil Scientists
Real Estate Appraisers	1990	Certified Interior Designers added to APELSLA
Waste Management Facility Operators	1991	
	1992	Nail Technicians added to Cosmetology
DOC re-named DPOR	1993	
Tradesmen added to Contractors	1994	Lead Abatement added to Asbestos
Cemetery	1998	Professional Boxing & Wrestling

Backflow Prevention Device Workers added to Tradesmen	1998	
<i>Board Merger: Barbers & Cosmetology</i>	2000	
Accountancy <u>removed</u> from DPOR (made independent again)	2001	Home Inspectors added to ALHI as <i>voluntary certification</i> program
Gas-fitters added to Tradesmen	2001	
Wax technicians added to Barbers & Cosmetology	2002	
Fair Housing split off from Real Estate (two boards)	2003	
Tattooists + body-piercers added to Barbers & Cosmetology	2004	Wetland delineators added to Soil Scientists
Elevator mechanics added to Tradesmen	2004	
Water well contractors added to Contractors	2007	Estheticians added to Barbers & Cosmetology
Common Interest Communities	2008	
Onsite Soil System Professionals added to Water & Wastewater Works Operators	2009	
Mold remediators added to ALHI	2011	Residential Building Energy Analysts added to Contractors
Mold remediators <u>removed</u> from ALHI (deregulated)	2012	Timeshare re-seller registration to CIC
Hair braiding <u>removed</u> from Barbers & Cosmetology (deregulated)	2012	
Natural gas auto techs certification to DPOR	2014	AMCs added to Real Estate Appraisers
Amateur boxing & MMA to DPOR	2015	
Amateur boxing <u>removed</u> from DPOR (deregulated)	2016	Meth lab remediators added to Contractors
Home Inspectors regulated by ALHI transitioned to <i>mandatory licensure (eff. 7/1/2017)</i>	2016	
Master barbers (establish two-tier licensing)	2018	
Fire Sprinkler Inspectors added to Contractors	2019	



BIENNIAL REPORT

FY 2016-17
FY 2017-18

DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL REGULATION

JAY W. DeBOER
DIRECTOR



www.dpor.virginia.gov



facebook.com/VirginiaDPOR



youtube.com/VirginiaDPOR

OVERVIEW

July 1, 2016 – June 30, 2018

200+

CAREER CIVIL SERVANTS

196

VOLUNTEER BOARD MEMBERS

15

REGULATORY BOARDS

3

ADVISORY BOARDS

1

POLICY BOARD

152

TYPES OF CREDENTIALS ISSUED

7

PUBLIC HEARINGS

32

REGULATORY ACTIONS COMPLETED



Our Organization

DPOR and its regulatory programs operate under a shared services "umbrella" model. The Department provides leadership and support to the boards that are charged by the General Assembly with regulating professions and occupations.

Leveraging the benefits of a centralized agency structure allows DPOR to keep fees affordable and identify opportunities for efficiencies of scale.

LICENSING ACTIVITY

Online transactions increased by 10%

Renewals + Reinstatements



Only 5% of renewals are submitted late.

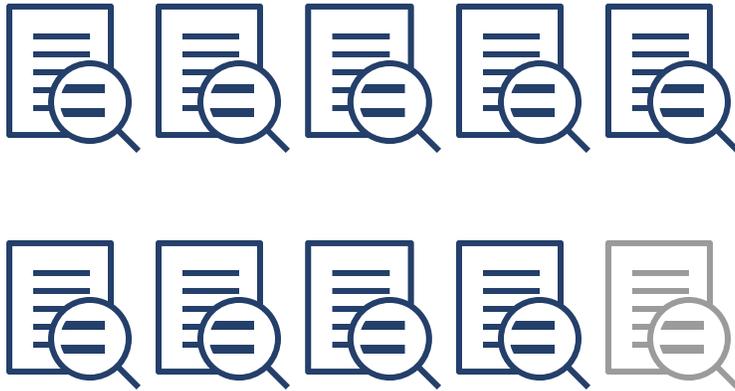
Renewals



- ✓ **129,700** online transactions
- ✓ **50,750** applications
- ✓ **266,800** renewals + reinstatements
- ✓ **47,900** name + address changes
- ✓ **10,700** certifications
- ✓ **720** licensing IFF conferences

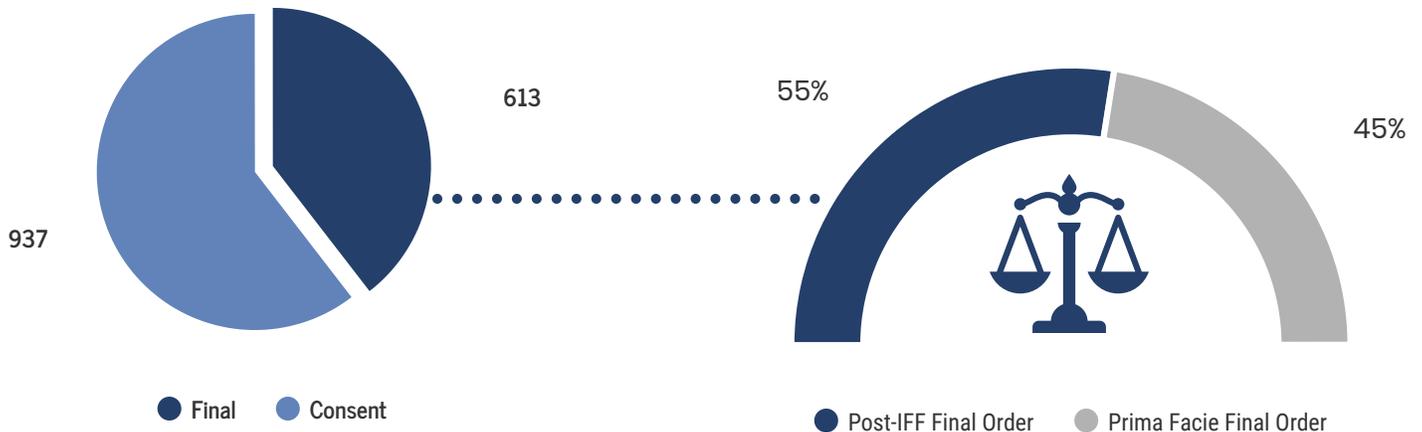
CASE DECISIONS

LICENSING DENIAL ORDERS



Just **one in ten** applications referred for a licensing IFF conference are ultimately **denied** licensure by the board.

DISCIPLINARY ORDERS



99% of DPOR regulants are never involved in a disciplinary case

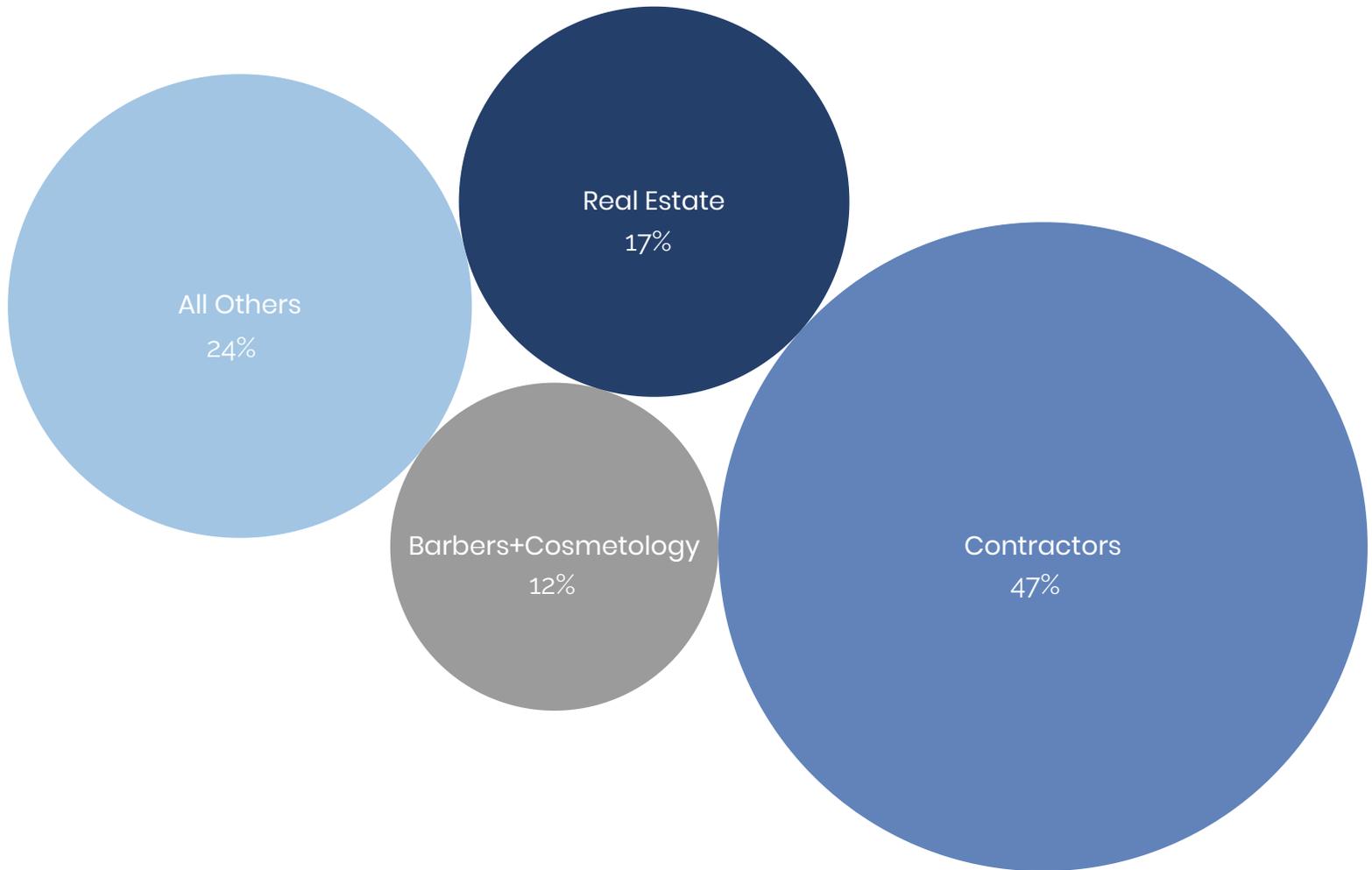
DPOR boards cannot deny a license application or impose disciplinary sanctions without providing notice and an opportunity to respond.

An **informal fact finding conference (IFF)** is the due process administrative proceeding used to gather additional information and give applicants and licensees the chance to present evidence about their case.

Negotiated settlement offers may bypass an IFF and go directly to the board for ratification as a Consent Order. "Prima facie" disciplinary files are forwarded to the board without the need for an IFF if the respondent agrees to waive the proceeding or does not respond to the IFF Notice.

COMPLIANCE ACTIVITY

Complaints categorized by program area



DPOR processed **more than 6,500** complaints involving regulated professions

Nearly a quarter of those complaints resulted in board orders against regulants, with sanctions ranging from monetary penalties or remedial education to license suspension or revocation.

Not all complaints allege violations of laws or regulations under DPOR jurisdiction. Files may be closed without additional investigation or board action for a variety of reasons, such as a lack of agency authority or successful mediation.

CONSUMER PROTECTION

Focused on public's health, safety, and welfare

DPOR cannot provide individual relief for consumers. Boards cannot make a regulant refund money or correct deficiencies, nor can they order other punishment. Agency jurisdiction does not extend to unlicensed individuals or businesses.

Civil or criminal court is often a consumer's only recourse for private remedy. DPOR administers recovery funds for eligible consumers who are unable to collect on a judgment against a contractor or real estate licensee. We also work with local law enforcement and prosecutors to combat unlicensed activity and fraud.

CONTRACTOR RECOVERY FUND

\$1.66 MILLION

Dollar amount of claims paid

\$792,000 in FY 2017

\$867,000 in FY 2018

135

Number of claim payments

58 in FY 2017

77 in FY 2018

REAL ESTATE RECOVERY FUND

\$24,300

Dollar amount of claims paid

\$20,000 in FY 2017

\$4,300 in FY 2018

2

Number of claim payments

1 in FY 2017

1 in FY 2018

UNLICENSED ACTIVITY

\$419,300

Court-ordered victim restitution in DPOR-assisted unlicensed prosecutions

240

Criminal warrants obtained by DPOR for unlicensed activity

PUBLIC PARTICIPATION

Transparent, accessible, responsive government

DPOR encourages participation by regulated professionals, industry groups, and consumers through a variety of channels.

Board meetings are open and noticed in advance. Agenda, minutes, and guidance documents are posted online. Boards often form stakeholder committees and DPOR always solicits meaningful comment from affected individuals and businesses when developing and amending regulations.



LEGISLATIVE DIRECTIVES

Almost 9 out of 10 survey respondents rated their regulatory requirements as "about right."

86% said DPOR fees are affordable

JLARC Review

In July 2017, the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review DPOR operations and performance. Among the findings:

- ✓ DPOR licensing requirements are generally appropriate and not overly burdensome.
- ✓ Most regulated individuals agree that our processes are balanced, well explained, and fairly applied.
- ✓ 92% of renewal fees do not exceed \$100.
- ✓ 82% of initial application fees are \$100 or less.

The entire report is available at:
<http://jlarc.virginia.gov/2018-dpor.asp>

Newly mandated regulatory programs

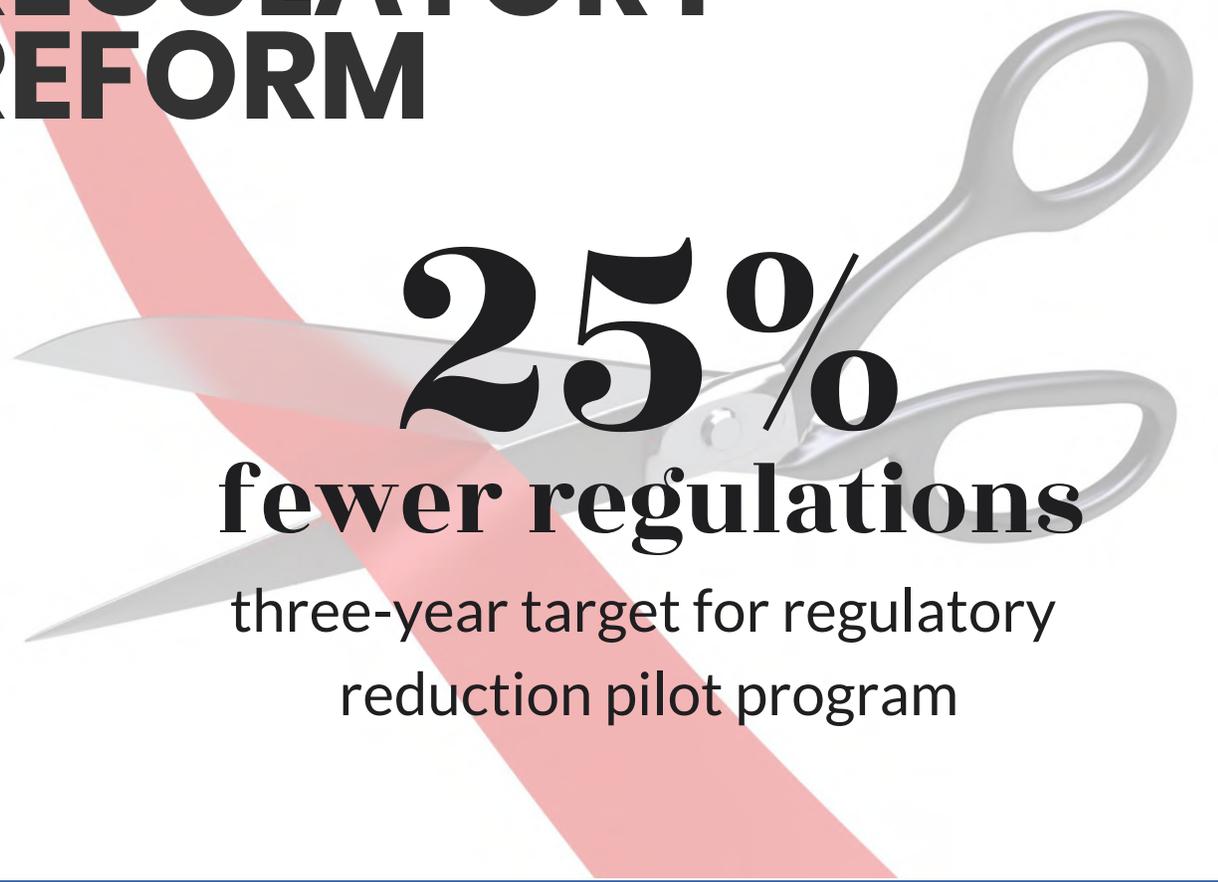
✓ Home Inspector Licensing

Effective July 1, 2017, the regulation of home inspectors transitioned from voluntary certification to mandatory licensure. The General Assembly continued to assign responsibility for administration of the program to the **Board for Asbestos, Lead, and Home Inspectors**.

