



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

Delegate James M. LeMunyon, Chair
Senator Richard H. Stuart, Vice Chair

Maria J.K. Everett, Esq., Executive Director/ Senior Attorney
Alan Gernhardt, Esq., Senior Staff Attorney
foiacouncil@dls.virginia.gov

General Assembly Building ~ North 9th Street, Second Floor ~ Richmond, Virginia 23219
804-225-3056 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-371-0169 ~ <http://foiacouncil.dls.virginia.gov>

August 12, 2016

Kevin E. Martingayle, Esq.
Bischoff Martingayle
3704 Pacific Avenue, Suite 300
Virginia Beach, Virginia 23451

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your email message and letter dated June 28, 2016.

Dear Mr. Martingayle:

You have asked four questions regarding a closed meeting of a board of visitors (the board) of a public institution of higher education (the university). As background, you included a copy of a closed meeting motion and certification that read as follows:

To Go Into Closed Session

I move that the Board of Visitors go into closed session to discuss the appointment, reappointment, performance, assignment, and compensation of specific University faculty; and to consult with legal counsel regarding a litigation report and specific legal and regulatory matters requiring the provision of legal advice where discussion in an open meeting would adversely affect the negotiating posture of the University. The relevant exemptions are Sections 2.2-3711(A)(1) and (7) of the Code of Virginia.

After Leaving Closed Session (read by the same member of the committee):

I move that we vote on and record our certification that, to the best of each member's knowledge, only public business matters lawfully exempted from open meeting requirements and which were identified in the motion authorizing the closed session, were heard, discussed or considered in closed session.

Kevin E. Martingayle, Esq.

August 12, 2016

Page 2

As additional background, you stated that eight days prior to this meeting board "members received documents that outlined a newly-established grant-making process, guiding spending principles, and a list of grant requests pertaining to a newly-established fund that consisted of very significant reserves and earnings discovered to exist within the university." You also stated that correspondence prior to the meeting indicated that the fund and plans for spending it were topics to be discussed at the closed meeting. You related that the only personnel discussed during the closed meeting were two former employees "cited for having done a good job of accumulating and managing such a large sum of funds over time." You stated that faculty and administrator appointments were made prior to the closed meeting and did not require a board vote. You also wrote that there was "no discussion that related to pending, threatened or possible litigation regarding the fund." Instead, you stated that the closed meeting "focused on principles for spending the money that now comprises the fund." You also indicated that during the closed meeting "members were asked to deny granting funds to proposals that would support university operations and to elevate those [proposals] that would enhance [the university's] reputation." You also stated that concerns were conveyed in the closed meeting regarding publicity about the fund and that "it was requested that members refrain from discussing the fund with legislators and the media." Regarding the certification of the closed meeting, you indicated that "aye" votes were solicited and no "nay" votes were requested. However, at least one board member afterwards stated that the minutes should reflect that the member did not vote on the certification due to questions and concerns regarding whether the discussion strayed beyond what was permitted under the Virginia Freedom of Information Act (FOIA). Your specific questions are set out below as they were enumerated in your letter, with additional facts as appropriate.

The guiding principles of FOIA set forth in subsection B of § 2.2-3700 are that the "affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government" and that "[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked." Regarding exemptions, the same subsection states that "[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law." Furthermore, the policy provides that FOIA "shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth." The definition of "public body" in § 2.2-3701 explicitly includes "boards of visitors of public institutions of higher education," so there is no doubt that the board is a public body subject to FOIA.

The requirements to convene a closed meeting are set forth in subsection A of § 2.2-3712, which reads in full as follows:

A. No 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 provided in § 2.2-3707 or subsection A of § 2.2-3711. The matters contained in such motion shall be set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.

A motion to convene a closed meeting must contain all three elements (subject, purpose, and citation) in order to comply with FOIA; a motion that lacks any of these elements is insufficient under the law.¹ We have previously observed that there is often confusion in differentiating between the subject and the purpose of a closed meeting. Conceptually, it may be helpful to think of the subject as what the meeting is about, while the purpose is why the meeting is to be held. This office has previously opined that when identifying the subject of a closed meeting, the subject need not be so specific as to defeat the reason for going into closed session, but should at least provide the public with general information as to object of the discussion.² Observing that the prefatory language of subsection A of § 2.2-3711 states that "[p]ublic bodies may hold closed meetings only for the following purposes," we also opined that quoting or paraphrasing from one of the exemptions in that subsection satisfies the requirement to state the purpose of the meeting, but it does not suffice to identify the subject matter. We concluded this analysis by noting that by quoting or paraphrasing from one of the statutory exemptions, and providing a proper citation to the exemption, only two of the three required elements of the motion to convene a closed meeting are satisfied. The public body must still identify the subject in order to make a proper motion to convene a closed meeting.³ Determining whether any particular motion meets the statutory requirements depends on the facts of each situation and requires a case-by-case analysis.

