



VCU

**VIRGINIA COMMONWEALTH UNIVERSITY
BOARD OF VISITORS
NEW MEMBER ORIENTATION
8:45 A.M.
AUGUST 15, 2019
THE JEFFERSON HOTEL
101 WEST FRANKLIN STREET
RICHMOND, VA
AGENDA**

- | | | |
|-----------|--|--|
| 1. | CALL TO ORDER & WELCOME | Mr. Keith Parker, <i>Rector</i>
Dr. Michael Rao, <i>President</i> |
| 2. | FIDUCIARY & LEGAL DUTIES
OF BOARD MEMBERS | Ms. Michele N. Schumacher,
Board Liaison and Assistant Secretary;
Mr. Mike Melis, <i>University Counsel</i> ; Mr.
Jacob Belue, <i>Associate University
Counsel</i> ; Karen Helderman, <i>Executive
Director – Audit and Compliance
Services</i> |
| 3. | OVERVIEW OF ACADEMIC AFFAIRS | Dr. Gail Hackett, <i>Provost and
Senior Vice President for
Academic Affairs</i> |
| 4. | RELATIONSHIP BETWEEN VCU & VCUHS | Dr. Marsha Rappley, <i>Senior Vice
President for Health Sciences and CEO
of VCUHS</i> |
| 5. | OVERVIEW OF 2020 BUDGET | Ms. Karol Kain Gray, <i>Senior Vice
President and Chief Financial Officer</i> |
| 6. | ADJOURNMENT | Mr. Keith Parker, <i>Rector</i> |



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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July 2019

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What Every Board Member **Absolutely *has* to Know about FOIA**

Do not underestimate the importance of Virginia's Freedom of Information Act ("FOIA"). This is very serious business. These are laws -- not just corporate bylaws or operating protocols that can be disregarded. Violations risk invalidation of board decisions and expose the institution and you personally to embarrassment, litigation, and civil penalties of up to \$5,000.¹ The greatest loss, however, is the resulting damage to public confidence in you and the institution. In fact, the Governor could publicly request your resignation.

The idea behind FOIA (which was first enacted in 1968) is that the Government's business is the people's business. FOIA ensures that citizens have the right to inspect and copy public records and to attend public meetings.²

FOIA governs many aspects of the operation of boards, and has wide application to the conduct of members, even when they are not at meetings. All members must be aware of the basic requirements of FOIA.

This Synopsis and FAQs are designed to give the Board of Visitors ("BOV" or "Board") a basic understanding of their personal responsibilities under FOIA and to ensure that you are aware that FOIA compliance is your responsibility. It is not comprehensive. It does not cover all aspects of FOIA. Whenever you have any concerns, questions, or uncertainties about FOIA or its application, you should contact the FOIA Officer or legal counsel.

¹ § 2.2-3714

² § 2.2-3700

VIRGINIA'S FREEDOM OF INFORMATION ACT: SYNOPSIS

Documents and Email

- FOIA broadly guarantees public access to public records, including your notes and correspondence concerning University business. This includes e-mail, digital documents, and even preliminary drafts of documents.³ There are numerous exemptions, which are all fact-specific.⁴ Always be sensitive to the potential for public disclosure of your written communications. Any request by the press or any person to inspect your public records should be brought immediately to the University's attention to ensure a timely and proper reply. Oral and informal requests to you are considered legitimate FOIA requests. Any request for public records, regardless of the request, is a FOIA request.

Meetings

- Unlike the private sector, the public (including employees of the institution) and press have a right to be present at your board and committee meetings.⁵
- All meetings of the Board, including its committees and subcommittees, in addition to any other group or entity appointed by the Board to advise it or exercise delegated power, must be conducted in an open meeting with at least three working days advance public notice of meeting time and location.⁶ It does not matter that a meeting involves no actual voting or transaction of business, such as, for example, retreats.⁷ A meeting exists in the eyes of the law whenever three or more Board members meet and discuss any University matter.⁸ Voting on any University action must always be conducted in open session.⁹ Voting by secret ballot or proxy is prohibited.¹⁰
- Once properly convened and in open session, discussions regarding certain limited topics can be held in closed session.¹¹ The justification for closed session does not depend on whether a subject may be very sensitive or political, or that a confidential setting might encourage more candid exchanges. Closed sessions must be specifically authorized by FOIA.¹²
- Also, to go into closed session, certain specific procedural steps must be taken, including:¹³
 - Advance public notice for the meeting must have been given.
 - During the meeting in open session, the Board must vote on a motion authorizing a closed session. This public motion must reasonably identify both the purpose for the closed session and the subject for discussion.