✓ Drug Lab Remediation Contractors

Board for Contractors regulations effective July 1, 2018, establish a specialty designation for businesses engaged in cleanup, containment, or removal of hazardous material from properties formerly used to manufacture methamphetamine or other drugs. The legislature directed the board to develop standards for the license specialty through regulation.

REGULATORY REFORM



25%
fewer regulations
three-year target for regulatory
reduction pilot program

Eliminate, streamline unnecessary regulatory requirements

DPOR is one of two agencies selected to participate in the bipartisan regulatory reduction pilot program established during the 2018 General Assembly Session.

- ✓ Many DPOR regulations are required by state or federal law, and therefore exempt from the pilot program.
- ✓ After establishing a "baseline" catalog of discretionary requirements, DPOR boards will identify possibilities for elimination or streamlining.
- ✓ Goal is to reduce discretionary regulatory requirements by 25% by July 1, 2021.



As with all regulatory activities, the best way to participate is to **register for notifications** on the Virginia Regulatory Town Hall.

<http://www.townhall.virginia.gov/L/Register.cfm>

BOARD STATISTICS

FY 2016-17 + FY 2017-18

(July 1, 2016 - June 30, 2018)

REGULATORY PROGRAM	REVENUES	EXPENDITURES	NUMBER OF BOARD MEETINGS	APPLICANTS EXAMINED	COMPLAINTS RECEIVED	REGULANT POPULATION (06/30/18)
Architects, Professional Engineers, Land Surveyors, Certified Interior Designers & Landscape Architects	\$3,554,546	\$3,719,325	24	5,595	149	43,326
Appraisers (Real Estate)	\$644,476	\$521,734	8	164	163	4,105
Asbestos, Lead & Home Inspectors	\$787,646	\$532,675	12	216	97	6,208
Auctioneers	\$88,760	\$128,640	9	96	49	1,437
Barbers & Cosmetology	\$6,901,737	\$7,069,098	14	18,557	764	72,549
Boxing, Martial Arts & Professional Wrestling	\$520,373	\$389,183	0	N/A	4	807
Branch Pilots	\$5,520	\$6,122	9	11	2	44
Cemetery	\$185,163	\$118,775	3	N/A	149	1,257
Common Interest Communities	\$1,944,279	\$1,470,069	7	N/A	460	7,121
Contractors	\$13,016,050	\$15,515,699	20	30,095	3,083	86,662
Fair Housing	\$75,450	\$75,450	8	N/A	384	2,475
Hearing Aid Specialists & Opticians	\$251,811	\$290,855	7	255	24	2,645
Natural Gas Auto Mechanics & Technicians	\$380	\$6	0	N/A	0	0
Polygraph Examiners	\$39,595	\$17,908	1	13	4	301
Professional Soil Scientists, Wetland Professionals & Geologists	\$92,010	\$105,187	5	107	2	1,161
Real Estate	\$8,231,560	\$9,544,869	26	44,316	1,107	71,821
Waste Management Facility Operators	\$45,260	\$45,645	2	174	1	670
Waterworks, Wastewater Works Operators & Onsite Sewage System Professionals	\$532,983	\$552,058	13	1,543	79	5,716
TOTALS	\$36,917,599	\$40,103,298	168	101,155	6,521	308,305



Department of Professional and Occupational Regulation

9960 Mayland Drive, Suite 400
 Richmond, VA 23233
 (804) 367-8500

www.dpor.virginia.gov

Organizational Chart

AGENCY
DIRECTOR

EXECUTIVE
ASSISTANT

COMPLIANCE &
INVESTIGATIONS

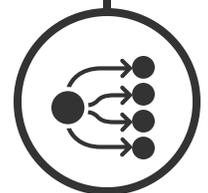
COMMUNICATIONS &
BOARD OPERATIONS

ADMINISTRATIVE &
FINANCIAL SERVICES

HUMAN
RESOURCES

VIRGINIA FAIR
HOUSING OFFICE

INFORMATION
TECHNOLOGY



Complaint Analysis & Resolution
In-House Investigations
Field Investigations
Adjudication
Alternative Dispute Resolution
Common Interest Community Ombudsman

Regulatory Board Sections
Media Relations
Legislative Affairs
Information Management
Examinations
EAGLES
Post-Adjudication & Licensing

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  VirginiaDPOR
 (804) 367-8500

Roles + Responsibilities

The primary responsibility of a regulatory board is to protect the public by establishing entry requirements to ensure minimum competence and standards of conduct for licensees. These requirements and standards are established in regulation.

The Board exercises its authority by acting as a Board, through the adoption of motions at properly noticed Board meetings. Individual members do not have the authority to take Board action.

As a Board Member you should:

- Attend all meetings, except in the case of emergency. Most boards schedule meetings a year in advance. Your attendance is critical to ensuring the presence of a quorum for all actions. If you cannot attend, let your Board Executive Director know in advance. Failure to have a quorum present could result in last minute cancellation of a meeting. The result could be respondents, applicants, fellow board members, and other interested persons traveling a considerable distance and incurring travel costs only to arrive and find out that a meeting cannot be held due to lack of a quorum.
- Read all agenda materials prior to a meeting. You are not eligible to vote on case decisions involving disciplinary action and granting of a license if you have not read the complete record.
- Handle all application and complaint files with confidentiality. Do not discuss Board business with friends and family. Do not discuss board business with fellow Board members outside of a properly noticed meeting, including through the use of e-mail or text message. Do not discuss cases with applicants or respondents outside of the Informal Fact-Finding Conference or Board meeting.
- Review all board business to determine whether you have a potential conflict of interest. Personal, business and family relationships may result in a conflict of interest. Some conflicts will require you to disclose your relationship with the licensee or applicant, other conflicts may require you to remove yourself from voting on a case. You are required to complete a conflict of interest statement at every Informal Fact-Finding Conference and Board meeting.

- Refer investigative matters to Compliance and Investigations. The *Code of Virginia* gives DPOR investigators the authority to investigate. The role of a Board member is to participate in the case decision making process at Informal Fact-Finding Conferences and Board Meetings.
- Submit all travel vouchers promptly. Staff will assist you with the preparation of a travel voucher at each of your meetings. Please bring original receipts with you so that all reimbursements can be processed in a timely manner.
- Contact your Board Executive Director when you receive a press inquiry. Open investigations should not be discussed with the press. Information regarding press contacts will be shared with the DPOR Communications Director who will coordinate contacts and provide follow-up if appropriate.
- Familiarize yourself with relevant provisions of the *Code of Virginia*.
 - Refer to Section 5



Virginia Department of Professional and Occupational Regulation Board Member Code of Conduct

This Code of Conduct is a set of behavioral expectations intended to assure the public that the board and its members uphold the highest level of integrity and ethical standards in preserving the health, safety, and welfare of the public. Board members and staff will conduct themselves in a manner that is respectful of the process and all participants, including board members, staff, applicants, regulants, respondents, witnesses, participants, complainants, and the public during conferences, hearings, and meetings.

The following guidelines and protocols, along with the observance of and compliance with relevant regulations, statutes, and established procedures, provide the foundation for assuring the public trust in the regulatory program administered by the board:

1. Being a member of the board is a privilege to serve the public.
2. Board members shall disclose any actual or perceived conflict of interest and recuse themselves from those decisions, when appropriate.
3. Board members shall avoid any relationships or activities that may, or appear to, influence, either directly or indirectly, the performance of his official duties as a board member.
4. Board members shall refrain from any contact with applicants, respondents, witnesses, and their legal counsel with a pending matter before the board.
5. Board members shall maintain confidentiality and safeguard all materials that are confidential.
6. Board members shall not discuss or conduct board business outside properly noticed meetings of the board.
7. Board members shall not represent the board or participate in board activities while impaired.

8. Board members shall refrain from actions that expose the board to unnecessary legal, ethical, or financial risks.
9. Board members shall accept and support decisions of the board regardless of personal opinion, regardless of whether they voted with the majority.
10. Maintaining appropriate boundaries in relationships with other members of the board and staff.
11. Always acting in the best interest of the board by conducting oneself with honesty and integrity at all times.
12. Board members shall conduct themselves in accordance with the following guidelines while in an official capacity as a member of the board:
 - a. Members shall be on-time for all meetings, preferably arriving five to ten minutes prior to the starting time of meetings;
 - b. Members shall review all materials in advance of a meeting or proceeding and alert staff to any potential or actual conflicts prior to the meeting or proceeding;
 - c. Members shall ensure that their demeanor, behavior, and body language remains professional and respectful at all times;
 - d. Members shall treat all people fairly regardless of race, gender, ethnic origin, or disability;
 - e. Members shall refrain from speeches and expressing personal opinions not based on evidence in the record and avoid repeating questions unless a clear answer was not given;
 - f. Silencing personal devices;
 - g. Informing staff if they are going to be late for or absent from a meeting;
 - h. Being fair, equitable, impartial, and consistent;
 - i. Allowing for the orderly conduct of all meetings, hearings, or conferences; and
 - j. Protecting the rights to due process.

Board Meetings Overview

The statutes relating to your specific Board set forth quorum requirements. A Board cannot act without a quorum present; therefore, your attendance at meetings is critical. It is also important for you to notify your Board Executive Director as far in advance as possible if you are unable to attend.

Voting to impose sanctions in a disciplinary case requires a majority vote of those “qualified” to vote. Members who have presided over the Informal Fact-Finding Conference or who have a conflict that would prevent them from voting are not “qualified.” However, members who are absent from the meeting are “qualified” unless *disqualified* for another reason. Therefore, instances may occur where a quorum is present to meet, but a majority of those qualified is either not present or a split vote prevents getting a majority vote of those “qualified.” Again, these statutory provisions make your attendance at meetings very important.

Boards operate by motion and vote, and typically the chairman votes. None of the DPOR Boards have formally adopted *Robert’s Rules of Order*; however, the rules generally serve as a guide in facilitating the conduct of an efficient meeting.

THE AGENDA

Public Comment Period - The first item on the agenda is a public comment period. During this time, individuals may address the Board on any issue that is not on the agenda. Comment is limited to five minutes. A Board response is not required; however, the Board may request staff to look into issues raised and discuss them at a later time.

Adoption of Minutes - The second agenda item is the adoption of minutes from prior Board meetings and Informal Fact-Finding Conferences. Remember, your minutes are a record of what occurred at the meeting. Corrections should be limited to the accuracy of the minutes. If you wish to discuss an item referenced in the minutes, you may request that the chair add the item to the agenda.

Disciplinary and Application Cases - The major portion of most agendas is the handling of disciplinary and application (licensing) cases. Participants may speak on a case; again their time is limited to five minutes. A participant is anyone who participated in the Informal Fact-Finding Conference.

The Administrative Process Act (APA) requires that participants be given an opportunity to address the Board; however, **the APA prohibits the submission of additional evidence at the Board meeting**. The Board's decision is to be based on the record from the Informal Fact-Finding Conference. *If you have a question of a participant, your question should be clarifying in nature only, you should not elicit new evidence.*

Miscellaneous Items - The remaining portion of the agenda will include miscellaneous items such as regulatory review or briefings on issues the Board may wish to address.

Boards should follow the agenda! The result is a more productive and efficient meeting and a more organized flow to the meeting minutes. In addition, members of the public can better follow your actions and plan their attendance to hear items of interest.

FREEDOM OF INFORMATION ACT REQUIREMENTS

The Freedom of Information Act (FOIA) governs most aspects of your Board meetings. FOIA requires that your meetings be publicly noticed. The notices are published by the Registrar of Regulations in the *Register* and are posted on the Regulatory Town Hall website and the Commonwealth Calendar. A list of meeting dates is also included on the DPOR website (www.dpor.virginia.gov).

FOIA prohibits the discussion of Board business outside of a properly noticed meeting. FOIA also requires that your meetings be held in open session, with few exceptions. You may go into closed session to discuss legal advice with counsel, to discuss examination issues, or for the deliberation of disciplinary cases.

DPOR encourages open government and the basic premise of FOIA follows the philosophy of "government in the sunshine;" therefore all Boards are encouraged to handle as much business as possible in open session. Should a Board choose to go into closed session, the Board must adopt a motion that states the statutory basis for the closed session and includes a list of non-members who will remain in the room, along with the reason. For example, you may wish to have your Board Executive Director present in a closed session for the purpose of aiding you in your discussion. If you are receiving legal advice, your counsel will be present. When you return to open session you must adopt a certification that states that only matters listed in your motion were discussed in the closed session.

FOIA also requires that minutes be taken of all meetings. Draft minutes are posted on the Regulatory Town Hall website (<http://townhall.virginia.gov/>) within 10 days of your meeting. Final minutes are posted within three days of the meeting.

Laws + Regulations

Laws (statutes) are adopted by the General Assembly and compiled in the *Code of Virginia*. A listing of statutes relevant to our boards is contained on the next page. You also may access the entire *Code* online at <http://law.lis.virginia.gov/vacode>.

Each of your board-specific statutes sets forth provisions relating to the composition of your board; quorum requirements; the necessity for licensure; exemptions from licensure, etc.

Regulations are promulgated by the board in accordance with the Administrative Process Act and are compiled in the *Virginia Administrative Code (VAC)*. The VAC is accessible online at <http://law.lis.virginia.gov/admincode>.

All regulations must be authorized by statute. A review of the regulatory process is provided in Section 6.

Law/Statute	Regulation
Code of Virginia § 54.1-XXXX	Virginia Administrative Code 18 VAC XX-YY-ZZZ
<ul style="list-style-type: none"> • Adopted by the General Assembly and approved the Governor • Can only be enacted, amended, and repealed by an act of the legislature • Statutory revisions only occur during General Assembly sessions (once per year beginning in January) 	<ul style="list-style-type: none"> • Must be authorized by the General Assembly (through enabling legislation) • Adopted by a state government agency (board) • Can be enacted, amended, and repealed by agency (board) • Regulatory review process can be initiated at any time

Code of Virginia

Statutory provisions DPOR and each of its Boards fall under [Title 54.1](#) of the *Code of Virginia*. All chapters are hyperlinked below for easy navigation.

In addition, each Board page on the agency website (www.dpor.virginia.gov) provides links to applicable statutes and regulations.

The first three chapters of Title 54.1 apply to the Department as a whole and each of its Boards.

Chapter 1	General Provisions
Chapter 2	General Provisions
Chapter 3	Department of Professional and Occupational Regulation

The remaining chapters are Board-specific.

Chapter 4	Architects, Professional Engineers, Land Surveyors, Landscape Architects and Interior Designers
Chapter 5	Asbestos, Lead, and Home Inspection Contractors and Workers
Chapter 6	Auctioneers
Chapter 7	Barbers and Cosmetologists
Chapter 8.1	Boxing and Wrestling Events
Chapter 9	Branch Pilots
Chapter 11	Contractors
Chapter 15	Hearing Aid Specialists and Opticians
Chapter 18	Polygraph Examiners
Chapter 20.1	Real Estate Appraisers
Chapter 20.2	Real Estate Appraisal Management Companies
Chapter 21	Real Estate Brokers and Salespersons
Chapter 22	Soil Scientists, Wetland Delineators, and Geologists
Chapter 22.1	Waste Management Facility Operators
Chapter 23	Waterworks and Wastewater Works Operators
Chapter 23.1	Cemetery Operators, Perpetual Care Trust Funds and Preneed Burial Contracts
Chapter 23.2	Fair Housing
Chapter 23.3	Common Interest Communities
Chapter 23.4	Natural Gas Automobile Mechanics and Technicians

In addition, you are required by statute to become familiar with the **State and Local Government Conflict of Interests Act (COIA)** upon your appointment to the Board, and to review the Act each year. ([Title 2.2, Chapter 31, §§ 2.2-3100 thru 2.2-3131](#))

The **Administrative Process Act (APA)** governs the way Boards promulgate regulations and make case decisions. ([Title 2.2, Chapter 40, §§ 2.2-4000 thru 2.2-4033](#))

The **Freedom of Information Act (FOIA)** governs most aspects of your meetings and also governs the Department's Release of Information Policy. ([Title 2.2, Chapter 37, §§ 2.2-3700 thru 2.2-3714](#))

Finally, members of some Boards need to be familiar with other provisions unique to their program area. Your Board Executive Director will review these provisions with you.