Turning to the certification requirement, subsection D of § 2.2-3712 sets forth the requirement to reconvene immediately after a closed meeting and certify the closed meeting as follows:

At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were

¹ See, e.g., Freedom of Information Advisory Opinions 03 (2013), 02 (2010), 13 (2009), 04 (2008), and 06 (2007).

² Freedom of Information Advisory Opinion 13 (2009).

³ *Id.*

heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

In considering a situations where members left a closed meeting without voting to certify it or making any statement to be included in the minutes, but later indicated they left in protest, we have previously opined that members are advised to comply with the procedural requirements set out in FOIA. By following the statutory procedure quoted above, the substance of the protest will be recorded in the minutes, documenting the issue(s) of concern and possibly facilitating subsequent discussion and resolution of any problems.⁴

Your first question asked whether the language of the motion and certification quoted above is legally sufficient to convene and certify a closed meeting of the board and if not, what remedial action should be taken by the board or individual members of the board. As quoted above, the motion to convene appears to address two different exemptions, and therefore we will consider each separately. The first part of the motion to convene the closed meeting reads as follows: "to discuss the appointment, reappointment, performance, assignment, and compensation of specific University faculty." This portion of the motion appears to correspond to the citation to the personnel meetings exemption, subdivision A 1 of § 2.2-3711, which allows a public body to convene a closed meeting for the following purposes:

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.

The language "appointment, reappointment, performance, assignment, and compensation" used in this part of the motion closely tracks the statutory language quoted above concerning "assignment, appointment...performance...salaries." Therefore this portion of the motion appears to state the purpose of the closed meeting by paraphrasing the statutory language. The subject identified in the motion appears to be "specific University faculty." As previously quoted, subsection A of § 2.2-3712 provides that a "general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting." Dissecting the phrase "specific University faculty," the exemption already requires the discussion to be about "specific"

⁴ Freedom of Information Advisory Opinion 04 (2008).

individuals, so the term "specific" by itself does not add anything to identify the subject. However, "University faculty" makes clear at least the category of employees to be discussed - University faculty as opposed to administrative, information technology, maintenance, law enforcement, or some other category of employees. While "University faculty" could identify the subject individuals to be discussed with greater precision (i.e., by providing additional information such as whether they are tenured or non-tenured, by identifying their department(s), or in any number of other ways), the language is more than a "general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting." Therefore it appears that the identification of the subject is more than a general reference so we cannot say it is insufficient, however, we recommend identifying the subject matter with greater specificity as described above. While we recognize there are times when a public body needs to be vague, in this instance it appears that the university could have been more specific in identifying the faculty in question without jeopardizing the reason for holding the closed meeting. For example, the university could have identified the subject as "faculty in the math department" or "faculty candidates for tenure" without revealing who was being discussed.

The second part of the motion reads as follows: "to consult with legal counsel regarding a litigation report and specific legal and regulatory matters requiring the provision of legal advice where discussion in an open meeting would adversely affect the negotiating posture of the University." This part therefore corresponds to the citation to subdivision A 7 of § 2.2-3711, the legal matters exemption, which allows a closed meeting to be held for the following purposes:

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; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. 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.

We have previously interpreted this exemption to apply to two different situations: (1) consultation pertaining to actual or probable litigation, and (2) consultation regarding specific legal matters.⁵ The meaning of "actual litigation" is self-evident, and "probable litigation" is defined as quoted above. "Specific legal matters" is not defined, but in reviewing court decisions and prior opinions of the Attorney General, we observed that

⁵ Freedom of Information Advisory Opinion 01 (2007).

the legal matters exemption would not allow a closed meeting to be held to discuss general policy or other matters that may eventually have legal consequences.⁶

When analyzing the motion that was made, it appears that it mixes language from both clauses of the cited exemption. Parsing the language of the quoted motion, the phrasing "to consult with legal counsel ... where discussion in an open meeting would adversely affect the negotiating posture of the University" tracks the statutory language from the first clause of the exemption concerning actual or probable litigation: "Consultation with legal counsel ... where such consultation ... in open meeting would adversely affect the negotiating ... posture of the public body." However, note that the language of the motion "to consult with legal counsel regarding ... specific legal ... matters requiring the provision of legal advice" closely tracks the second clause of the exemption regarding specific legal matters: "consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel." As the language of the motion uses phrasing from both clauses of the exemption, it appears to indicate the purpose of the discussion will involve both actual or probable litigation and consultation with legal counsel on specific legal matters.