³ § 2.2-3700

⁴ See § 2.2-3705.1-3705.8.

⁵ § 2.2-3700

⁶ § 2.2-3707

⁷ § 2.2-3701

⁸ § 2.2-3701

⁹ § 2.2-3711(B)

¹⁰ § 2.2-3710

¹¹ § 2.2-3711

¹² § 2.2-3711

¹³ For "closed session" procedures, see § 2.2-3712.

- While in closed session, the discussion must be related only to the topic identified in the public motion. Take care not to digress into any unrelated areas or other subjects, even if those topics would be eligible for closed session with a proper motion. It is your responsibility both as a matter of law and common sense that you stick to the subject matter described in the motion authorizing the closed session.
 - Any action the Board wishes to take as a result of discussions in closed session must be voted on in open session.
 - When discussion in closed session is adjourned, the chair of the meeting should immediately direct the opening of doors and inviting public/staff into the room for open session.
 - Once back in open session, each member of the body will then be required to certify publicly that his or her discussion in closed session was proper and related to the permitted subject set forth in the motion convening the closed session.
 - The law requires you to invite your general counsel to all BOV and committee meetings, including all closed sessions. This also protects the Board in the event the discussion in closed session is questioned.
- Some Board members may participate in a meeting by phone, provided that (1) there is a quorum physically assembled at one primary meeting location; (2) notice of the meeting has been given at least three working days in advance; and, (3) members of the public are provided a substantially equivalent way to listen to or observe the meeting. The notice must include the electronic communication means by which members of the public may witness the meeting and which remote locations, if any, are open to the public. Public access to remote locations is encouraged, but not required.
 - Another way Board members may participate by telephone (or other electronic communication means) is if before or on the day of the meeting, a board member notifies the chair that the member has a temporary or permanent medical condition, or has a personal matter that prevents his or her physical attendance. The Board must vote to approve the member's participation under these conditions. In addition, the Board must have: (1) adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation. The policy must be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member making the request or the matters to be considered or voted on during the meeting; (2) there is a quorum of the Board or committee physically assembled at the primary meeting location; and (3) the Board makes arrangements for the voice of the remote participant to be heard by all persons at the primary meeting location.¹⁴ Whenever a member wants to participate by telephone (or other means of electronic communication), please consult with counsel.

¹⁴ § 2.2-3708.2

Frequently Asked Questions

Table of Contents

VIRGINIA'S FREEDOM OF INFORMATION ACT: SYNOPSIS	2
<i>Documents and Email</i>	2
<i>Meetings</i>	2
FOIA GENERALLY	6
What does FOIA do?	6
FOIA requires that some records be withheld and some meetings be closed, right?	6
Who does FOIA apply to?	6
MEETINGS	7
Meetings Generally	7
Can we meet without telling anyone?	7
Can less than a quorum of the Board – say three or four members – get together informally to discuss affairs of the institution?	7
Can't I even go to a cocktail party or dinner with two (or more) other Board members?	7
The Board wants to take a bus tour of campus and our new facilities during a break at our Board meeting. Any problem with this?	8
Our Board members routinely serve on ad hoc committees or task forces. Must the institution advertise these meetings?	8
We hold an annual retreat. This is a very informal work/training session. No business is conducted and no action is taken. Do we have to advertise this meeting and allow the press and members of the public to attend?	8
Who can come to our meetings?	8
Do we have to tape record our meetings?	8
Do we have to take minutes?	9
Closed Meetings	9
What are the exceptions to open meetings? When can we hold a closed session?	9
When are we required to go into closed session?	10
What must we do to go into closed session?	10
What if we are in open session with only the BOV and President are present, and we want to discuss something that we would ordinarily discuss in closed session. Can't we do that without going through the formalities?	11
What can we discuss in closed sessions?	11
Who is permitted to go into a closed session with the Board?	11
Who decides when closed session is appropriate?	11
Can we vote in closed session?	12
What do we do when we have finished our closed session discussions?	12
May Board members talk with other people about matters that were discussed in closed session?	12
Should minutes be taken in closed session?	12
What is an executive session?	13