ACCESS TO PUBLIC MEETINGS

under the

VIRGINIA FREEDOM OF INFORMATION ACT

I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and the provisions relating to meetings set forth the procedures that a public body must follow in conducting an open meeting and convening in a closed meeting. This outline breaks down the procedural requirements, such as what is required in posting a notice and certifying a closed meeting, and provides practical advice for conducting meetings that comply with FOIA. Appendix A sets forth in detail the requirements for making a motion to convene a closed meeting. Appendix B describes commonly used meeting exemptions of general applicability.

II. OPEN MEETINGS GENERALLY

WHAT IS A MEETING UNDER FOIA?

A “meeting” is defined as “meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708.2, as a body or entity, or as an informal assemblage of (i) **as many as three 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.** (Emphasis added.)¹

WHAT IS NOT A MEETING UNDER FOIA?

1. The gathering of employees of a public body;
2. The gathering or attendance of two or more members of a public body at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, the gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, **and** the public business is not discussed; or
3. The gathering or attendance of two or more members of a public body 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 discussions relating to the transaction of public business, even though the performance of the members

¹ Statutory reference: § 2.2-3701. FOIA Council Opinions AO-4-00, AO-20-01, AO-40-01, AO-46-01, AO-02-02, AO-06-02, AO-13-03, AO-15-04, AO-20-04, AO-11-05, AO-02-06, AO-10-07, AO-12-08, AO-03-09, AO-05-11, AO-07-14.



individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting.²

MAY A PUBLIC BODY CONDUCT A MEETING BY CONFERENCE CALL OR OTHER ELECTRONIC METHOD?

Maybe. Prior to July 1, 2007, no **local** governing body or any other type of local public body was permitted to conduct a meeting through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business. However, **state** public bodies may conduct such meetings under specified circumstances. Since July 1, 2007, all public bodies (state, local and regional) may also allow participation by their members via teleconference or other electronic means under certain limited circumstances.³

IF IT IS A MEETING, WHAT DOES FOIA REQUIRE?

If it is a meeting under FOIA, the law requires that:

1. Notice of the meeting be given;
2. The meeting must be open to the public; **and**
3. Minutes of the meeting must be taken and preserved.⁴

WHAT IS SUFFICIENT NOTICE?

Notice must contain the **date, time, and location** of the meeting.

WHERE TO POST THE NOTICE?

As of July 1, 2017, FOIA requires that all public bodies post notices in three locations:

1. On its official public government website, if any;
2. In a prominent public location at which notices are regularly posted; and
3. At the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

State public bodies must also post notice on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of meeting notices by electronic means by other public bodies shall be encouraged.⁵

WHO ELSE IS ENTITLED TO NOTICE OF MEETINGS?

Any person who annually files a written request for notification with a public body is entitled to receive direct notification of all meetings of that public body. If the person requesting notice does not object, the public body may provide the notice electronically.

² Statutory references: §§ 2.2-3701. FOIA Council Opinions AO-4-00, AO-10-00, AO-46-01, AO-02-02, AO-13-03, AO-12-04, AO-12-08, AO-05-11, AO-07-14.

³ Statutory reference: § 2.2-3708.2 (formerly §§ 2.2-3708 and 2.2-3708.1). FOIA Advisory Opinions AO-1-01, AO-16-02, AO-21-04, AO-12-08, AO-07-09.

⁴ Statutory references: §§ 2.2-3700, 2.2-3707. FOIA Council Opinions AO-40-01, AO-06-02, AO-17-02, AO-13-03, AO-15-04.

⁵ Statutory reference: § 2.2-3707(C). FOIA Council Opinions AO-18-01, AO-43-01, AO-08-07, AO-03-09.



The request for notice shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any.⁶

WHEN TO POST THE NOTICE?

For regular meetings: The notice must be posted **at least three working days prior to the meeting.**

For special, emergency, or continued meetings: Notice, reasonable under the circumstance, of special, emergency, or continued meetings must be given at the same time as the notice provided members of the public body conducting the meeting. FOIA defines an emergency as “an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which circumstance requires immediate action.”⁷

MAY THE PUBLIC OR MEDIA RECORD THE MEETING?

Yes. Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open.⁸

MAY A PUBLIC BODY RESTRICT THE USE OF RECORDING DEVICES?

Yes. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting to prevent interference with the proceedings. However, public bodies are not permitted to conduct meetings required to be open in any building or facility where such recording devices are prohibited.⁹

WHEN MUST AGENDA MATERIALS BE AVAILABLE TO THE PUBLIC/MEDIA?

At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state 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 received.¹⁰

ARE THERE ANY EXCEPTIONS FOR TAKING MINUTES?

Yes. Minutes are required to be taken only at open meetings; minutes are not required to be taken during closed meetings. Minutes are also not required to be taken at deliberations of:

1. Standing and other committees of the General Assembly;
2. Legislative interim study commissions and committees, including the Virginia Code Commission;

⁶ Statutory reference: § 2.2-3707(E). FOIA Council Opinions AO-3-01, AO-13-03, AO-23-03, AO-08-07.

⁷ Statutory references: §§ 2.2-3701, 2.2-3707(C),(D). FOIA Council Opinions AO-13-00, AO-3-01, AO-18-01, AO-06-02, AO-08-07.

⁸ Statutory reference: § 2.2-3707(G). FOIA Council Opinions AO-03-03, AO-10-05.

⁹ Statutory reference: § 2.2-3707(G). FOIA Council Opinions AO-03-03, AO-10-05.

¹⁰ Statutory reference: § 2.2-3707(F). FOIA Council Opinions AO-3-01, AO-35-01, AO-23-03, AO-05-12.



3. Study committees or commissions appointed by the Governor; or
4. Study commissions or study committees, or any other committees or subcommittees appointed by the governing body or school board of a county, city or town, except where the membership of the commission, committee or subcommittee includes a majority of the members of the governing body.¹¹

WHAT DO MINUTES HAVE TO LOOK LIKE?

Minutes are required (except as noted above) of all open meetings, and must include: the date, time, and location of the meeting; the members of the public body present and absent; a summary of matters discussed; and a record of any votes taken. In addition, motions to enter into a closed meeting and certification after a closed meeting must be recorded in the minutes.¹²

ARE MINUTES PUBLIC RECORDS UNDER FOIA?

Yes. Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual recordings, are public records and must be released upon request.¹³

IS THERE AN AFFIRMATIVE OBLIGATION TO POST MINUTES?

Yes, but **only for state agencies in the executive branch.**

All boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to FOIA must post minutes of their meetings on their official public government website and on a central electronic calendar maintained by the Commonwealth. Draft minutes of meetings must be posted as soon as possible but no later than 10 working days after the conclusion of the meeting. Final approved meeting minutes must be posted within three working days of final approval of the minutes.¹⁴

MUST ALL VOTES OF A PUBLIC BODY TAKE PLACE IN AN OPEN MEETING?

Yes. Any and all votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting.

A public body may not vote by secret or written ballot.¹⁵

IS IT A FOIA VIOLATION TO POLL MEMBERS OF A PUBLIC BODY?

No. Nothing in FOIA prohibits separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member’s position with respect to the transaction of public business. Such contact may be done in person, by telephone, or by electronic communication, provided the contact is done on a basis that does not constitute a meeting as defined in FOIA.¹⁶

¹¹ Statutory reference: § 2.2-3707(H). FOIA Council Opinion AO-08-07.

¹² Statutory references: §§ 2.2-3707(H), 2.2-3712(A),(D). FOIA Council Opinions AO-25-04, AO-01-06, AO-05-15.

¹³ Statutory reference: § 2.2-3707(H). FOIA Council Opinions AO-13-03, AO-25-04.

¹⁴ Statutory reference: § 2.2-3707.1.

¹⁵ Statutory reference: § 2.2-3710(A). FOIA Council Opinions AO-9-00, AO-15-02, AO-01-03, AO-13-03, AO-01-05, AO-05-09, AO-07-09, AO-02-17.

¹⁶ Statutory reference: § 2.2-3710(B). FOIA Council Opinions AO-08-02, AO-15-02, AO-01-03, AO-07-09.



III. CLOSED MEETING PROCEDURES

WHAT DOES A PUBLIC BODY HAVE TO DO TO CLOSE A MEETING?

In order to conduct a closed meeting, the public body must take an affirmative recorded vote in an open meeting approving a motion that:

1. Identifies the subject matter for the closed meeting;
2. States the purpose of the closed meeting; **and**
3. Makes specific reference to the applicable exemption from the open meeting requirements.

The motion must be set forth in detail in the minutes of the open meeting.

A general reference to the provisions of FOIA, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting.¹⁷

WHAT MAY BE DISCUSSED DURING A CLOSED MEETING?

A public body holding a closed meeting must restrict its discussions during the closed meeting to those matters **specifically exempted** from the provisions of FOIA and **identified in the motion.**¹⁸

AT THE END OF A CLOSED MEETING, WHAT DOES THE PUBLIC BODY HAVE TO DO?

At the conclusion of any closed meeting, the public body holding the meeting must immediately reconvene in an open meeting and take a roll call or other recorded vote certifying that to the best of each member's knowledge:

1. Only public business matters lawfully exempted from open meeting requirements under this chapter, **and**
2. 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 meeting by the public body.

The vote must be included in the minutes of the open meeting.

Any member of the public body who believes that there was a departure from the requirements of (1) or (2) above must state so prior to the vote and indicate the substance of the departure that, in his judgment, has taken place. This statement must also be recorded in the minutes of the open meeting.¹⁹

¹⁷ Statutory reference: § 2.2-3712(A). FOIA Council Opinions AO-8-00, AO-19-00, AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-17-02, AO-02-04, AO-24-04, AO-01-05, AO-06-07, AO-13-07, AO-04-08, AO-13-09, AO-03-13, AO-02-16, AO-03-17.

¹⁸ Statutory reference: § 2.2-3712(C). FOIA Council Opinions AO-8-00, AO-13-07, AO-13-09, AO-02-16.

¹⁹ Statutory references: § 2.2-3712(D),(E). FOIA Council Opinions AO-8-00, AO-17-02, AO-02-04, AO-06-07, AO-04-08, AO-02-16, AO-03-17.



WHEN DO DECISIONS MADE IN A CLOSED MEETING BECOME OFFICIAL ACTIONS OF THE PUBLIC BODY?

Decisions become official when the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation, or motion agreed to in the closed meeting. Otherwise, no resolution, ordinance, rule, contract, regulation, or motion adopted, passed, or agreed to in the closed meeting is effective.

Public officers improperly selected due to the failure of the public body to comply with the other provisions of § 2.2-3711 will become *de facto* officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.²⁰

CAN THERE BE A CLOSED MEETING WITHOUT FIRST HAVING AN OPEN MEETING?

No. A closed meeting can take place only within the context of an open meeting, even if the closed meeting is the only agenda item. A closed meeting motion must be made and voted upon in an open meeting. After the conclusion of the closed meeting, the members of the public body must reconvene in an open meeting to vote to certify that they restricted their discussion during the closed meeting to those matters specifically exempted from the provisions of FOIA and identified in the motion. Because votes must be taken at open meetings, public bodies must convene in open meeting both before and after any closed meeting.²¹

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²⁰ Statutory references: §§ 2.2-3711(B),(C), 2.2-3712(H). FOIA Council Opinions AO-23-01, AO-38-01, AO-15-02, AO-01-03, AO-13-03, AO-24-04, AO-01-05, AO-13-09.

²¹ FOIA Council Opinions AO-02-04, AO-06-07, AO-08-07, AO-13-09, AO-02-10.



APPENDIX A

How To Make A Motion To Convene A Closed Meeting

The Requirements

Section 2.2-3712(A) states that *[n]o closed meeting shall be held unless the public body proposing to convene such meeting 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.* (Emphasis added.)

FOIA Council opinions have held that a motion that lacks any of these three elements is insufficient under the law and would constitute a procedural violation.²² Here's a step-by-step look at how to put together a motion that meets all three requirements:

1. Identify the subject matter:

- The identification of the subject goes beyond a general reference to the exemption, and provides the public with information as to specifically why the closed meeting will be held. The subject matter describes the particular fact, scenario, or circumstances that will be discussed by the public body during the closed meeting.
- The specificity required for identification of the subject must be determined on a case-by-case basis. It involves balancing FOIA's policy of affording citizens every opportunity to witness the operations of government with the need of the public body to hold certain discussions in private. The identification of the subject need not be so specific as to defeat the reason for holding a closed meeting in the first place.
- Examples of identification of the subject: discussion of candidates for the appointment of a new city manager; discussion of the appropriate disciplinary action to take against a high school student for violation of school policy; discussion of probable litigation relating to highway construction.²³

2. State the purpose:

- The purpose refers to the general, statutorily allowed meeting exemptions set forth at § 2.2-3711(A). Section 2.2-3711(A) states that *public bodies may only hold closed meetings for the following purposes* (emphasis added) and then sets forth the exemptions.
- Examples of purposes: personnel matters; student admissions or discipline; consultation with legal counsel.

3. Make specific reference to the applicable exemption:

- All of the meetings exemptions can be found at § 2.2-3711(A). It is not enough to cite this general Code provision, because § 2.2-3711(A) includes 44 different exemptions. Instead, the citation must be as specific as possible.

²² FOIA Advisory Opinions AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-24-04, AO-01-05, AO-06-07, AO-04-08, AO-13-09, AO-02-10, AO-03-13, AO-02-16.

²³ Example of probable litigation taken from FOIA Advisory Opinion AO-14-01.



- Examples of specific Code references: § 2.2-3711(A)(1); § 2.2-3711(A)(2); § 2.2-3711(A)(7).

Putting It All Together

Based upon the analysis above, here are three examples of motions to go into closed session that satisfy the minimum requirements of § 2.2-2712(A). It is always appropriate to include more information, and any motion should be tailored with additional facts describing the particular scenario being addressed by the public body.

1. I move that (insert name of public body) convene in closed session to discuss the candidates being considered for the appointment of a new city manager pursuant to the personnel exemption at § 2.2-3711(A)(1) of the Code of Virginia.
2. I move that (insert name of public body) convene in closed session to discuss the appropriate disciplinary action to take against an individual high school student for violation of school policy pursuant to the scholastic exemption at § 2.2-3711(A)(2) of the Code of Virginia.
3. I move that (insert name of public body) convene in closed session to meet with legal counsel about probable litigation relating to highway construction pursuant to the consultation with legal counsel exemption at § 2.2-3711(A)(7) of the Code of Virginia.

Remember, the appropriateness of any given motion is fact-based, and no “fill-in-the-blank” model motion will work in all situations. When drafting a motion, go down the checklist and ensure that you have included all three elements. Keep in mind the balancing required to keep citizens informed of the workings of a public body while maintaining the integrity of the closed session. Please do not hesitate to contact the FOIA Council to discuss these requirements or the sufficiency of a specific motion.

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APPENDIX B

Meeting Exemptions Of General Applicability

As of July 2011, FOIA contains more than 40 open meeting exemptions. Although many of these exemptions apply to specific agencies or to very content-specific discussions, there are several open meeting exemptions of general applicability that may be used by virtually all public bodies. The open meeting exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

§ 2.2-3711(A)(1): Personnel. Provides an exemption for:

Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

§ 2.2-3711(A)(2): Students. Provides an exemption for:

Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any public institution of higher education in the Commonwealth or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

§ 2.2-3711(A)(3): Acquisition & disposition of property. Provides an exemption for:

Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

§ 2.2-3711(A)(4): Privacy. Provides an exemption for:

The protection of the privacy of individuals in personal matters not related to public business.

§ 2.2-3711(A)(5): Prospective business. Provides an exemption for:

Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.



§ 2.2-3711(A)(6): Investment of public funds. Provides an exemption for:

Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

§ 2.2-3711(A)(7): Legal advice or briefings regarding actual or probable litigation. Provides an exemption for:

Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

§ 2.2-3711(A)(8): Legal advice regarding specific legal matters. Provides an exemption for:

Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

§ 2.2-3711(A)(12): Tests & exams. Provides an exemption for:

Discussion or consideration of tests, examinations, or other records excluded from this chapter pursuant to subdivision 4 of § 2.2-3705.1.

§ 2.2-3711(A)(16): Medical. Provides an exemption for:

Discussion or consideration of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5.

§ 2.2-3711(A)(19): Public safety. Provides an exemption for:

Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of information subject to the exclusion in subdivision 2 or 14 of § 2.2-3705.2, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

§ 2.2-3711(A)(29). Contracts. Provides an exemption for:

Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

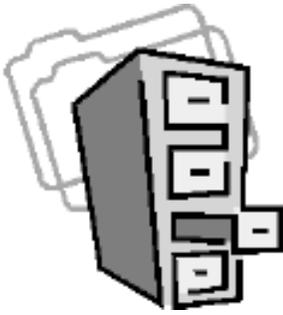


§ 2.2-3711(A)(39). Economic development. Provides an exemption for:

Discussion or consideration of information subject to the exclusion in subdivision 3 of § 2.2-3705.6 related to economic development.

