



Mathews County Board of Supervisors

Work Session Meeting – FOIA Training

Historic Courthouse

27 Court Street, Mathews, VA 23109

Tuesday, February 22, 2022 at 5:00 PM

MINUTES

1. CALL TO ORDER

Chairman Hudgins called the meeting to order.

2. PLEDGE OF ALLEGIANCE

3. ROLL CALL/ESTABLISHMENT OF A QUORUM

Board of Supervisors Members

Present:

Paul Hudgins, Chairman

Jackie Ingram, Vice Chair

Melissa Mason, Supervisor

Dave Jones, Supervisor

Mike Walls, Supervisor

Board of Supervisors Members Absent: None

Staff Present:

Mr. David Schlosser, Interim County Administrator

Mrs. Julie A. Kaylor, Deputy County Administrator/Clerk

Ms. Andrea G. Erard, Esq., County Attorney

Mrs. Judi Green, Deputy Clerk/Office manager

4. APPROVAL OF AGENDA

MOTION: On Motion of Dave Jones, seconded by Jackie Ingram, the Mathews County Board of Supervisors voted 5-0-0 as follows: Paul Hudgins, Jackie Ingram, Melissa Mason, Dave Jones, Mike Walls - aye; None - nay; to approve the agenda, as presented.

Roll Call Vote:

Paul Hudgins, Chairman - Aye

Jackie Ingram, Vice Chair - Aye

Melissa Mason, Supervisor - Aye

David Jones, Supervisor - Aye

Mike Walls, Supervisor - Aye

5. FREEDOM OF INFORMATION ACT TRAINING: County Attorney Andrea Erard

A. FOIA Training Information

County Attorney Erard stated that she has worked over the years with VML and VACo, conducting training on FOIA before there was a FOIA Council. She stated she is currently working with VRSA, our insurer, as well. She noted that this training is required by all elected officials and must be taken once every two years. Attorney Erard stated that the FOIA Council website offers form letters, legal information and issues advisory opinions.

Below is a recap of her training:

Meetings:

All meetings and all records are open. The law is framed so that the citizens have a right to observe the functions of their government. Anything that is kept from the public must be specifically outlined in an exemption. The definition of public records, with the advancement of technology, can now be anything such as a voicemail message, video, any document that is in the possession of a public official that contains public business.

Three elected officials gathering at any one time discussing public business, is considered a meeting. It becomes an illegal meeting if any public business is conducted during that gathering. When asked about the burden of proof, Attorney Erard stated that the burden is on the government to prove that they did everything correctly. The public only needs to make a very basic case. She stated that it must be kept in mind that proper notice must be given, minutes must be taken and kept, and if it is not a properly called meeting, any action is not actionable.

There are requirements for posting of meeting notices. Notice must be placed on the official public government website, in a public location where notices are regularly posted, and it should be posted at the office of the Clerk of the public body or in the case where no Clerk exists, it should be posted at the office of the Chief Administrator. Meeting notice should not be confused with posting an agenda packet. There is no deadline for posting an agenda or packet.

Committees:

FOIA does not pertain to committees unless they are made up of members of the Board of Supervisors. Even if there are only two people from the Board, the meeting notice must be posted at least three business days in advance, and the meeting must be open to the public and minutes must be taken and kept.

Electronic Meetings:

There are three ways in which to hold an electronic meeting. 1. Adoption of a policy which Mathews has. 2. A quorum physically assembled, with one Board member participating remotely. 3. Two types of reasons why someone might have to participate electronically; medical reasons for themselves, where they do not have to disclose their reason. She noted that a new section was added this year to accommodate those who have to physically care for a family member. County Attorney Erard stated that there is no limit on the number of meetings where Board members can participate electronically if citing medical reasons. She stated that one can also participate for personal reasons, but the limit on the use of that reason is up to three times per year or 25% of the total number of the Board's meetings. If citing personal reasons, one must state the reason why. When there is a State of Emergency declared, everyone can participate electronically. The meeting

would have to be called to address some aspect of the emergency, and only if it is not possible to get everyone together. This is very limited.