The remaining portion of the motion referring to "a litigation report and specific legal and regulatory matters" appears to be the attempt to identify the subject matter of the closed meeting. Further analyzing the language used, the term "litigation report" adds no substantive context to the basic concept of discussing actual or probable litigation, it only adds the word "report." Even with the additional word "report," however, it is unclear whether the "litigation report" is about a current case, a case that has been resolved, a case that may be filed in the future, an aggregate overview of cases, a particular type of case or cases, a case against the university, a case brought by the university, or some other thing. A report can be about any subject, and therefore adding the word "report" does nothing to further identify what is the subject of the closed meeting. There are many ways to identify litigation matters without defeating the reason for going into closed meeting. For example, the style of the case (i.e., *University v. John Doe*) might be used for past or current litigation matters already filed on a public court docket, or one might say "probable litigation stemming from a contract dispute" or "litigation matters regarding an insurance claim" or any number of other possibilities. However, simply stating "a litigation report" as the subject is merely a general reference to litigation, and is insufficient in identifying the subject matter to be discussed.

Similarly, referring to "legal...matters" does nothing but to reiterate that same language from the exemption itself. Referring to "regulatory" matters is something beyond the statutory language, as "regulatory matters" would be a subset of "legal matters," but only in the most general of terms, as there is no indication of what type of regulation may be at issue, whether it is an enforcement matter, a proposed regulatory change, some action that needs to be taken to avoid a regulatory violation, litigation over a regulation, or some other "regulatory matter." Note that subsection A of § 23-9.2:3

⁶ *Id.*

provides that all boards of visitors have the power to establish regulations in various subject areas including the acceptance and assistance of students, the conduct of students while attending the institution, the rescission or restriction of financial aid, the suspension and dismissal of students, the employment and dismissal of professors, teachers, instructors, and all other employees, and parking and traffic regulations, as well as establishing guidelines and programs in other subject areas. Boards of visitors may also establish regulations governing the disposition of unclaimed property as set forth in § 23-4.2. In addition to these general regulatory powers granted to all boards of visitors, the various boards of visitors may have further regulatory authority that is specific to each institution. For example, § 23-44 provides that the board of visitors of the College of William and Mary "shall make all needful rules and regulations" for the colleges; § 23-49.17 uses the same language to describe the regulatory power of the board of Old Dominion University; §23-50.10 states that the board of Virginia Commonwealth University "shall make all rules and regulations it deems advisable;" and § 23-76 provides that the board of the University of Virginia "regulate the government and discipline of the students, and the renting of the rooms and dormitories, and, generally, in respect to the government and management of the University, make such regulations as they may deem expedient, not being contrary to law." While these examples are not exhaustive, they clearly demonstrate that the General Assembly has granted broad regulatory powers to the boards of visitors of the public institutions of higher education in Virginia. Given the breadth of topic areas and nearly limitless number of factual scenarios that could be encompassed by the phrase "regulatory matters," this phrase cannot be read to be more than a "general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting." In summary, it appears that the identification of the subject here as "a litigation report and specific legal and regulatory matters" is at best a "general reference to ... the subject matter of the closed meeting." Without further detail in identifying the subject matter, this part of the motion appears to be insufficient.

Next addressing the certification of the closed meeting, the heart of the statutory requirement under subsection D of § 2.2-3712 is the requirement that the public body certify "that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) 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 certification language you provided as factual background was as follows: "I move that we vote on and record our certification that, to the best of each member's knowledge, only public business matters lawfully exempted from open meeting requirements and which were identified in the motion authorizing the closed session, were heard, discussed or considered in closed session." Although not a direct quote, this motion closely paraphrases the statutory language and contains both of the required clauses (i) and (ii). Therefore the language used in this motion comports with the language of the statute and is sufficient as a motion to certify the closed meeting. However, as will be discussed below, you have raised other issues that question the

Kevin E. Martingayle, Esq.

August 12, 2016

Page 8

substance of the discussion held in the closed meeting. If the substance of the discussion strayed from what was purported to be discussed and identified in the motion to convene the closed meeting, then the certification would be improper even though the motion to certify used language that comported with the statutory requirements.