Last updated July 2018





ACCESS TO PUBLIC RECORDS under the VIRGINIA FREEDOM OF INFORMATION ACT

I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and §§ 2.2-3704 and 2.2-3704.01 of the Code of Virginia guides users as to how to make or respond to a FOIA request for public records. The remainder of this outline breaks down these procedural requirements and provides practical advice for adhering to FOIA when making or responding to a request. Further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act.”

WHAT IS A PUBLIC RECORD UNDER FOIA?

A “public record” is any writing or recording, 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. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

ARE DRAFT OR PRELIMINARY VERSIONS ALSO CONSIDERED PUBLIC RECORDS?

Yes. The definition of “public record” does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA.¹

II. MAKING A REQUEST FOR RECORDS

WHO MAY REQUEST RECORDS UNDER FOIA?

- 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.

MUST A REQUEST MENTION “FOIA” SPECIFICALLY?

No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

MUST A REQUEST BE MADE IN WRITING?

No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Writing is recourse for both parties!²

¹ FOIA Council Opinions AO-3-00, AO-05-09.

² FOIA Council Opinion AO-07-11.



MAY A PUBLIC BODY REQUIRE A REQUESTER TO FILL OUT A REQUEST FORM?

No. A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request. [NOTE: It is suggested that if the requester refuses to fill in the form or to put the request in writing, the public body should fill out its own form—remember, writing is recourse.]³

MAY A PUBLIC BODY REQUIRE A REQUESTER TO PROVIDE HIS NAME AND LEGAL ADDRESS?

Yes. A public body may require a requester to provide his name and legal address before processing a FOIA request. [NOTE: This is a tool a public body *may* use, but FOIA does not mandate that public bodies get identification first.]⁴

II. RESPONDING TO A REQUEST FOR RECORDS

HOW LONG DOES A PUBLIC BODY HAVE TO RESPOND TO A REQUEST?

A public body must respond within five working days of receipt of the request. [NOTE: Count the day **after** receipt as day 1.]⁵

REMEMBER: Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.⁶

WHAT ARE THE PERMISSIBLE RESPONSES TO A REQUEST?

As of July 1, 2007, a public body must make one of the five responses allowed by FOIA:

1. Provide the requested records to the requester;
2. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with FOIA;
3. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with FOIA;
4. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body;
or
5. It is not practically possible to provide the requested records **OR** to determine whether they are available within the five-work-day period, and the public body

³ FOIA Council Opinions AO-18-04, AO-07-11.

⁴ FOIA Council Opinion AO-07-11.

⁵ FOIA Council Opinions AO-34-01, AO-47-01, AO-05-06, AO-02-08, AO-07-08, AO-07-11, AO-06-14, AO-01-17.

⁶ FOIA Council Opinions AO-10-02, AO-12-03, AO-18-03, AO-01-08, AO-07-08, AO-01-17.



needs an additional seven work days in which to provide one of the four preceding responses.⁷

WHEN DOES A RESPONSE NEED TO BE IN WRITING?

If any part of the answer is “NO” (i.e., response 2 OR 3 above), the response **must**:

1. Be in writing;
2. Identify with reasonable particularity the subject matter of withheld records; **and**
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.

If the records are being entirely withheld (i.e., response 2) then the response must also identify with reasonable particularity the volume of the withheld records.

If the answer is “we cannot find it” or “it does not exist” (i.e., response 4 above), the response **must**:

1. Be in writing, **and**
2. **If** the public body knows that another public body has the records, it must provide contact information for the other public body.

If the answer is “we need more time” and the public body would like seven additional working days to respond (i.e., response 5 above), the response **must**:

1. Be in writing, **and**
2. Specify the conditions that make production of the records within the five-work-day period impossible.

HOW DOES A PUBLIC BODY RESPOND IF A RECORD CONTAINS EXEMPT AND NONEXEMPT INFORMATION?

Generally, if a record contains exempt and nonexempt information, the public body must release the record and delete or excise the exempt portion of the record.

MUST A PUBLIC BODY CREATE A RECORD IN RESPONSE TO A FOIA REQUEST?

Generally, no public body is required to create a new record if the requested record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.⁸

HOW MUCH MAY A PUBLIC BODY CHARGE FOR PRODUCING RECORDS?

A public body may make reasonable charges for its **actual cost incurred in accessing, duplicating, supplying, or searching for the requested records**. A public body may not charge extraneous or surplus fees unrelated to the production of the records. [NOTE: This

⁷ Prior to July 1, 2007, FOIA permitted four responses to a records request; FOIA Council Opinions AO-1-00, AO-21-01, AO-12-03, AO-18-03, AO-16-04, AO-05-05, AO-05-06, AO-11-07, AO-12-07, AO-03-08, AO-07-08, AO-13-08, AO-01-09, AO-07-11, AO-02-12, AO-01-17.

⁸ FOIA Council Opinions AO-11-00, AO-6-01, AO-11-01, AO-35-01, AO-49-01, AO-01-02, AO-03-02, AO-10-02, AO-11-03, AO-04-04, AO-10-04, AO-16-04, AO-05-05, AO-06-05, AO-09-07, AO-11-07, AO-07-08, AO-12-09, AO-07-11, AO-04-15.



means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees.] Charges for copies must not exceed the actual cost of duplication.

A citizen may request that the public body estimate the cost of supplying the requested records in advance. As mentioned previously, further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act.”⁹

CAN A PUBLIC BODY REQUIRE ADVANCE PAYMENT?

When a public body determines in advance that the charges for supplying the requested records are **likely to exceed \$200**, it may require the requester to pay a deposit before proceeding with the request. This deposit may not exceed the amount of the advance determination, and the public body must credit it towards the final cost of supplying the records. If a public body asks for the advance deposit, the five-working-day period to respond to the request will be tolled until the deposit is paid.¹⁰

WHAT CAN A PUBLIC BODY DO IF A REQUESTER DOES NOT PAY FOR RECORDS PROVIDED UNDER FOIA?

Before responding to a new request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

DO THESE SAME REQUIREMENTS APPLY TO A REQUEST FOR ELECTRONIC RECORDS?

Yes. Like all other records, regardless of format, a public body may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. And like other records, when electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information. The excision of exempt fields from a database is not considered the creation of a new record under FOIA.

A public body must provide electronic records in any medium identified by the requester, if that medium is used by the public body in the regular course of business. If the public body has the capability, this includes the option of posting the records on a website or delivering the records to an email address. A public body is not required to produce records in a format not regularly used by the public body. However, a public body must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and the public body, including the payment of reasonable costs.¹¹

⁹ FOIA Council Opinions AO-1-00, AO-21-01, AO-25-01, AO-32-01, AO-39-01, AO-49-01, AO-05-02, AO-10-02, AO-14-02, AO-08-03, AO-20-03, AO-21-03, AO-01-04, AO-04-04, AO-16-04, AO-23-04, AO-06-05, AO-02-07, AO-09-07, AO-06-09, AO-07-11, AO-03-12, AO-05-13, AO-02-14, AO-04-15.

¹⁰ FOIA Council Opinions AO-21-01, AO-14-02, AO-04-04, AO-16-04, AO-08-09, AO-07-11.

¹¹ FOIA Council Opinions AO-11-00, AO-10-02, AO-11-02, AO-14-02, AO-21-03, AO-05-05, AO-08-09, AO-05-13.



APPENDIX

Records Exemptions of General Applicability

FOIA contains over 100 exemptions for records. Although many of these exemptions apply to specific agencies or to very content-specific records, there are several records exemptions of general applicability that may be used by virtually all public bodies. The records exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

§ 2.2-3705.1(1): Personnel. Provides an exemption for:

Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

§ 2.2-3705.1(2): Attorney-client privilege. Provides an exemption for:

Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

§ 2.2-3705.1(3): Attorney work product. Provides an exemption for:

Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

§ 2.2-3705.1(4): Tests and examinations. Provides an exemption for:

Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of



test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

§ 2.2-3705.1(5): Closed meetings. Provides an exemption for:

Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

§ 2.2-3705.1(6): Vendor proprietary information. Provides an exemption for:

Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, "vendor proprietary information software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

§ 2.2-3705.1(7): Computer software. Provides an exemption for:

Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

§ 2.2-3705.1(8): Cost estimates of real property. Provides an exemption for:

Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

§ 2.2-3705.1(10): Personal contact information. Provides an exemption for:

Personal contact information furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, "personal contact information" means the information provided to the public body for the purpose of receiving electronic mail from the public body and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device.

§ 2.2-3705.1(12): Contracts. Provides an exemption for:

Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect



the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

§ 2.2-3705.1(13): Account numbers. Provides an exemption for:

Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

§ 2.2-3705.2(2): Security systems. Provides an exemption for:

Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

§ 2.2-3705.2(14): Critical infrastructure, cybersecurity, antiterrorism and related public safety information. Provides an exemption for:

Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;

b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;

c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or

d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.



The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.

§ 2.2-3705.4(1): Students. Provides an exemption for:

Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.

§ 2.2-3705.5(1): Health. Provides an exemption for:

Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.



Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § 16.1-338 or 54.1-2969, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

§ 2.2-3705.6(3): Economic development and retention. Provides an exemption for:

Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

§ 2.2-3705.6(10): Prequalification to bid. Provides an exemption for:

Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

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Updated July 2018





E-MAIL: USE, ACCESS & RETENTION

The use of e-mail in the business place has become routine and is a preferred mode of communication. For state and local government officials and employees, the application of the Virginia Freedom of Information Act (FOIA) relating to access to records and the Virginia Public Records Act (the PRA) relating to the retention of records comes into play.

Government officials and employees frequently ask two key questions about the use of e-mail -- "**Can the public and media access my e-mail under FOIA?**" and "**Do I have to save my e-mail?**"

This document will attempt to answer these questions and provide guidance about the use and management of e-mail by state and local government.

The nature of e-mail

E-mail generally refers to any communication that requires an electronic device for storage and/or transmission.¹ E-mail is a medium for correspondence -- essentially, e-mail is the "envelope" for the communication. For purposes of FOIA & the PRA, e-mail provides a medium for communication, much like a telephone or the U.S. Mail provides a means of communication. The fact that a communication is sent via e-mail is not alone conclusive of whether that e-mail must be accessible to the public under FOIA or retained pursuant to the PRA; one must look at the text and substance of the communication to determine whether it is indeed a public record.

The Virginia Freedom of Information Act

FOIA addresses access to public records. Section 2.2-3701 of the Code of Virginia defines public records for purposes of FOIA to include "*all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, 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.*"

¹ Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).



Clearly an e-mail would fall under this broad definition of a public record, because it applies to all writings and recordings...set down by...mechanical or electronic recording...however stored, regardless of physical form or characteristics. As noted above, e-mail is just the medium, or the envelope, used to convey the communication. Just as a letter sent via U.S. Mail from one public official to another concerning public business would be a public record under FOIA, so would that same communication sent via e-mail.

FOIA requires that unless subject to a statutory exemption, all public records must be open to inspection and copying. Therefore, an e-mail relating to public business would be accessible just like any other public record, and may be withheld from public disclosure only if a particular exemption applies to the content of the e-mail.

The Virginia Public Records Act

While FOIA governs access to records held by state and local government, the PRA governs how long a government entity must retain certain records. The PRA defines "public record" for purposes of records retention, and like FOIA, the definition is fairly broad and would include e-mail as a public record. Section 42.1-77 defines a public record to include recorded information that documents a transaction or activity by or with any public officer, agency or employee of the state government or its political subdivisions. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business.

The PRA sets forth different retention schedules for different types of records. Several factors shape how long a record needs to be held. Many records are only kept for so long as business requires them to be kept, although if a record has historical significance or is created by an agency head or director, it may need to be kept longer. For example, certain records are required to be maintained permanently, such as records from standing committees of the General Assembly, annual reports of state agencies, and correspondence of agency directors. Other records need only be kept so long as they are administratively necessary, such as reminders of events like blood drives or fund raisers, courtesy copies of correspondence, or messages received from a listserv. Along the continuum, other records may be required to be retained for 30 days to ten years, depending on their content. After the retention time has expired for a particular document, then that record may be destroyed pursuant to the guidelines set forth by the Library of Virginia.²

In providing guidance for adhering to the PRA, the Library of Virginia notes that e-mail should be treated the same as paper correspondence. Again, e-mail is only the medium,

² PRA is administered by the Library of Virginia. For more details on retention schedules for particular types of records or for a particular agency, or for information regarding the proper disposal of records, please contact the Library of Virginia. Records retention information and contact information is also available on the Library's website at <http://www.lva.lib.va.us/whatwedo/records/index.htm>.



or the envelope, by which the correspondence is sent; the retention schedule for a particular e-mail will depend on its content and should be preserved the same as its paper equivalent. Both incoming and outgoing e-mail should be retained, along with any attachments sent via e-mail.

Tips for using and managing e-mail

All e-mails related to public business are subject to the provisions of FOIA and the PRA, and should be managed in the same manner as all other public records.

There is a tendency with e-mail to hit the delete button as soon as you are finished with a particular message. However, consideration must be given to whether that particular e-mail must be retained for purposes of the PRA -- you can't automatically delete your e-mail, just as you can't automatically throw away paper correspondence and records.

FOIA governs access to records. The PRA dictates how long you are required to keep certain records. If a government entity keeps an e-mail (or any other record) for longer than its retention schedule requires, that e-mail will still be subject to FOIA if requested. Conversely, if a government entity properly disposes of a record pursuant to a retention schedule, and a subsequent FOIA request is made for that record, FOIA does not require the government entity to recreate the record.

E-mail is often used as a substitute for a telephone call, and is quite informal. However, e-mail creates a record of that communication that must be retained pursuant to the PRA and will be available upon request to the public under FOIA. Consider the consequence of choice to use e-mail instead of the telephone -- it may not be in your best interest to be as informal on e-mail as you are on the telephone.

The Library of Virginia discourages the practice of maintaining permanent records solely in electronic format, without a paper or microfilm backup.³ For records that do not need to be maintained permanently, these e-mails can be printed out and stored in a traditional, paper file (and the electronic copy can be deleted) or electronic folders can be created on the computer to organize e-mails based on functions, subjects or activities. The Library of Virginia suggests that these folders are assigned to your home directory on the computer, and not on the network. By way of example, at the FOIA Council we print a copy of all of the FOIA questions that we receive via e-mail, along with our corresponding response, and file the paper copy in a chronological file. After we have printed a copy to retain for our records, we delete the e-mail off of the computer.

Public officials and employees should not commingle personal and official e-mails. Private e-mails do not need to be retained; e-mails relating to the transaction of public business do. From an e-mail management perspective, it is probably not a good idea to mix personal and official business in the same e-mail. Official e-mails that need to be retained should be maintained with other public records that relate to the same content.

³ Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).



An Easy Guide to FOIA for Boards of Visitors

While the below video is for Boards of Visitors, the concepts are the same for all boards with the following caveats:

E-meetings – because the Department does not have the technological infrastructure to support e-meetings in compliance with the law (§ 2.2-3708 of the *Code of Virginia*), our boards do not meet electronically.

Records must be maintained by DPOR in order to appropriately respond to FOIA requests and subpoenas as well as comply with appropriate retention schedules. Therefore, it is crucial that you be careful not to communicate with fellow board members outside of board meetings. Such communication may create records (e-mails, etc...) we would not necessarily be aware of when responding to requests for information, nor could we ensure that they are appropriately retained. The Department operates in a culture of openness, meaning that our business – the people's business – is conducted in a public forum!



Regulatory Review Process

Title 54.1 of the *Code of Virginia* provides the statutory authority for regulatory boards. The regulatory review process is governed by the Administrative Process Act and [Executive Order 14 \(2018\)](#).

A regulation is promulgated (enacted), amended, or repealed through a regulatory action. All regulatory actions are tracked through the **Virginia Regulatory Town Hall** website (<http://townhall.virginia.gov/>). The website contains a wealth of information about the regulatory process, including Questions & Answers excerpted below.

Register as a public user on Town Hall to choose the boards/agencies and types of actions for which you want to receive notifications.

To sign up, visit: <http://townhall.virginia.gov/L/Register.cfm>.

What is a regulation?

A regulation is a general rule governing people's rights or conduct that is implemented by a state agency and has the force of law. Agencies put regulations in place in order to administer and enforce specific state laws and to implement general agency objectives. Each regulation must be authorized by statute. Each chapter of the Virginia Administrative Code (VAC) contains a single regulation.