Attorney Erard stated that the General Assembly passed legislation this past year that if there is an emergency and the governing body needs to get together, it is permissible to have an electronic meeting and not have a quorum physically assembled. She noted that there is a requirement that any type of conferencing technology that is used generally by the governing body shall be made available so that the citizens can participate and be able to comment as if it were a regular meeting.

Closed meetings:

There are three parts to a closed meeting motion. 1. Subject Matter. 2. Purpose. 3. Specific Exemption. Because FOIA starts from the premise that every meeting is open, going into closed meeting is intended to be a deliberate process and the need should be identified ahead of time. She stated that the Attorney General and the FOIA Council have issued advisory opinions on this matter that are very clear. The purpose and scope need to be identified prior to going into the closed meeting. Upon returning to open meeting, the Board must certify that only those matters identified were heard, discussed, or considered while in the closed meeting. She noted that should a Board member find themselves in a position where a Board member strayed, the Board member would not certify, and instead, during the certification vote that member would vote no and state the reason for that no vote.

Attorney Erard provided an example of the Section 2.2-3711 (A)(1) exemption. She stated that the use of the broad term personnel, is not a proper motion. She provided another FOIA advisory opinion that stated that a general description is not appropriate and does not pass muster under the law. Regarding minutes for closed meetings, she stated that there is no requirement that minutes be taken for a closed meeting. She stated that minutes can be taken if the Board wishes, however, depending on what is written down, the information may or may not be exempt from disclosure. Referring to audio recordings, if one person knows that they are being recorded, it is legal in Virginia. She stated that she does not recommend taking notes or recordings while in closed meetings and provided examples.

Attorney Erard stated that Section 2.2-3711 (A)(1), is straight forward, noting that there are several exemptions outlined in that Section such as assignment, appointment, demotion, salary, of specific public officers, appointees or employees of any public body, among others. She stated that the expectation is that the exemption is going to be tailored to the discussion with a certain amount of specificity. She stated that the Board should pick the one reason out of those allowed that they would want to use that exemption for.

Attorney Erard stated that in the past, Boards would go into closed meeting to routinely discuss all staff and that in 1990, the Attorney General stated that Board members can only discuss people that the Board directly hires and fires, not other staff. She stated that the Attorney General has issued an opinion regarding this as well.

In the case of Section 2.2-3711 (A)(7), actual or probably litigation, the style of the case to be discussed should be disclosed. County Attorney Erard stated that probable litigation is very narrowly interpreted by the Attorney General and the FOIA Advisory Council. She noted that probable means pleadings are ready and will be filed in the morning. Must have reasonable certainty. She further stated that if there is a deficiency in a motion to go into closed meeting, the

FOIA Council feels it is the responsibility of the elected officials and the Board to make sure that motion is correct, and that this is not a function of the county attorney. She reviewed Section 2.2-3711 (A)(4), for personal matters.

Attorney Erard stated that legal advice is another exemption. She noted that there is an expectation that you are going into closed meeting to receive legal advice for a particular reason. She stated that the matter must be stated on the agenda. She reiterated the fact that a motion must have that third prong that shows some further delineation.

Attorney Erard stated that it is generally understood that any matters discussed in closed meeting are to be kept confidential. She stated that there are no legal ramifications, but this is more of a common sense thing. She stated that all Board members should respect the confidentiality of those matters discussed.

Certification:

She outlined the process of coming out of closed meeting and reconvening open meeting. Referring to the statement, "I so certify", she stated that the purpose of that is if there is a legal issue down the road, you have given your assurance to the integrity of that closed meeting discussion.

Agenda packets:

When packets are given to the Board, a complete copy must be provided to the public at the same time. She noted that this can be a printed copy available in the office, or online. Attorney Erard stated that there is no requirement in terms of the number of days the packet is made public. County Attorney Erard stated that the agenda is not the Board's agenda until the point in which the Board votes to approve it. She explained that staff works with the County Administrator and Chairman to try to put together an agenda of public business that it is anticipated that the Board will want or need to address, but the final decision rests with the Board, and that is the reason why the Board votes to approve the agenda.