You also asked what remedial action should be taken by the board, or by individual members of the board, should either the motion or the certification discussed above be insufficient to meet the requirements of FOIA. In terms of the certification, subsection D of § 2.2-3712 provides that a member who feels there has been a deviation from FOIA's closed meeting limitations shall make a statement to that effect prior to voting on the certification. Otherwise, FOIA does not set out a remedial course for public bodies to follow once a violation has occurred. The statutory remedy for a FOIA violation is a petition for mandamus or injunction supported by an affidavit showing good cause as set forth in § 2.2-3713. Other than a board member or some other person bringing such a petition against the board, FOIA does not set forth any statutory remedy set to cure a defective motion or certification after it has occurred. As a practical matter, a public body or member thereof may wish to publicly acknowledge that an error was made and a violation occurred, and may seek to take such remedial action as seems appropriate depending on the violation, but FOIA itself does not provide a mechanism for doing so.

Your second question posits that "the primary purpose of discussing the fund during the closed meeting was neither to discuss any personnel matters nor to request/receive legal advice." Given that assumption, you ask whether the board violated FOIA and what remedial action might be taken. Subsection A of § 2.2-3712 provides that no closed meeting shall be held unless the public body votes to approve a proper motion to convene the closed meeting, as quoted and described above. Subsection C of the same section provides that a "public body holding a closed meeting shall restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of this chapter and identified in the motion required by subsection A." Following these provisions, if a public body held a closed meeting to discuss topics other than those described in the motion, and in fact did discuss topics other than those identified in the motion, that closed meeting would be in violation of FOIA. The answer to your question is therefore "yes," it would be a violation to hold a closed meeting to discuss a fund when the motion to convene the closed meeting was for the purposes of discussion of personnel, legal matters and litigation. Although you did not ask, I would also note that there is no exemption in FOIA for the purpose of discussing general budget matters in closed meetings, although there are exemptions that allow closed meetings to be convened to discuss certain topics that may be related to or may affect budgetary matters (for example, certain contract negotiations and procurement, economic development, real estate acquisition and disposition, etc.).

Regarding the second part of your second question, as stated above, FOIA does not provide for a remedial action to be taken by the public body once a violation has occurred. However, as stated above, FOIA does require a vote to certify the closed meeting under subsection D of § 2.2-3712. That subsection sets out the proper course of action for an individual member to take if a closed meeting has been held in violation of FOIA: "Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body." Therefore an individual board member who feels that a violation has occurred shall make a statement to be included in the minutes as described. Note that subsection D requires a public body to immediately reconvene in public after a closed meeting and take a "roll call or other recorded vote" for certification. While not explicitly stated in the Code, it would logically follow that the member who feels a violation has occurred would also vote against the motion to certify the closed meeting, in addition to making a statement before the vote is taken.

Your third question asked what is the procedure for determining and recording the vote of the members, and what remedial action should be taken to correct any mistakes. As quoted above, subsection D of § 2.2-3712 requires a "roll call or other recorded vote" when certifying a closed meeting. No statutory definition is provided to say what constitutes a "roll call" or "other recorded" vote. Turning to the ordinary usage in the absence of a statutory definition, the term "roll call" means "reading aloud of a list of names of people, as in a classroom or military post, to determine who is absent."⁷ In the context of voting at an open meeting, a "roll call vote" would mean that the vote is taken by calling each member by name and recording that member's vote. An "other recorded vote" must therefore be something else, but FOIA does not specify what. FOIA generally does not address parliamentary procedure or limit what rules of procedure or by-laws a public body may adopt. Lacking a specific statutory definition of "other recorded vote," it is helpful to consider some principles of statutory construction such as the doctrine of *ejusdem generis*: "when items with a specific meaning are listed together in a statute, and are followed by words of general import, the general words will not be construed to include matters within their broadest scope but only those matters of the same import as that of the specific items listed."⁸ Following this maxim, the scope of "other recorded vote" would be limited to the same import as "roll call." Another similar principle of statutory construction is also helpful to consider:

The maxim of *noscitur a sociis* provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are

⁷ The American Heritage Dictionary 1069 (2d College ed. 1982).

⁸ *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity, Inc.*, 266 Va. 455, 470, 587 S.E.2d 701, 710 (2003).

grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.⁹

This maxim leads to the same conclusion that "other recorded vote" should be construed as being similar in nature to "roll call." Considering the meetings provisions of FOIA as a whole, note that subsection I of § 2.2-3707 already requires that meeting minutes include, among other items, "a record of any votes taken." Subsection A of § 2.2-3710 provides that that all votes must be "taken at a meeting conducted in accordance with the provisions of [FOIA]" and that "[n]o public body shall vote by secret or written ballot, and unless expressly provided by this chapter, no public body shall vote by telephone or other electronic communication means." It would appear then that in general, public bodies may adopt their own procedural rules regarding how to vote, so long as the meeting is conducted in accordance with FOIA, the vote is recorded in the minutes, that the vote is not conducted by secret or written ballot, and that votes are only taken by electronic means when expressly authorized.¹⁰ Given that general background and the principles of statutory construction expressed above, the phrase "other recorded vote" following "roll call" in the context of certifying a closed meeting would therefore appear to require a type of vote which is recorded in the minutes that allows the public to determine the vote of each member present.