How is a regulation promulgated?

A regulation is created, amended, or repealed through a regulatory action. Typically, regulatory actions take *at least 18 to 36 months* from start to finish. The process is designed to ensure the public has an opportunity to participate in the rulemaking process and that all perspectives are considered in the development of a final regulation. In addition, proposed regulations must meet the Governor's policy goals and are usually subject to an economic impact analysis. Absent special circumstances (detailed at the end of this section), each regulatory action goes through a mandatory **three-stage process**.

STAGE 1: Notice of Intended Regulatory Action (NOIRA)

The public receives notification that a regulatory change is under consideration, along with a general description of the changes to be considered. Once the NOIRA is published in the *Virginia Register of Regulations* and appears on the Town Hall website, this first stage provides at least a 30-day period during which

the board receives comments from the public. The board reviews these comments as it develops the *proposed* regulation.

STAGE 2: Proposed

After taking into account the public comment received during the NOIRA stage, the board prepares the full text of the regulation and a statement explaining the substance of the proposed regulatory action. In addition, the Department of Planning and Budget (DPB) prepares an economic impact analysis (EIA). Once the proposed stage is published in the *Register* and appears on the Town Hall website, a minimum 60-day public comment period must occur. The board summarizes comments received and provides a response, which may include modifying the proposed text of the regulation.

STAGE 3: Final

The public is provided with the full text of the regulation, this time with an explanation of any changes made since the proposed stage. Once the final stage is published in the *Register* and appears on the Town Hall website, the regulation becomes effective after a final adoption period of at least 30 days.

SPECIAL CIRCUMSTANCES

EMERGENCY REGULATIONS: Sometimes, the General Assembly passes a law requiring an emergency regulation. Emergency regulations are effective for up to 18 months—with an option to extend up to an additional six months—and bypass the usual three-stage regulatory process. A board will promulgate an emergency regulation and, at the same time, begin a regulatory action for a permanent replacement regulation using the standard three-stage process.

EXEMPT REGULATIONS: Certain regulatory actions are exempt from the three-stage process: actions of designated agencies, regulations setting rates or prices or relating to internal agency operations, and regulations with technical changes or amendments strictly limited to conforming to changes in federal or state law. Most exempt regulations are published in Final form only; however, some exempt actions can include notice and publication of Proposed text.

FAST-TRACK REGULATIONS: The fast-track rulemaking process is for regulatory actions that are expected to be non-controversial. After review by the Governor, notice of a proposed fast-track rulemaking is published in the *Register* and appears on the Town Hall website. Then, if no objections are raised during the 60-day public comment period, the regulation becomes effective 15 days after the close of the public comment period (unless the regulation is withdrawn or a later effective date is specified by the agency).

However, if concerns are raised by during the public comment period suggesting the proposed regulation is *not* non-controversial, the regulatory action is “pulled” from the fast-track and continued using the standard regulatory process. Specifically, the law (§ 2.2-4012.1) requires a fast-track action be terminated based on objections from the following:

- Any member of the applicable standing committee of the Senate or House of Delegates;
- Any member of the Joint Commission on Administrative Rules (JCAR); or
- Ten or more members of the public.

The board does not need to start over from the very beginning, however, because the initial publication of the fast-track regulation in the *Register* serves as the NOIRA (Stage 1).

What is the Virginia Administrative Code (VAC)?

The Virginia Administrative Code (VAC) is the official source for Virginia's regulations. The VAC consists of approximately 1,250 chapters (regulations). You can link to the official text of a regulation in the VAC on each Chapter Information page of the Town Hall website. Below is the format of a VAC citation:

EXAMPLE:

18 VAC 120-11-10

18	Title Number: There are 24 titles in the Virginia Administrative Code. For example, Title 18 contains regulations pertaining to Professional and Occupational Licensing.
VAC	Abbreviation for Virginia Administrative Code.
120	Agency/Board Number: There are more than 100 boards in Virginia. For example, Agency 120 of Title 18 contains regulations of the Department and Director-regulated programs (i.e., Boxing, Martial Arts & Professional Wrestling; Polygraph Examiners; NG Auto Mechanics).
11	Chapter Number: There are more than 1,000 chapters in the Virginia Administrative Code. Each chapter contains one regulation. For example, Chapter 11 under Title 18, Agency 120 contains a regulation about the Public Participation Guidelines (PPGs) applicable to all DPOR programs.
10	Section Number: Each regulation is divided into parts (e.g., definitions, purpose, and scope). For example, Section 10 of this citation is about the purpose of PPGs to promote public involvement.

What is the Virginia Administrative Process Act (APA)?

The Virginia Administrative Process Act (APA) provides the basic framework for rulemaking in Virginia. Article 2 of the APA, in particular, sets out the stages of the regulatory process, including notice and comment; requires agencies to implement guidelines on how the public can be involved in the rulemaking process; and outlines procedures for executive branch review of regulations.

What is executive branch review?

Before a stage of a regulatory action becomes available for public comment, it often undergoes review by the Office of Attorney General, the Department of Planning and Budget, the subject matter area Cabinet Secretary, and the Governor. Executive branch review includes certifying that the regulation is consistent with statutory authority and assessing its economic costs and benefits. As an accountability measure, the oversight phase helps ensure regulations are clearly written and easily understandable to the regulated community and the public; essential to protect public health, safety, and welfare; and the least burdensome and intrusive regulation possible.

What is an economic impact analysis (EIA)?

An economic impact analysis (EIA) is prepared by the Department of Planning and Budget (DPB). An EIA summarizes the costs and benefits that are expected to result from the implementation of the regulatory language. The analysis includes an evaluation of any unintended consequences the new rule may have and assessment of any less intrusive and more cost effective alternatives. The EIA must also include information on the number and types of entities affected by a regulatory action, and estimates on the effects the regulation may have on particular localities, on employment, and on the use and value of private property. DPB must complete its economic analysis within 45 days from the date of a regulatory action's submission. EIAs can be found on the Stage Information page for each proposed regulatory action.

What are guidance documents?

Guidance documents are developed by state agencies and boards to provide general information to agency staff or the public on how to implement or interpret state law or agency regulations. Guidance documents are often helpful in understanding how agencies apply and enforce regulations. Links to guidance document lists can be found on Board and Chapter Information pages.

What is the Virginia Register of Regulations?

The *Virginia Register of Regulations* is the official publication of legal record in Virginia for regulatory actions. Citations to the *Register* are available on each Stage Information page of the Town Hall.

Standard regulatory process: Basic outline

Notice of Intended Regulatory Action (NOIRA)

Agency submits NOIRA for executive branch review.

Agency is authorized by Governor to submit NOIRA for publication.

NOIRA is published in *The Virginia Register of Regulations*.

Submit your comment during the 30-day public comment period.

Proposed regulation

Agency considers public comment and submits proposed regulation.

Governor approves proposed regulation.

Proposed regulation is published in the *Register* and notification is sent to all registered Town Hall users.

Submit your comment during the 60-day public comment period.

Final regulation

Agency/board considers public comment and adopts final regulation.

Governor approves final regulation.

Final regulation is published in the *Register* and email notification sent to registered public Town Hall users.

30-day final adoption period begins

Regulation becomes effective
(unless it is suspended or 25+ people request an additional public comment period).

A regulatory stage is announced as follows:

An automatic email notification is sent to registered Town Hall users.

Ten days later, a regulatory stage is published in *The Virginia Register of Regulations*, the official publication of legal record for regulations in Virginia.

When the stage is published in the *Register*, a public comment forum opens on the Town Hall and remains open through the end of the public comment period.

Source: Sections 2.2-4006 through 2.2-4017 of the Code of Virginia (Article 2 of the Administrative Process Act)


For more information,
visit the
Virginia Regulatory Town Hall
at
townhall.virginia.gov

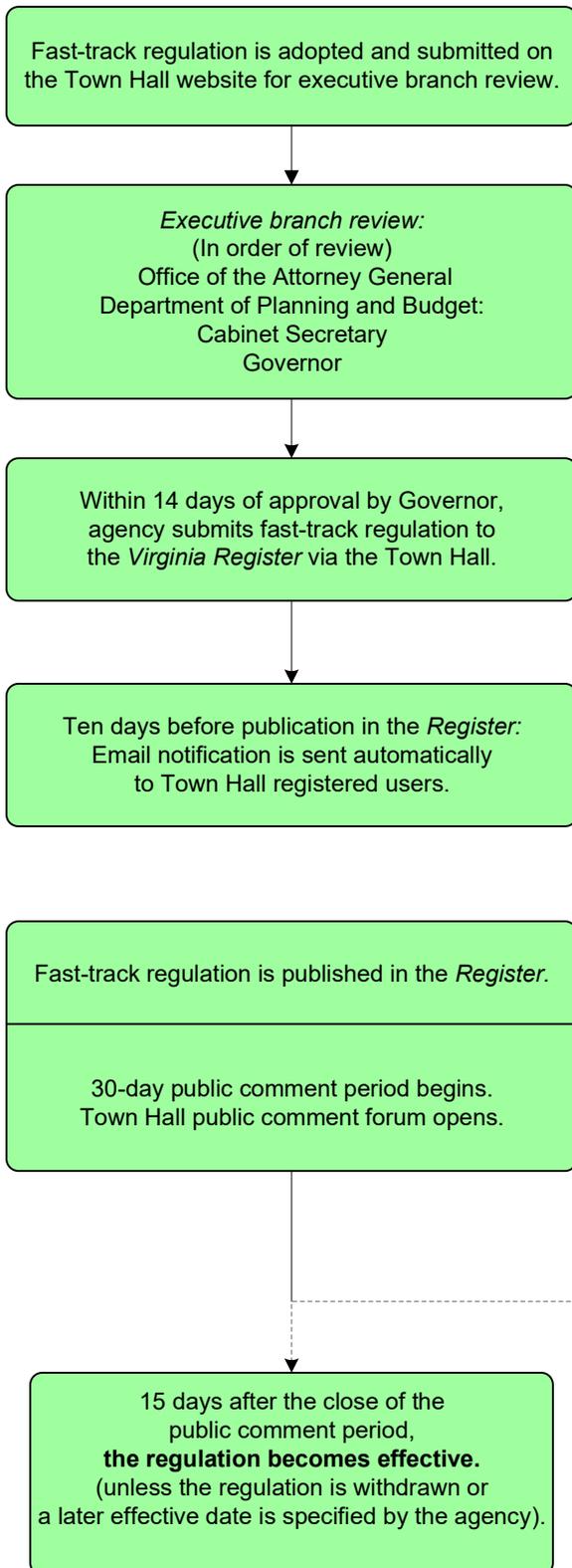


How a regulation is fast-tracked:

Fast-track regulations

The fast-track process is for proposed regulations that are expected to be noncontroversial. Whether a proposed regulation is noncontroversial is determined by the process detailed on this page.

Source: Section 2.2-4012.1 of the Code of Virginia



*For more information,
visit the award-winning
Virginia Regulatory Town Hall
@
townhall.virginia.gov*



Emergency regulation

An emergency regulation is:

--Promulgated if there is an "emergency situation" or legislation states that a regulation must be promulgated within 280 days.

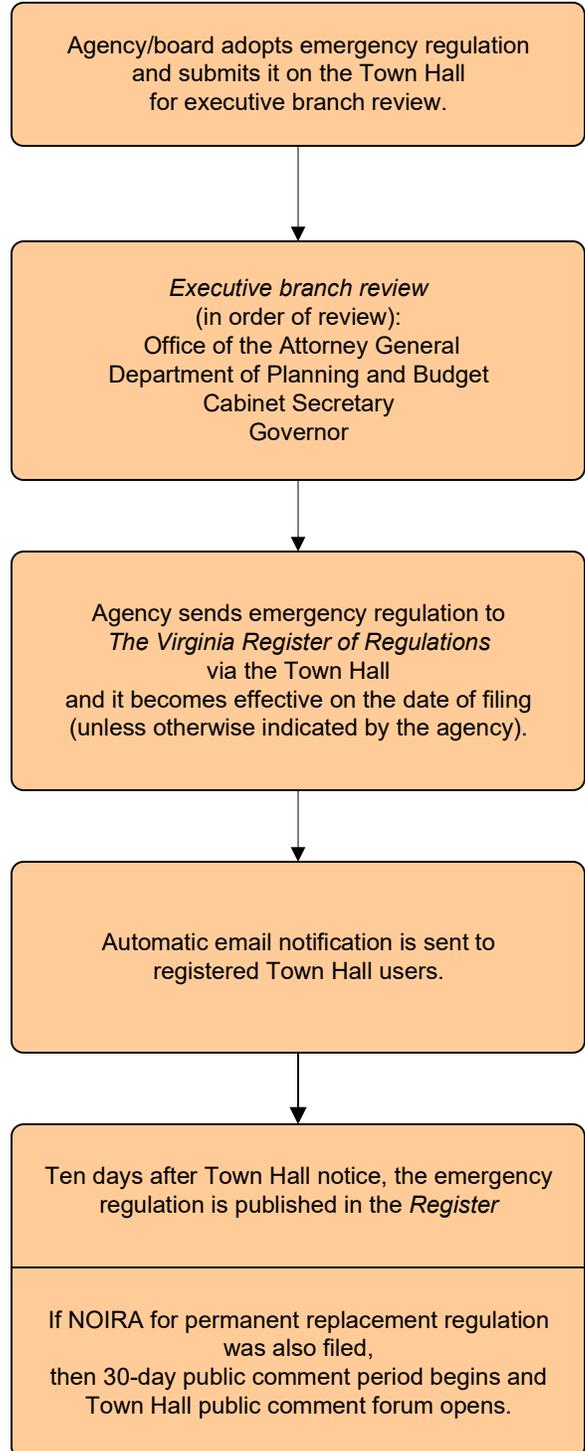
--Effective upon filing with the *Registrar of Regulations*.

--Effective for up to 18 months, and this period may be extended up to 6 months if the Governor approves.

--Usually replaced with a permanent regulation; if so, a Notice of Intended Regulatory Action (NOIRA) to promulgate the permanent replacement regulation must be filed at the same time as the emergency regulation.

Source: Section 2.2-4011 of the Code of Virginia

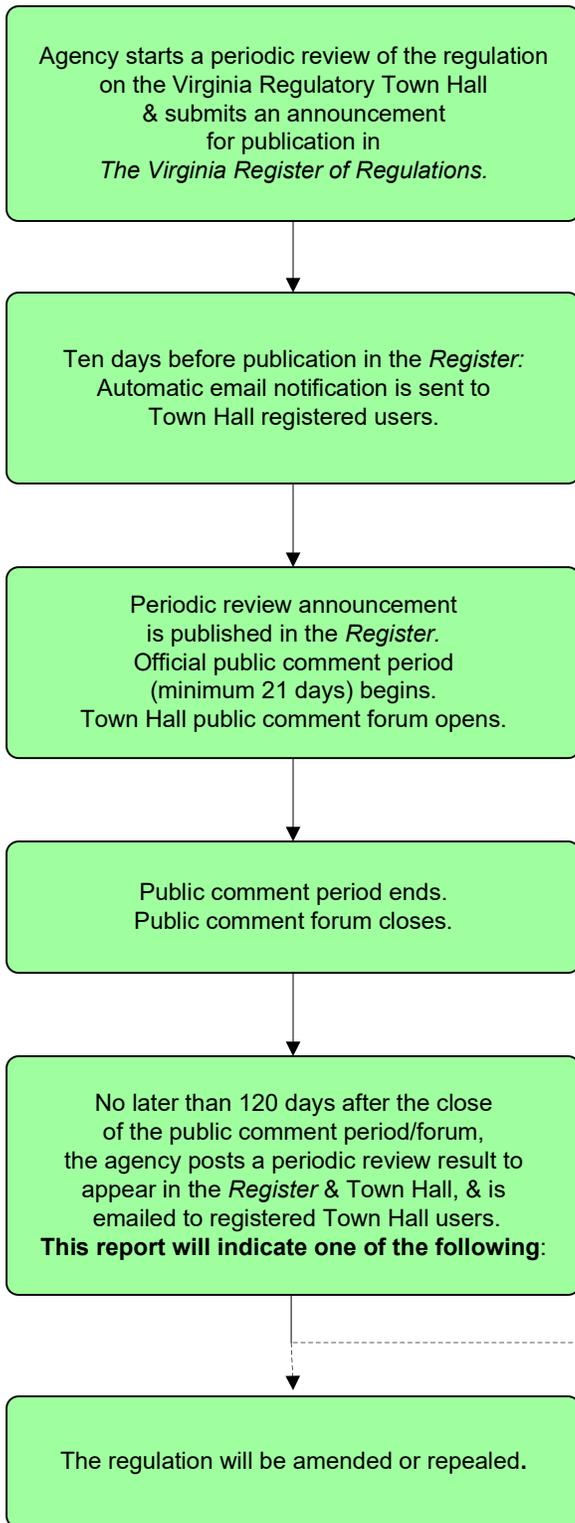
How it is promulgated:




For more information,
visit the
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at
townhall.virginia.gov



How does the periodic review feature on Town Hall work?