County Attorney Erard stated that FOIA requests do not have to be in writing, they can be verbal. Although the request does not need to be made to any one particular person, it is good practice to route all requests to the designated FOIA Officer for coordination. She stated that if staff were going to be out of town, the automatic out of office reply should be used for incoming email so that requests can be routed properly and handled timely.

Supervisor Walls asked if a request could be made to staff in another office. She recommended that all requests go through the designated FOIA Officer. She stated that the FOIA Council feels that all requests should be honored, however, she does not agree. She stated that she feels that if the request comes from a citizen within the Commonwealth, it should be honored.

County Attorney Erard explained that FOIA applies only to requests for records, not information, and provided an example. She noted that it is staff's responsibility to try to understand what the citizen is seeking. If there is a request for information, for example, "why are my taxes so high", there likely would not be a record so the response would be that no record exists. She also noted that there is no requirement to create a document that does not already exist.

Email:

County Attorney Erard stated that the Court has found that an exchange of emails between elected

officials does not constitute a meeting. However, that day is going to come. One of the things the Court's opinion looks at is how simultaneous the responses are. It was noted that a text message is almost simultaneous, so it could be construed as a meeting and that best practices should be followed. The example she provided is that if Board members are going to email and share information, that information should be routed through the County Administrator or a staff person for dissemination. She stated that the use of blind copy in email is appropriate. She also stated that that conversations in email do not look appropriate. She stated that "reply all" should not be used, and that the Board should either respond only to the sender or use staff to send correspondence. She also reiterated the importance of using the email account issued by the County, noting that it is easier to harvest emails in the event of a FOIA request later.

County Attorney Erard reviewed costs associated with FOIA requests. She stated that staff salaries, exempt from benefits, is allowable, but attorney fees are not permitted to be charged to the requestor. Attorney Erard stated that if there is a large request for records, it is appropriate to request a deposit from the person making the request prior to fulfilling the request.

County Attorney Erard stated that staff has five business days to respond to a request for records, and that the response must be in writing. Failure to respond is a per se violation. She stated that it is permissible to redact records, but the remainder of those redacted documents should still be provided. She noted that if the response is large, it is permissible to request an extension of time within the initial five days, and state the reason. She noted that provides staff an additional seven days to response. When redacting, one must cite an exemption allowing the redaction. She recommends we keep a copy of both the original and redacted version of all documents.

County Attorney Erard touched on other types of public records, stating that a record is defined not by the medium but by the content and person involved. She noted that a Facebook message, text messages, email to and from personal email accounts, are all included in FOIA requests, if it entails conducting public business. She noted that requests are widely construed, exemptions narrowly construed.

Attorney Erard stated that the burden of proof lies with the Attorney. It is possible to be fined and have costs assessed against anyone non-responsive to requests. She noted that fines are not usually as substantial as the costs. Attorney fees and costs are in the neighborhood of \$10,000 to \$15,000 and are assessed individually.

6. OPPORTUNITY FOR CITIZEN COMMENTS

Mr. Tom Bowen, Commonwealth Attorney, spoke in support of Mr. Jonathan Ingram of Premiere Broadband, LLC.

7. ADJOURNMENT

MOTION: On Motion of Melissa Mason, seconded by Dave Jones, the Mathews County Board of Supervisors voted 5-0-0 as follows: Paul Hudgins, Jackie Ingram, Melissa Mason, Dave Jones, Mike Walls - aye; None - nay; to adjourn the meeting at 6:00 p.m.

Roll Call Vote:

Paul Hudgins, Chairman - Aye

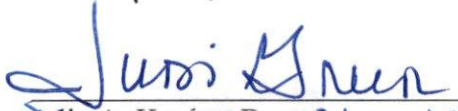
Jackie Ingram, Vice Chair - Aye

Melissa Mason, Supervisor - Aye

David Jones, Supervisor - Aye
Mike Walls, Supervisor - Aye



Interim County Administrator



Jodi Green
Deputy Clerk



Paul Hudgins, Chairman
Mathews County Board of Supervisors