Further note than in addition to requiring that votes be recorded, subsection I of § 2.2-3707 also requires that meeting minutes include "the members of the public body recorded as present and absent." Assuming accurate minutes are kept, then, a simple statement that the vote to certify was unanimously in favor or against would suffice as a recorded vote as it would be clear that all members present voted the same way. On the other hand, if the vote was not unanimous, a vote may be taken in some fashion other than a roll call - such as by a show of hands, for example - but should be recorded in the minutes in a way that clearly identifies which members voted for the motion and which members voted against, just as a roll call vote would. If in doubt as to whether a particular voting procedure would suffice, a public body should simply vote by roll call.

Applying this interpretation to the facts as you presented them, it would appear that the board in this instance did not take a "roll call or other recorded vote" to certify the meeting you described. Instead, you indicated that the board solicited "aye" votes only, did not ask for votes in the negative, and did not record any votes in the negative. If the vote was in fact unanimous agreement by all members present, and the minutes reflected this fact as well as the members present, then the vote described would be sufficient. However, you added that at

⁹ *Cuccinelli v. Rector and Visitors of the University of Virginia*, 283 Va. 420, 432, 722 S.E.2d 626, 633 (2012).

¹⁰ See §§ 2.2-3708 and 2.2-3708.1 regarding participation via electronic communication.

least one member later told the board secretary that the minutes should reflect that the member did not vote on the certification because of concerns that the discussion may have strayed beyond what was legally permitted. While FOIA does not set out rules of parliamentary procedure, it is my general understanding that under most rules of procedure members of public bodies who are present at a meeting when a vote is taken can vote in the affirmative, in the negative, or they may abstain from voting. Furthermore, a member's silence is typically construed as tacit agreement (i.e., an affirmative vote), and it is the duty of the member to speak up if he or she dissents from the majority or abstains from voting. The provisions of subsection D of § 2.2-3712 requiring members to make a statement to be recorded in the minutes prior to voting on certification reflect these concepts and make them statutory requirements when voting to certify a meeting. In the situation you describe, it appears that the board may have misconstrued a member's silence for tacit agreement, and the member may have failed to correct that misunderstanding until some later time. Such facts emphasize the importance of complying with the statutory directive to state any such concerns prior to voting and demonstrate the value of taking a roll call vote when certifying a closed meeting.

Regarding remedies, again, FOIA does not provide for remedial action when mistakes are made in the voting process. However, it is my understanding that various parliamentary rules may allow for votes to be corrected or even re-taken. While such rules are not addressed in FOIA, any such corrective action, to be effective as a vote of a public body, would still have to be taken at a public meeting conducted in accordance with FOIA and recorded in the minutes, as required by subsection I of § 2.2-3707, subsection A of § 2.2-3710, and subsection D of § 2.2-3712, all quoted above.

Your fourth question asked what action, if any, are individual board members expected, allowed, and/or legally obligated to take when they have questions or concerns relating to FOIA open meeting violations by the board on which they sit. You also asked with whom a member may consult and seek guidance, whether there are any mandatory reporting requirements, and if so, to whom should violations be reported. As described above, subsection D of § 2.2-3712 provides the mechanism for a member to make a statement concerning any deviations from the closed meeting requirements prior to voting to certify the closed meeting. If the member's questions or concerns are about some other aspect of the meeting, FOIA does not specify a course of action for members to take. Regarding consultation and guidance, anyone with questions about FOIA is welcome to contact this office, as part of the FOIA Council's powers and duties includes providing advisory opinions, guidelines, and other information about FOIA.¹¹ It is my understanding that all of the public institutions of higher education are provided with legal counsel through the Office of the Attorney

¹¹ Subdivision 1 of § 30-179.

Kevin E. Martingayle, Esq.

August 12, 2016

Page 12

General, which would be another source of guidance and consultation. Members might also choose to consult with their own legal counsel, just as with any other legal question. Regarding reporting requirements, FOIA does not impose any mandatory reporting requirements regarding questions, concerns or violations. As stated previously, the statutory remedy for a FOIA violation of any type is to bring a petition for mandamus or injunction supported by an affidavit showing good cause. It would be up to each member to decide whether to file such a petition.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director