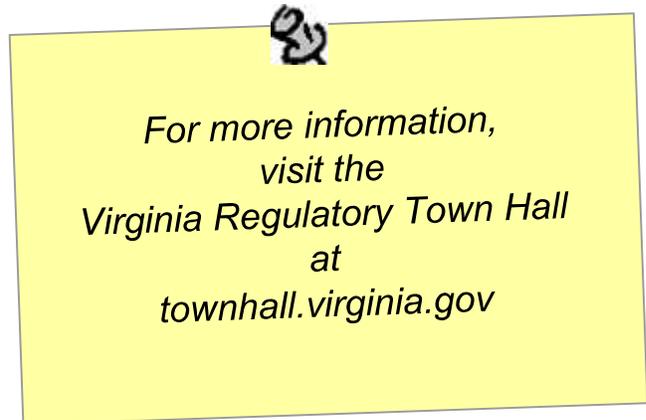


Periodic review of regulations using Feature on Town Hall

Every state regulation must be reviewed **every four years** to:

- (1) ensure it is supported by statutory authority (as determined by the Office of the Attorney General),
- (2) determine that the regulation is (a) necessary for the protection of public health, safety and welfare and (b) clearly written and easily understandable, and to
- (3) make sure its economic impact on small businesses is minimized as much as possible.

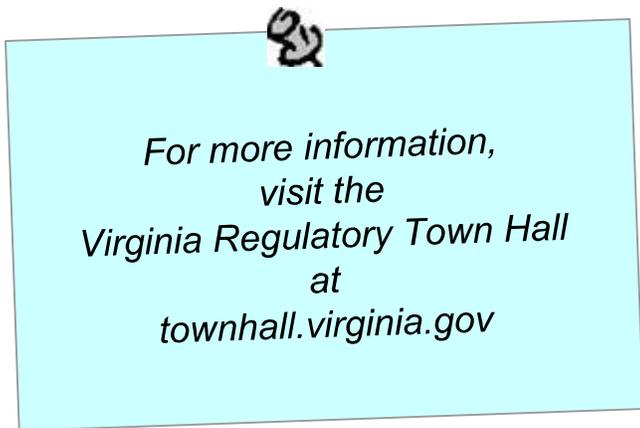
Sources: Sections 2.2-4017 and 2-2-4007.1 of the Code of Virginia and Executive Order 14 (as amended July 16, 2018)



How to ask an agency to change a regulation or create a new one

This is how you can request an agency/board to develop a new regulation or amend an existing regulation.

Source: Section 2.2-4007 of the Code of Virginia



For more information,
visit the
Virginia Regulatory Town Hall
at
townhall.virginia.gov

What you need to do and what will happen:

Tell the agency in a written communication the following:

The substance and purpose of the rulemaking that is requested and, if an existing regulation, include the citation to the Virginia Administrative Code, e.g., 1 VAC 2-30).

The legal authority of the agency/board to take the action requested, e.g., Code of Virginia § 12.3-45, i.e., the language that says a board or agency can or must promulgate regulations.

Mention, "Code of Virginia Section 2.2-4007" and "petition for new or amended regulation" to signal the agency on how to handle your request.

Within 14 days of receiving your request, the agency must send a notice with your name, the nature of your request, and its plan for handling your request to the *Virginia Register*.

The notice appears on Town Hall & email notification is sent to Town Hall registered users.

Notice is published in the *Register*.
Town Hall public comment forum opens for 21 days to receive comment on your petition.

Public comment period/forum closes.

Within 90 days (under most circumstances), the agency issues a written decision granting or denying your request.

The agency's decision must include its reasons for taking action or not taking action.

The agency's decision appears in the *Register* & on the Town Hall. Email notification is also sent to Town Hall registered users.

Note: Agency decisions regarding requests to change a rule are not subject to court review





Commonwealth of Virginia
Office of the Governor

Executive Order

NUMBER FOURTEEN (2018) (AMENDED)

DEVELOPMENT AND REVIEW OF STATE AGENCY REGULATIONS

Importance of the Initiative

By virtue of the authority vested in me as Governor under Article V of the Constitution of the Commonwealth of Virginia and under the laws of the Commonwealth, including, but not limited to, §§ 2.2-4013 and 2.2-4017 of the *Code of Virginia*, and subject to my continuing and ultimate authority and responsibility to act in such matters, I hereby establish policies and procedures for the review of all new regulations and changes to existing regulations proposed by state agencies, which shall include all agencies, boards, commissions, and other entities of the Commonwealth within the executive branch authorized to promulgate regulations. Nothing in this Executive Order shall be construed to limit my authority under the *Code of Virginia*, including to require an additional 30-day public comment period, file a formal objection to a regulation, suspend the effective date of a regulation with the concurrence of the applicable body of the General Assembly, or to exercise any other rights and prerogatives existing under Virginia law.

Definitions

The following acronyms and definitions are set out for ease of use and represent only a summary of terms and acronyms related to the regulatory review process. More detailed descriptions and definitions appear in the Administrative Process Act (APA), § 2.2-4000, *et seq.* of the *Code of Virginia*.

“Agency Background Document” (ABD) refers to a form completed by agencies and uploaded on the Virginia Regulatory Town Hall website for each regulatory stage in order to describe and explain the regulatory action. The form for each stage is available on the Town Hall.

“Administrative Process Act” (APA) refers to § 2.2-4000, *et seq.* of the *Code of Virginia*, which contains provisions setting forth the process for promulgating regulations in Virginia.

“Day” means a calendar day.

“Virginia Department of Planning and Budget” (DPB) refers to the state entity that reviews regulatory proposals for economic and policy impact and manages the Virginia Regulatory Town Hall website.

“Economic Impact Analysis” (EIA) refers to a report prepared by DPB that evaluates the estimated costs and benefits of a regulatory proposal.

“Emergency rulemaking process” refers to the process used (1) when there is an emergency situation as determined by the agency and affirmed by the Governor that an emergency regulation is necessary, or (2) when a Virginia statutory law, Acts of Assembly (such as the appropriation act), federal law, or federal regulation requires that a state regulation be effective in 280 days or fewer from its enactment.

“Executive Branch Review” refers to the review of a regulatory proposal at various stages by the executive branch before the regulatory proposal is published in the *Virginia Register of Regulations* and is available for public comment.

“Exempt rulemaking process” refers to the process by which agency actions exempt from the promulgation requirements of Article 2 of the APA can be adopted and filed directly with the Office of the Registrar of Regulations (Registrar) and are not subject to Executive Branch Review outlined in this executive order. Agencies should consult with their respective cabinet secretary prior to promulgating a regulation under the exempt process.

“Fast-track rulemaking process” refers to the process utilized for rules that are expected to be noncontroversial.

“Mandate” refers to a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.

“Notice of Intended Regulatory Action” (NOIRA) refers to the first stage in the standard rulemaking process under Article 2 of the APA.

“Office of the Attorney General” (OAG) refers to the state agency headed by the Attorney General. The OAG reviews regulatory proposals at the emergency stage, the fast-track stage, and the proposed stage. In addition, the OAG must review a proposal at the final stage if changes with substantial impact, as determined by either the promulgating agency or DPB, have been made since the proposed stage.

“The *Virginia Register of Regulations*” (*Register*) refers to an official legal publication that provides information about proposed and final changes to Virginia’s regulations.

“Rulemaking or regulatory process” refers to the four types of rulemaking processes in Virginia: (1) emergency, (2) fast-track, (3) standard, and (4) exempt.

“Standard rulemaking process” refers to the default rulemaking process in Virginia. If a regulatory proposal does not meet the criteria for exempt, fast-track, or emergency rulemaking, it goes through the standard rulemaking process, generally consisting of three stages: NOIRA, proposed, and final.

“The Virginia Regulatory Town Hall website” (Town Hall) refers to the website managed by DPB and used by agencies to post regulatory proposals and to facilitate the regulatory review process.

“*Virginia Administrative Code*” (VAC) refers to Virginia’s official legal publication for regulations.

Policy and Principles

The executive branch agencies of the Commonwealth must consider, review, and promulgate numerous regulations each year. This Executive Order sets out procedures and requirements to ensure the efficiency and quality of Virginia’s regulatory process. All state employees who draft, provide policy analysis for, or review regulations shall carefully consider and apply the principles outlined below during the regulatory development and review process.

General

- A. All regulatory activity should be undertaken with the least possible intrusion into the lives of the citizens of the Commonwealth and be necessary to protect the public health, safety, and welfare. Accordingly, agencies shall consider:
 - 1. The use of user fees or permits;
 - 2. The use of information disclosure requirements, rather than regulatory mandates, so that the public can make more informed choices;
 - 3. The use of performance standards in place of required techniques or behavior; and
 - 4. The consideration of reasonably available alternatives in lieu of regulation.
- B. Where applicable, and to the extent permitted by law, it shall be the policy of the Commonwealth that only regulations necessary to interpret the law or to protect the public health, safety, or welfare shall be promulgated. These principles shall be considered when an agency performs its periodic review of regulations pursuant to § 2.2-4017 and this Executive Order.
- C. Regulations shall be clearly written and easily understandable.
- D. Regulations shall be designed to achieve their intended objective in the most efficient, cost effective manner.

Regulatory Development

- A. Regulatory development shall be based on the best reasonably available and reliable scientific, economic, and other information concerning the need for, and consequences of, the intended regulation. Agencies shall specifically cite the best reasonably available and reliable scientific, economic, or statistical data as well as any other information in support of regulatory proposals.
- B. Regulatory development shall be conducted in accordance with the statutory provisions related to impact on small businesses. DPB shall work with state agencies to address these requirements during the regulatory review process, including notifications, as appropriate, to the Joint Commission on Administrative Rules.
- C. During regulatory development, agencies shall consider the impact on existing and potential Virginia employers and their ability to maintain and increase the number of jobs in the Commonwealth, as well as the cost of compliance to the general public.

Public Participation

- A. Agencies shall actively seek input for proposed regulations from interested parties, stakeholders, citizens, and members of the General Assembly.
- B. In addition to requirements established in Article 2 of the APA, agencies shall post all rulemaking actions on Town Hall to ensure that the public is adequately informed of rulemaking activities.
- C. All legal requirements and guidelines related to public participation shall be strictly followed to ensure that citizens have reasonable access and opportunity to present comments and concerns. Agencies shall inform interested persons of (1) Town Hall's email notification service that can send information regarding specific regulations, regulatory actions, and meetings about which citizens are interested, and (2) the process to submit comments in Town Hall public comment forums. Agencies shall establish procedures that provide for a timely written response to all comments and the inclusion of suggested changes that would improve the quality of the regulation.

Other

- A. Agencies, as well as reviewing entities, shall perform their tasks in the regulatory process as expeditiously as possible and shall adhere to the timeframes set out in this Executive Order.
- B. Regulations are subject to periodic evaluation, review, and modification, as appropriate, in accordance with the APA, policy initiatives of the Governor, and legislation.

- C. Each agency head will be held accountable for ensuring that the policies and objectives specified in this Executive Order are followed. Agency heads shall ensure that information requested by DPB, a Cabinet Secretary, or the Office of the Governor, in connection with this Executive Order, is provided on a timely basis. Incomplete regulatory packages may be returned to the appropriate agency by DPB.

Applicability

The review process in this Executive Order applies to rulemakings initiated by agencies of the Commonwealth of Virginia in accordance with Article 2 of the APA.

With the exception of the requirements governing the periodic review of existing regulations, the posting of meeting agenda and minutes, and the posting of guidance documents, agencies and agency regulatory action exempt from Article 2 of the APA are not subject to the requirements of this Executive Order. Nonetheless, the Governor, a Cabinet Secretary, or the Chief of Staff to the Governor may request in writing that an agency comply with all or part of the requirements of this Executive Order for regulations exempt from Article 2 of the APA. Copies of such requests shall be forwarded to the Governor's Policy Office and DPB. In addition, a Cabinet Secretary may request in writing that certain Article 2 exempt regulations be further exempted from all or part of the requirements of this Executive Order.

These procedures shall apply in addition to those already specified in the APA, the agencies' public participation guidelines, and the agencies' basic authorizing statutes. As of July 16, 2018, these procedures shall apply to all regulatory actions and stages that have been submitted to DPB for any stage of Executive Branch Review.

Any failure to comply with the requirements set forth herein shall in no way affect the validity of a regulation, create any cause of action or provide standing for any person under Article 5 of the APA (§ 2.2-4025 *et seq.* of the *Code of Virginia*), or otherwise challenge the actions of a government entity responsible for adopting or reviewing regulations.

Regulatory Review Process

Regulations shall be subject to Executive Branch Review as specified herein. All agency regulatory packages shall be submitted via Town Hall. For each stage of the regulatory development process, agencies shall complete and post the applicable ABD on Town Hall to describe the regulatory action and inform the public about the substance and reasons for the rulemaking. Agencies shall ensure that the correct regulatory text is synchronized with the appropriate stage information page on Town Hall.

If a regulatory package is submitted to DPB, and DPB determines that the package is not substantially complete, then DPB shall notify the agency within 10 days. At that time, the agency must withdraw the package from Town Hall and resubmit the package after all missing elements identified by DPB have been added. Agencies shall submit regulatory packages to the Registrar for publication on Town Hall within 14 days of being authorized to do so.

In rulemakings where there are two or more stages, the filing of each stage shall be submitted on Town Hall as expeditiously as the subject matter allows and no later than 180 days after the conclusion of the public comment period for the prior stage.

A. Standard Rulemaking Process

1. NOIRA Stage

The NOIRA shall include the nature and scope of the regulatory changes being considered and the relevant sections of the VAC. This package shall include draft regulatory text if it is available.

DPB shall review the NOIRA to determine whether it complies with all requirements of this Executive Order and applicable statutes, and whether the contemplated regulatory action comports with the policy of the Commonwealth as set forth herein. Within 14 days of receiving a complete NOIRA review package from the agency, the Director of DPB or his designee shall advise the appropriate Cabinet Secretary and the Governor of DPB's determination.

If the Director of DPB or his designee advises the appropriate Cabinet Secretary and the Governor that the NOIRA presents issues requiring further review, the NOIRA shall be forwarded to the Cabinet Secretary. The Cabinet Secretary shall review the NOIRA within 14 days and forward a recommendation to the Governor. If DPB does not find issues requiring further review, the agency shall be authorized to submit the NOIRA to the *Register* for publication after the Governor approves the NOIRA.

The Chief of Staff to the Governor or his designee is hereby authorized to approve or disapprove NOIRAs on behalf of the Governor.

Public comments received following publication of the NOIRA should be encouraged and carefully considered in developing the proposed stage of a regulatory proposal.

2. Proposed Stage

Following the initial public comment period required by § 2.2-4007.01 of the *Code of Virginia*, and taking into account the comments received, the agency shall prepare a regulatory review package.

At this stage, the proposed regulation and regulatory review package shall be in as close to final form as possible, including completed review by all appropriate regulatory advisory panels or negotiated rulemaking panels. New issues that were not disclosed to the public when the NOIRA was published shall not be addressed at the proposed stage.

The order of Executive Branch Review shall be as follows:

- a. OAG. The OAG will conduct a review of the proposed regulation and produce a memorandum assessing the agency’s legal authority to promulgate the regulation and determining whether the content of the proposed regulation conflicts with existing law. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the proposed regulation. After the OAG has completed its review, the package will be submitted to DPB.
- b. DPB. DPB shall review the proposed regulatory package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. Consistent with § 2.2-4007.04 of the *Code of Virginia*, within 45 days of receiving a complete regulatory review package, the Director of DPB or his designee shall prepare a policy analysis and EIA, and advise the appropriate Cabinet Secretary and the Governor of the results of the review.
- c. Cabinet Secretary. The Cabinet Secretary shall review the proposed regulation package within 14 days and forward a recommendation to the Governor.
- d. Governor. The Chief of Staff to the Governor or his designee is hereby authorized to approve or disapprove proposed regulations on behalf of the Governor.

3. **Revised Proposed Stage (Optional)**

Following the public comment period of the proposed stage, required by § 2.2-4007.03 of the *Code of Virginia*, the agency may wish to make additional changes and/or receive additional public comment by publishing a revised proposed regulation (as allowed by § 2.2-4007.03 of the *Code of Virginia*). The order of Executive Branch Review for the revised proposed stage shall be the same as for the Proposed Stage, with the exception that DPB will perform its duties within 21 days.