Electronic Communication Meetings, or “Telephone Meetings”	13
May we hold a meeting by telephone or video?	13
May members of the board call in from different locations?	13
May a member call in from wherever he or she happens to be at the time of the meeting?	13
If a remote location that is open to the public is noticed, then the member decides to attend at another location, may we then omit the original location?	14
If something comes up after the three working days’ notice that prevents a board member’s physical attendance, can a board member still participate?	14
May we hold all of our meetings as telephone meetings?	14
Are there any special voting requirements for telephone meetings?	14
Must the telephone meeting be tape recorded or minutes kept?	14
What if a phone goes out or there is some other problem with communication during the meeting?	14
May a member call in on the telephone and participate in discussion at a meeting so long as the member does not vote?	14
May a Board set up remote sites for public participation without 3 days’ notice?	15
What types of meetings may be held by telephone?	15
May we use email to communicate between meetings?	15
Emergency Meetings	16
What if the University or Board has an emergency? Can we meet without three days’ notice?	16
If we have an emergency, may we have a telephone meeting without 3 days’ notice?	16
If an emergency telephone meeting is held, must public access be provided?	16
RECORDS	16
What does FOIA require regarding public records?	16
What is a “public record”?	16
Do FOIA requests have to be in writing?	17
Are there exceptions to the requirement that we produce requested records?	17
How long do I have to produce records in response to a FOIA request?	17
Would a FOIA request require me to give an account of some event I witnessed, for example, write a description of a discussion I had with another Board member?	17
What about my personal documents, including for example, handwritten notes such as those from meetings or discussions with alumni, email at home on my personal computer, etc.?	18
PENALTIES	18
So what if we violate FOIA? What’s the big deal?	18

FOIA GENERALLY

What does FOIA do?

In general terms, FOIA defines what a meeting is and requires that all meetings be open to the public.¹⁵ It also prohibits discussion of public business among members outside of meetings.¹⁶ There are, however, exceptions to these general meeting requirements that each member should be familiar with.¹⁷

FOIA also requires that all public records (with some limited exceptions) be made available upon request to members of the public for inspection and copying.¹⁸

All public records and meetings are *presumed* open, and the Board and the institution have the burden always of being prepared to prove that there was a legitimate reason for closing meetings or withholding records.¹⁹

FOIA also requires that its open government provisions be liberally construed, and its exemptions be narrowly construed. This means that you should always err on the side of leaving meetings open rather than closing them, and releasing documents rather than withholding them.²⁰

Whenever you have specific questions about FOIA or its requirements, please do not hesitate to contact counsel.

FOIA requires that some records be withheld and some meetings be closed, right?

Wrong. The exemptions to disclosure of records and for closed sessions are discretionary, not mandatory. There is no penalty for *releasing* records that *could* be withheld under a FOIA exemption (though other provisions of federal and state law, such as FERPA, may prohibit disclosure). There is also nothing that says a meeting *must* be closed just because it *could* be closed under a meetings exemption under FOIA. Please contact counsel if you have concerns about federal or state law that might prohibit release of information.

Who does FOIA apply to?

FOIA applies to all public bodies. In the context of public institutions of higher education, that means that FOIA applies to the institution and all of its officers (including members of the Board) and employees.²¹ It also applies to the operations of the Board itself together with all of its committees and subcommittees, and any other groups or entities appointed by the Board to advise the Board or exercise delegated functions.

¹⁵ § 2.2-3700

¹⁶ § 2.2-3707

¹⁷ §§ 2.2-3707.01 and 2.2-3711

¹⁸ § 2.2-3704

¹⁹ § 2.2-3700(B)

²⁰ § 2.2-3700(B)

²¹ § 2.2-3700

MEETINGS

Meetings Generally

Can we meet without telling anyone?²²

FOIA requires that all meetings of the Board or any committee or subcommittee be advertised to the public for at least three working days. The notice requirements of FOIA are very specific. The secretary to the Board will handle the details of complying with these. Members of the Board, however, should be aware that any meeting called must be far enough in advance that the secretary has time to prepare the notice properly and advertise the meeting for three working days in the various ways required by FOIA. Any materials the institution supplies to Board members before the meeting also must be supplied to the public at the same time, with the exception of documents that are specifically exempt under FOIA from disclosure.²³ This includes any materials one Board member sends to all other members.