4. **Final Stage**

Following the approval of the proposed regulation package or the revised proposed regulation package, and taking into account all comments received during the prior stage, the rulemaking entity shall revise the proposed regulation.

If any change with substantial impact—as determined by DPB—has been made to the regulatory text between the proposed and final stages, the agency shall obtain a letter from the OAG certifying that the agency has authority to make the additional changes.

The order of Executive Branch Review shall be as follows:

- a. DPB. DPB shall review the final stage package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. In particular, DPB shall assess the effect of any substantive changes made since the publication of the proposed regulation and the responsiveness of the agency to public comment. Within 21 days of receiving a complete final regulation package from the agency, the Director of DPB or his designee shall prepare a policy analysis advising the appropriate Cabinet Secretary and the Governor of the results of the review.
- b. Cabinet Secretary. The Cabinet Secretary shall review the final stage regulation package within 14 days and forward a recommendation to the Governor.
- c. Governor. The Chief of Staff to the Governor or his designee is hereby authorized to approve or disapprove proposed final regulations on behalf of the Governor.

B. Fast-Track Rulemaking Process

The fast-track rulemaking process is for rules that are expected to be noncontroversial.

DPB shall review the fast-track regulation to determine whether it complies with all other requirements of this Executive Order and applicable statutes, and whether the contemplated regulatory action comports with the policies of the Commonwealth as set forth herein. DPB shall request the Governor's Office to determine if the fast-track process is appropriate when there is any question as to whether a package should be allowed to proceed in this manner. The Governor or his designee retains sole discretion to disapprove use of the fast-track rulemaking process when the Governor or his designee determines it is not in the public interest.

After a fast-track regulation has been submitted on Town Hall, Executive Branch Review will proceed as follows:

1. OAG. The OAG will conduct a review of the proposed fast-track regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation and determining that the content of the proposed regulation does not conflict with existing law. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the fast-track regulation. After the OAG has completed its review, the package will be submitted to DPB.
2. DPB. DPB shall determine within 10 days or less whether the regulatory package is appropriate for the fast-track rulemaking process and communicate

this decision to the agency. After a package has been determined to be appropriate for the fast-track process, the Director of DPB or his designee shall have 30 days to prepare a policy analysis and EIA, and advise the appropriate Cabinet Secretary and the Governor of the results of the review.

3. Cabinet Secretary. The Cabinet Secretary shall review the fast-track regulation package within 14 days and forward a recommendation to the Governor.
4. Governor. The Chief of Staff to the Governor or his designee is hereby authorized to approve or disapprove fast-track regulations on behalf of the Governor.

C. Emergency Rulemaking Process

Emergency regulations may be promulgated by an agency if it determines there is an emergency situation, consults with the OAG, and obtains the approval of the Governor or his designee. Emergency regulations may also be promulgated where Virginia statutory law, an Act of Assembly such as the appropriation act, federal law, or federal regulation requires that a state regulation be effective in 280 days or fewer from its enactment and the regulation is not exempt from the APA.

If the agency plans to replace the emergency regulation with a permanent regulation, it should file an Emergency/NOIRA stage. The order of Executive Branch Review shall be as follows:

1. OAG. The OAG will conduct a review of the proposed emergency regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation and determining that the content of the proposed regulation does not conflict with existing law. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the proposed emergency regulation. After the OAG has completed its review, the package will be submitted to DPB.
2. DPB. DPB shall review the proposed emergency regulatory package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. Within 14 days of receiving a complete emergency regulation package from the agency, the Director of DPB or his designee shall prepare a policy analysis, and advise the appropriate Secretary and the Governor of the results of the review.
3. Cabinet Secretary. The Cabinet Secretary shall review the proposed emergency regulation package within 10 days and forward a recommendation to the Governor.
4. Governor. The Chief of Staff to the Governor or his designee is hereby authorized to approve or disapprove emergency regulations on behalf of the

Governor.

An emergency regulation shall be effective for up to 18 months and may be extended for up to an additional six months if, despite the rulemaking entity's best efforts, a permanent replacement regulation cannot become effective before the emergency regulation expires. If an agency wishes to extend an emergency regulation beyond its initial effective period, the agency shall submit an emergency extension request to the Governor's Office via Town Hall as soon as the need for the extension is known, but no later than 30 days before the emergency regulation is set to expire. The emergency extension request must be granted prior to the expiration date of the emergency regulation, pursuant to § 2.2-4011(D) of the *Code of Virginia*.

D. Periodic Review of Existing Regulations

Existing state regulations shall be reviewed every four years to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law, as regarding § 2.2-4007.1 of the *Code of Virginia*.

The regulatory review shall include: (1) the continued need for the rule; (2) the nature and complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Prior to commencement of the periodic regulatory review, the agency shall publish a notice of the review in the *Register* and post the notice on Town Hall. The agency shall provide a minimum of 21 days for public comment after publication of the notice. No later than 120 days after close of the public comment period, the agency shall publish a report of the findings of the regulatory review in the *Register* and post the report on Town Hall.

The periodic review shall include (1) a review by the Attorney General or his designee to ensure statutory authority for regulations, and (2) a determination by the Governor or his designee, whether the regulations are (a) necessary for the protection of public health, safety and welfare and (b) clearly written and easily understandable.

The periodic review must be conducted on Town Hall and may be accomplished either during the course of a comprehensive regulatory action using the standard rulemaking process, or by using the periodic review feature as follows:

1. If during the course of a comprehensive rulemaking, using the standard regulatory process, the agency plans to undertake a standard regulatory action, then the agency can fulfill the periodic review requirement by including a notice of a periodic review in the NOIRA. When the proposed stage is submitted for Executive Branch Review, the ABD shall include the result of

the periodic review. When a regulation has undergone a comprehensive review as part of a regulatory action and when the agency has solicited public comment on the regulation, a periodic review shall not be required until four years after the effective date of the regulatory action.

2. Using the periodic review feature. If, at the time of the periodic review, the agency has no plans to begin a comprehensive rulemaking using the standard rulemaking process, then the agency shall use the periodic review feature to announce and report the result of a periodic review using the appropriate Town Hall form. If the result of the periodic review is to amend or repeal the regulation, the agency shall link the periodic review with the subsequent action to amend or repeal the regulation.

Electronic Availability of Petitions and Documents

Agencies shall post petitions for rulemaking and decisions to grant or deny the petitions on Town Hall, in accordance with the timeframes established in § 2.2-4007 of the *Code of Virginia*.

Executive branch agencies shall post the notice of, and agenda for, a public regulatory meeting on Town Hall at least seven days prior to the date of the meeting, except if it is necessary to hold an emergency meeting in which case the agenda shall be posted as soon as possible.

In addition, agencies that promulgate regulations and keep minutes of regulatory meetings shall post such minutes of those meetings on Town Hall in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the *Code of Virginia*.

Agencies shall post all guidance documents or a link to each agency guidance document, as defined by § 2.2-4101 of the *Code of Virginia* on Town Hall. Any changes to a guidance document or a guidance document link shall be reflected on Town Hall within 10 days of the change.

Effective Date of the Executive Order

This Executive Order amends Executive Order No. 14 (2018) issued by Governor Ralph S. Northam and rescinds Executive Order No. 58 (1999) issued by Governor James S. Gilmore, III. This Executive Order shall become effective on July 16, 2018, and shall remain in full force and effect until June 30, 2022, unless amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia on this 16th day of July, 2018.



Handwritten signature of Ralph S. Northam in black ink.

Ralph S. Northam, Governor

Attest:

Handwritten signature of Kelly Thomasson in black ink.

Kelly Thomasson, Secretary of Commonwealth

Application IFFs

Applications that are complete and satisfy the legal prerequisites for licensure or certification may, in most instances, be approved by the board's licensing section staff. Final determinations about applications that appear not to meet the board's entry requirements—for reasons such as disclosure of prior criminal convictions or other disciplinary action, or failure to satisfy experience, education, or financial standards—must be made by the full Board, however, because a decision not to approve an application or otherwise deny licensure cannot be delegated to staff.

Therefore, deficient applications are referred for an Informal Fact-Finding (IFF) conference to provide the applicant an opportunity to offer additional information to assist the Board in making its determination. (Only if the applicant wishes to pursue the matter; upon notification of the process, some applicants do not choose to move forward and instead withdraw their applications.) The Board's licensing section prepares a **Referral Memorandum** outlining the issues to be considered at the IFF.

Post-Adjudication and Licensing (PAL) staff prepares and sends a Notice of the IFF, alerting the applicant of the right to appear before the Presiding Officer in support of the application. At the IFF, staff presents information from the application file—only those issues referenced in the Referral Memorandum can be considered—to the Presiding Officer (who may be a Board member), and a court reporter transcribes the entire proceeding. The applicant and any witnesses may offer additional evidence to the Presiding Officer during the IFF. In addition, if the Presiding Officer determines additional information is needed, the record may be left open for the applicant to provide the information, or an additional IFF may be convened.

A summary is written, based solely on the information in the Agency Record, and a recommendation is made whether or not to approve the application. Staff members assist the Presiding Officer with preparation of the **Summary & Recommendation**, which is presented to the full Board for a final decision at its next meeting.

The Board reviews the **Agency Record**—which includes the application file, Referral Memorandum, exhibits, transcript, and Summary & Recommendation—prior to making its case decision, and is limited to considering only the information contained in the Agency Record. The Board can **approve** the application, **deny** the application, enter into an **Agreement for Licensure** (approval conditioned on specific terms), or **reconvene the IFF** to gather additional information (with concurrence from the applicant).

Examinations Overview

Examinations—along with appropriate education and experience—are used to assure the public that an individual possesses the minimum competence required to practice a profession at the entry level. The Examinations section provides centralized services for all regulatory programs that require applicants to pass a test as a prerequisite to licensure or certification.

Once approved to sit for a test, the Examinations section works with the candidate until the test is successfully passed or the candidate makes no further attempts. Responsible for the testing of approximately 50,000 individuals per year, the Examinations section supports the agency in the following areas:

- Development and administration of in-house examinations;
- Oversight of development and administration of contracted and national exams;
- Managing all contracted exam services and evaluating vendor performance;
- Conducting examination workshops with contracted vendors;
- Communicating with exam candidates, including development of Candidate Information Bulletins;
- Reviewing Americans with Disabilities Act (ADA) accommodation requests;
- Scheduling examinations and providing candidates with individual test results;
- Maintaining exam security and investigating violations or cheating incidents;
- Scoring exams and posting results on the Department's automated system;
- Developing diagnostic reports for failing candidates and rescheduling new testing;
- Answering inquiries about examinations and resolving complaints; and
- Providing statistical data to the Department, Boards, and others.

All licensing examinations must measure entry-level knowledge and skills, and be developed with the ultimate goal of discriminating between *minimally* competent and incompetent candidates in order to protect the public's health, safety, and welfare. Tests must be administered in a standardized manner to maintain security, and all aspects of the program should be documented to justify how:

- The content of the examination is designed;
- Items are developed, reviewed, and edited;
- Examination forms are assembled ;
- Candidates register and schedule;

- The examination is administered;
- The test is analyzed, scored, and reported; and
- Security is maintained.

All licensing examinations must be fair, valid, reliable, and defensible. Whether the examination used is developed in-house, by a national organization, or contracted out to a test developer, the Department is ultimately responsible for ensuring the administration of a *fair, valid, reliable, and defensible* examination.

EXAMINATION DEVELOPMENT

All exams must be reviewed to ensure the testing reflects the knowledge and skills necessary for current, competent performance *in Virginia* from the perspective of public protection. In order for a test to measure the competency of a candidate, it must be both **valid** and **reliable**.

Test Validity

Validity refers to how well a test measures what it is supposed to measure. For professional regulation, an exam is considered valid if it accurately measures competencies for safe and effective entry-level performance. This standard is met by establishing a link between the questions on the examination and the tasks essential to public protection that are actually performed on the job. This linkage is initially established through ***a job or task analysis***.

This criterion is satisfied by establishing a passing score that defines the minimum level of competence in terms of examination performance for public protection, which is normally accomplished with a cut-score study. A cut-score study consists of a panel of SMEs who review each exam item, or an "item bank" of questions, and estimate the percentage of competent candidates who will answer each question correctly. When the proportions established by the panel are summed across all questions, the result is a recommended minimum cut-score or passing score.

The use of the cut-score study and statistical methods of computing the cut-score (such as the Angoff method) separates criterion-referenced examinations from norm-referenced examinations. All licensing examinations used by the Department are criterion-referenced, which set minimum competency based on how the individual candidate performs. The agency, its appointed representative, or SME committee will be asked to approve the cut-score derived from a cut-score study.

Test Reliability

Reliability refers to how well a test produces stable and consistent results. An examination is said to be reliable, or to generate reliable scores, if it consistently passes candidates who can demonstrate the knowledge, skills, and abilities needed to perform

the job competently. (Alternatively, a reliable exam should consistently fail candidates who cannot demonstrate such knowledge, skills, and abilities.)

Reliability is necessary for an exam, but it also must be valid. For example, a scale that is off by five pounds will read your weight every day with an excess of five pounds.

The scale is *reliable* in that it consistently reports the same weight each day, but it is not valid because it adds five pounds to your actual weight and therefore is not a true measure of what you weigh.

Item Writing

After the job analysis is complete and the tasks required of minimally competent entry-level practitioners are determined, the test specifications are created. Test specifications outline the content of the examination and indicate the relative emphasis to be given to various content areas.

Test items are usually written at an item writing workshop at which a panel of SMEs meets to prepare and review actual questions to be used. The review aspect of this process is very important, and panel members receive specific guidance on item writing techniques. All items approved by the panel are placed in the item bank for future use in examinations.

During examination construction, the actual questions to be used on a particular form (version) of the exam are selected or pulled from the item bank and placed in the test form. Exam vendors typically use automated systems to store and retrieve items in a method to ensure each form is equivalent to the next in content and difficulty level.

Post-Examination Analysis

A statistical analysis of examination performance is typically completed after test administration. Performance values, or p-values, are calculated on each question to indicate the percentage of candidates who answered correctly. Items with low p-values are reviewed by the agency or other SMEs to determine a reason why the item did not perform well.

If the item is clearly written and otherwise valid and reliable, the item remains in the exam regardless of the p-value. If problems are discovered, the exam can be adjusted by dropping items from the test or multiple keying items as necessary.

Practical or "Hands-On" Performance Examinations

Several professions require the candidate to **demonstrate** skills in addition to passing a written (or theory) examination. Some practical examinations are administered by vendors and others by Board member practitioners themselves.

Practical examinations are more time-consuming and costly to administer than written examinations, as well as being more challenging to develop since they must be designed to be objective in an inherently subjective environment.

EXAMINATION ADMINISTRATION

In-House Exam Administration

Examinations section staff or professional proctors hired on a temporary basis conduct the exam at the Department or an off-site facility.

Contracted Exam Administration

Vendor administers, proctors, provides test site(s) for exam pursuant to contract terms.

Scoring

Exam scoring procedures vary depending on the profession. Most contracted examinations are scored by the vendor and then reported to the Department's automated system electronically, which then generates pass/fail letters to candidates. Some vendors have the capability of reporting scores to the candidate immediately while at the test site, while others send the pass/fail notices to candidates directly.

No vendor issues a license or certificate; only the Department issues credentials on behalf of the Boards.

Examination Security

Test security and integrity are maintained by the Examinations section for in-house examinations, and by the vendor for contracted examinations. When exam review by Board members or SMEs is required, specific content must never be divulged to potential candidates or to the general public. Exam workshop participants are required to sign a statement of non-disclosure.

The Department's Examination Site Conduct policy addresses disruptive and prohibited conduct (e.g., abusive behavior or cheating) by candidates during exam administration.

Candidate Information Bulletins

Candidate Information Bulletins (CIBs) provide information on general exam content, reference materials, fees, test dates, application deadlines, test sites, and scoring procedures.

CIBs are created by both the Examinations section and the contracted vendor.

Examination Fees

Board Regulations may include specific fee schedules or fees based on negotiated contracts with vendors. Exam fees cover administrative costs such as reviewing candidate applications, scheduling, examination development and production costs, scoring, and reporting.

Some exam fees are paid directly to the vendor to compensate fully for exam development and administration; other fees are paid directly to the Department. Fees are generally non-refundable, unless the candidate can document extenuating circumstances supporting a request for exam cancellation or postponement (depending on the profession).

In addition to exam fees, some professions also assess application fees to cover the cost of reviewing candidates' initial applications to determine exam eligibility.

ACCOMMODATING CANDIDATES WITH DISABILITIES

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) addresses accommodations related to testing for qualified individuals with disabilities. Candidates with disabilities must be offered examinations in an accessible place and manner. Qualified disabled candidates cannot be charged for special accommodations, special services, or alternate test formats. Examples of ADA accommodations include: qualified readers, sign-language interpreters, additional test-taking time, and Braille-format examinations.

The Department and its examination vendors are aware of the requirements of the ADA, which are addressed in Department Policy 100-02: Americans with Disabilities Act Compliance.

INTERNSHIP PROGRAM

The Examinations section coordinates the Department's Internship Program, which offers college and graduate-level students paid educational and work-related experience opportunities across all agency functions. (Interns may also receive academic credit, depending on their own educational institution's policies.)

Responsibilities include assisting other Department staff with preparing internship job descriptions, posting internship announcements, serving as the liaison between the agency and participating educational institutions, and coordinating the recruitment and interview process with Human Resources and internship supervisors.

Disciplinary Process

Disciplinary complaints are received by the **Complaint Analysis and Resolution (CAR)** section. CAR intake staff members docket and conduct an initial analysis of the complaint, which may include collecting additional information and giving the respondent (licensee) an opportunity to submit a written response to the allegations.

If the initial review determines DPOR has jurisdiction over the complaint and suggests probable cause exists to support a violation of the Board's regulations or statutes, the complaint is forwarded to the Investigations section or, when appropriate, to the **Alternative Dispute Resolution (ADR)** section. Otherwise, the complaint is closed.

The **Investigations** section collects information to support the alleged violations. Investigators obtain additional evidence, interview witnesses, perform site visits as needed, and draft a **Report of Findings**. If the investigation indicates a regulatory violation may have occurred, the agency attempts to resolve the complaint through ADR (mediation), compliance, or a Consent Order.

CAR Legal Analysts handle **Consent Orders**, which are voluntary settlement agreements between the respondent and the Board regarding the violation(s) and appropriate sanctions. If the complaint is not resolved through one of these methods, it is referred to the Adjudication section for an **Informal Fact-Finding (IFF) conference**, the due process administrative proceeding used to gather information Boards must use in determining disciplinary action.

The **Adjudication** section sends a **Notice of the IFF** to the respondent, alerting the licensee of the right to appear before the presiding officer—who may be a Board member, former Board member, or staff member—and respond to the complaint. At the IFF conference, Adjudication staff presents the Department's case to the presiding officer, and a court reporter transcribes the entire proceeding. The respondent, and any other appropriate witnesses, may present additional evidence to the presiding officer.

After the IFF conference, a Consent Order may still be offered; however, if a voluntary agreement is not reached, staff members assist the presiding officer in preparing a **Summary & Recommendation** for presentation to the Board at its next meeting. This document consists of the facts learned during the IFF conference and suggested sanctions for any regulatory violation(s) identified. When it meets, the full Board may accept, amend, or reject the IFF recommendation.

Prima Facie disciplinary cases are those in which the respondent waives the right to an IFF. These cases are presented to the Board with the investigative ***Report of Findings (ROF)*** and recommended sanctions, without the need for the administrative proceeding.

The Compliance & Investigations Division is also responsible for enforcing criminal laws under DPOR jurisdiction, such as practicing without a license and filing false or fraudulent license applications. After investigation, criminal matters are referred to local Commonwealth's Attorneys for further action; ultimately, however, the decision whether to pursue prosecution remains at the discretion of local officials.

Financial Overview

Regulatory Fees

The activities of the Department and its regulatory boards are funded almost entirely from licensing fees. The general powers and duties of the boards related to financing their programs are addressed in the *Code of Virginia*, § 54.1-201:

To levy and collect fees for certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the regulatory board and a proportionate share of the expenses of the Department of Professional and Occupational Regulation and the Board of Professional and Occupational Regulation.

In § 54.1-113, the *Code* addresses the board's responsibilities for setting fee amounts:

Following the close of any biennium, when the account for any regulatory board within the Department of Professional and Occupational Regulation or the Department of Health Professions maintained under § 54.1-308 or § 54.1-2505 shows expenses allocated to it for the past biennium to be more than ten percent greater or less than moneys collected on behalf of the board, it shall revise the fees levied by it for certification or licensure and renewal thereof so that the fees are sufficient but not excessive to cover expenses.

The Budget and Analysis section maintains a detailed accounting of each board's revenues and expenditures to support their duty to establish fees and maintain adequate revenues. The section also provides monthly reports to inform the board of its financial status.

After the close of each biennium, or more frequently if necessary, the section reviews the financial position of each board, prepares projections of expected revenues and expenditures for the next biennium, and makes recommendations concerning the need to adjust its fees. If fee adjustments are necessary, the Budget and Analysis section will prepare alternative fee structures for the board's consideration. The recommendations are designed to maintain the board's financial stability, as well as to comply with statutory requirements and the Department's procedures for establishing fees.

Fee changes must be proposed and published for public comment under the provisions of the Administrative Process Act (APA), similar to other regulations. Fees do not become effective until the processes and approvals required by the APA are completed, which generally takes a minimum of 18-36 months. For that reason, each regulatory board's current and projected financial position are monitored closely to plan for any upcoming need for fee adjustments, and recommendations for fee adjustments are

presented to the board to ensure adequate time to complete required processes and maintain financial stability.

Budgets

Licensing fees are established at amounts that provide sufficient revenue to pay the operating expenses of each board and the Department. Amounts collected from fees are designated as non-general fund revenues, which means they are collected for a specific purpose (professional and occupational licensure), and must be expended for that purpose. The Department receives no general fund (i.e., tax) revenues from the Commonwealth.

Revenues collected by the Department must be appropriated before they can be expended, meaning the General Assembly first must authorize the appropriation in the state budget each year. The Department's appropriation represents the amount of money it is authorized to spend each year.

Each fiscal year, the Department establishes an internal operating budget that distributes available funds (the appropriation) to support all the operations and activities of the Department and the regulatory boards. During the budgeting process, managers have the opportunity to explain plans and request funding for specific activities for the year. Board Executive Directors or Board Administrators may ask the board for input during this process about plans for regulatory actions, travel and training, board meetings, changes in regulatory requirements, or other planned activities that affect funding needs. The agency director approves the final operating budget based on the Department's total available funds/appropriation.

Board Expenses and Reimbursements

Costs that relate to a single board's activities are reported in a separate department code established for each board, and are charged directly to the board. Costs commonly charged directly to a board include board member travel costs, board member or staff training, printing, postage, and legal services.

Board members may incur certain expenses associated with working or traveling on official board business, which may be reimbursed within the requirements of state and agency travel policies. Board members are reimbursed for mileage when traveling to and from board meetings and authorized workshops or conventions. Lodging costs and meals are also reimbursed when the board member is in overnight travel status (subject to state spending caps). Before traveling, board members should familiarize themselves with the basic provisions of state travel regulations by reading the travel brochure. Board members should contact their Board Executive Director or the Finance Office to obtain advance approval for overnight travel or assistance with travel-related questions.

Penalty Collections for Consent and Final Orders

Monetary penalties collected pursuant to a board's disciplinary actions are deposited to a special state fund known as the Literary Fund and are not available for spending by the Department. The Literary Fund provides low-interest loans to localities for funding school building projects. State law mandates all monetary penalties be deposited into this fund, thereby ensuring the boards' clear independence from any appearance of improper assessment of penalties.

BOARD FINANCIAL STATEMENTS

Cost Allocation System

Section 54.1-113 of the *Code of Virginia* (Callahan Act) requires the Department to account for revenues collected for each board, and expenses allocated to each board, on a biennial (two-year) basis. That information is used for the purpose of maintaining or adjusting fees so that revenues collected are sufficient to cover expenses, but not excessive. In order to reasonably and appropriately allocate and account for each board's expenses in a reasonable and appropriate manner, the Department uses a Cost Allocation System.

Under this system, direct expenditures of each board are identified from accounting records. Other costs incurred by the agency to provide operational support are then identified and distributed to each board using specific allocation methodologies. Through cost allocation, the revenues collected through regulatory fees and the total expenses incurred to support operations are accounted for by each individual board.

Format

Because of the requirements of the Callahan Act, the Cost Allocation System is designed to account for each board's financial position for an entire biennium. A biennium begins on July 1st of each even-numbered year, and ends on June 30th of the next even-numbered year.

The Cost Allocation System produces two financial statements for each board:

Statement of Financial Activity: Produced for each board on a monthly basis, the Board name, biennium, and current month are reported in the heading. The first column lists each item by type, beginning with revenues, and then details expenditures by Cost Category (see explanations below). The second column reports revenues collected and each type of expenditure for the *current month*.

The third and fourth columns provide a *comparison of financial activity for the previous and the current biennium*. Each column reports the board's total financial activity from the beginning of the applicable biennium through the report month. The third column reports the board's financial activity as of the same month in the previous biennium. The

fourth column is a statement of the board's *financial position for the current biennium to date*, including the balance brought forward from the previous biennium and the cash/revenue balance at the close of the current month.

The final section of the Statement reports the board's actual Callahan Act percentage at the close of the previous biennium. It also reports the target Callahan Act percentage for the end of the current biennium (once the target becomes available). The target percentage is determined from the fee analysis performed for each board after the close of each biennium, and represents where the board is expected to be in the course of planned operations and any fee adjustments as required by the Callahan Act.

Supporting Statement of Year-to-Date Activity: Summarizes each board's financial activity on a *fiscal year basis* for the purpose of monitoring plans and variances from budgeted amounts. Although the Callahan Act requires accounting on a biennial basis, most operational planning and budgeting for board activities is conducted on an annual basis.

For monitoring purposes, the agency's budgets for each type of expenditure are entered into the Cost Allocation System to provide estimates of anticipated annual costs for each board in each category. Because the allocations are based on volume and activity levels (see explanations below), which may not be constant, allocated budget amounts and actual allocated expenses can vary substantially. This statement can assist the boards in understanding underlying causes for such variations, and how operational, economic, regulatory, or legal activities affect budget and actual allocations.

The Statement of Year-to-Date Activity details each type of expenditure for each month and provides a *fiscal year-to-date* total. It reports the budget allocated to the board for each type of expenditure, and the remaining budget. It then provides a straight-line projection of estimated costs at the close of the fiscal year (assuming that all costs remain relatively stable and continue at the same rate for the remainder of the year), and provides projected variances from budgeted amounts.

Cost Categories and Allocation Methodologies

Board Expenditures consist of charges incurred directly in support of board operations, such as travel, per diem, printing, and postage. Board Expenditures include the board's share of the costs of processing fees, based on the number of fees processed for each board during the month.

Board Administration represents the cost of staff supporting regulatory program operations. The allocated cost is based on each board's number of licensees.

Exam Administration represents the cost of providing direct support in the development, administration, and contracting of exams. Costs are allocated based on percentages of time and effort given to each board by Examination staff, and number of exams given.

Enforcement represents the costs associated with complaint processing, investigation, and adjudication. Costs are allocated based on enforcement activity for each board.

Legal Service charges include billings from the Office of Attorney General for support provided to each board, and other legal costs that are charged directly to the board.

Information Systems represents charges incurred for information technology services and information management. The costs are allocated based on each board's percentage of licensees.

Facilities Management includes rent and equipment, mailroom and procurement, supplies, and maintenance costs incurred in support of board activities. The costs are allocated based on staff assigned to each board.

Agency Administration includes the Department's general administrative support and overhead costs. Charges are allocated based on each board's percentage of licensees.

Transfers/Other is the category used to allocate other charges to each board. The most common type of charge reported here is transfers to the General Fund of the Commonwealth when mandated in the Appropriations Act, or to pay the agency's share of central state processes and support costs. The charges are allocated based on each board's percentage of licensees.

Fee Analysis

Information accumulated through the Cost Allocation System provides the data required for analysis of each board's financial position after the close of each biennium, and justifies any recommended fee adjustments. The Budget and Analysis section discusses financial position, projections, and recommendations for any fee adjustments with each board as needed.

Legislative Process

Title 54.1 of the *Code of Virginia* provides the statutory authority for regulatory boards and programs at DPOR. The law sets the parameters within which a board regulates, as well as establishes the board's authority for enforcement of the law. Any additions to the *Code* or revisions to an existing statute must be passed by the General Assembly and signed by the Governor.

Each summer, the Governor's Policy Office solicits legislative proposals from all executive branch agencies for consideration. In determining whether to approve agency legislative requests, the Administration considers whether the proposal is necessary to comply with federal law or a recent court decision, or whether the proposal is essential to the operation of state government. The Governor's Policy Office reviews the numerous legislative proposals it receives from all state agencies and selects **only those deemed "critical"** for inclusion in the Administration's legislative package to the General Assembly.

DPOR and members of its policy boards must observe the following process to initiate legislative proposals for a given year. At regularly scheduled meetings, a board may identify **additions** to a statute it believes are needed. The board may also identify provisions within existing law it believes should be **revised** or **deleted**. When such amendments are discussed in concept, the board also must consider whether alternative, non-legislative means are available to achieve the same results (e.g., via regulation, guidance document, internal policy, etc.).

Because several of DPOR's boards may submit proposals in any given year, **not all proposals will be included** in the agency's final list of submissions presented to the Administration. The Department's Legislative Director is responsible for compiling all board-approved requests that have arisen during the year, prioritizing them along with the Department's own legislative initiatives (which may affect agency-wide administrative functions, for instance, or general statutes involving all boards), and drafting statutory language for submission to the Attorney General's Office to obtain assurance proposals are constitutional and in compliance with state and federal law.

All Board proposals must follow the procedures for introduction described above, as outlined by the Governor's Chief of Staff. If the Governor elects *not* to include particular proposals in the Administration package, Board members must not seek outside entities to pursue legislation.

Legislation affecting your regulatory program may be introduced by an outside entity, such as a professional association or individual constituent. In such cases, DPOR will inform the Board of the bill and its analysis of the potential impact, and whether the Administration is taking a position on the proposal or seeking amendments. On occasion, the Governor's Office will *deliberately* not take a specific position (pro or con) on a piece of legislation.

If the Governor *does* approve a legislative proposal to move forward, DPOR will work with the Administration to promote the bill's passage. Board members may be requested by the agency to lend support through the legislative process. Regardless of the subject matter of a particular bill, you may only express your opinion as an individual citizen—not as a Board member—to avoid speaking improperly on behalf of the Board or the Administration. **As an appointee representing an executive branch agency, it is important you avoid any appearance of usurping the Governor's prerogative to take policy positions.**

Notify your Board Executive Director immediately if you receive inquiries from a General Assembly member or legislative staff regarding proposals affecting a board or the agency in general. Please feel free to contact your Board Executive Director or DPOR's Legislative Director at any time with questions or concerns you may have about this process.

Media Relations

The Department recognizes the importance of providing accurate and timely information, as well as the value of pursuing a proactive, vibrant outreach strategy. Therefore, the agency strives to respond promptly to information queries and also to seek out external communications opportunities.

As public servants, all DPOR staff and Board members must keep in mind that our work is available for public consideration. The agency operates in a culture of openness, meaning that our business—the people’s business—is conducted in a public forum and that **we welcome public input, attention, and comment.**

An inquiry from a reporter should not be seen as a threat, but as an excellent opportunity to tell the DPOR story. When we do talk with the public, either directly or through the media, it is important the agency message is **clear, consistent, and knowledgeable**—and so we ask staff and Board members to observe the following procedures:

Official agency messages related to DPOR or its regulatory boards are issued by the Communications Director to broadcast and print media outlets and posted on the DPOR website and agency social media platforms (e.g., Facebook, YouTube). As public figures, Board members may wish to review the *Employee Use of Social Media Policy #100-03* for additional guidance about online communications. However, nothing governs or prevents your use of your own personal social media platforms where the content is unrelated to DPOR or your role as an appointee and board member.

At times, a licensee or regulatory program may become involved in a highly visible or controversial news event. DPOR will respond to media inquiries with information subject to public disclosure, in accordance with the agency's *Release of Information Policy #100-04*. If a reporter requires technical expertise or requests to speak directly to a Board member, DPOR staff may provide whatever contact number you prefer for public dissemination.

Board members may speak with reporters if they choose, or refer media inquiries to the Communications Director for response—whatever is your personal preference. In either case, staff and Board members **must** advise the Communications Director or applicable Board Executive Director of media-related contacts they receive **as soon as possible.**

DPOR acknowledges open disciplinary cases once an investigation has determined sufficient evidence exists to establish probable cause of a violation. However, no *specific* information concerning a complaint under investigation by the Regulatory Programs and Compliance section or under review by a regulatory board should be released to the media or the public until the case is closed.