If your bylaws call for more notice for meetings than FOIA does, you must comply with the stricter provisions of the bylaws.

Can less than a quorum of the Board – say three or four members – get together informally to discuss affairs of the institution?

No. A gathering of three or more members of the Board where business is discussed is illegal, unless the gathering has been properly advertised for at least three working days as a meeting. It does not matter that a quorum was not present.²⁴ If more than two Board members serve on an institution-related foundation's board, FOIA will likely be violated.

This prohibition is generally against *three or more* members discussing public business. *Two* members may discuss public business in person, on the phone, or otherwise, with one notable exception. If those two members constitute either the entirety or a quorum of a committee or subcommittee, or other group that has been designated by the Board or Board Chair to advise the Board or has been delegated some responsibility by the Board, then any discussions between them must be properly advertised as a meeting. Otherwise, the gathering is an illegal “meeting” under FOIA.²⁵

Can't I even go to a cocktail party or dinner with two (or more) other Board members?

Yes, of course you can. While there, you may even discuss business with *one* other member at a time.

Three members, however, may not discuss public business together, and a third member may not listen to the conversation of the other two.

Please keep in mind that this prohibition applies at *all* times and in *all* places – including, for example, lunches, dinners, and social occasions held in conjunction with Board meetings or at annual professional conferences. For example, if a Board holds a luncheon between the

²² For details *see* § 2.2-3707.

²³ § 2.2-3707(F)

²⁴ § 2.2-3707

²⁵ § 2.2-3701

morning and afternoon sessions of a meeting, the Board must advertise the luncheon as a meeting and have the luncheon open to members of the public, or ensure that Board members do not discuss any public business during the luncheon. That's a difficult task, but a mandatory one.²⁶

The Board wants to take a bus tour of campus and our new facilities during a break at our Board meeting. Any problem with this?

No, provided that arrangements are made also for members of the press and public to be present whenever any institutional business is discussed. That means you might need a big bus if any discussions will take place on the bus. (This was a real-life problem at another institution.)²⁷

Our Board members routinely serve on ad hoc committees or task forces. Must the institution advertise these meetings?

If three or more Board members are on a committee, the meetings must be noticed. You can avoid noticing all of these meetings by having only one or two board members on the committee or task force.

We hold an annual retreat. This is a very informal work/training session. No business is conducted and no action is taken. Do we have to advertise this meeting and allow the press and members of the public to attend?

Absolutely. Any get-together of three or more members at which the business or operations of the institution are discussed is a "meeting" under FOIA. Retreats and work sessions are no exception. They must be properly advertised, and must be open unless an exemption applies to a specific matter under discussion.²⁸

Who can come to our meetings?

Anybody who wants to may attend your meetings. All meetings must be open to the public. Any member of the public (including, of course, press, employees, and students) has a right to attend, listen, and make a video or audio recording of any meeting. The Board can put reasonable restrictions on recording to ensure that actions of the press or public do not disrupt the meeting.

You will, at times, have outside consultants present at your meetings. They will not be familiar with FOIA and may expect or request confidentiality that FOIA does not permit. The Board and staff should provide these consultants with information that will reduce the conflict between their expectations and what FOIA permits.

Do we have to tape record our meetings?

No. Recording meetings is not required. However, proper minutes must be taken. Draft minutes and final minutes must be posted to the institution's website and the Commonwealth Calendar.²⁹ The secretary to the Board will ordinarily have this responsibility.

²⁶ § 2.2-3701

²⁷ § 2.2-3700

²⁸ § 2.2-3701

²⁹ § 2.2-3707.1

Do we have to take minutes?

Yes. FOIA requires that minutes be taken of every meeting, including retreats or work sessions. Minutes must include (a) the date, time, and location of the meeting; (b) the members of the public body recorded as present and absent; and (c) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken.³⁰ Also, minutes, including draft minutes that fairly reflect actions taken, must be posted on the website and the Commonwealth Calendar within 10 days following the meeting.³¹

Closed Meetings

What are the exceptions to open meetings? When can we hold a closed session?³²

FOIA has 51 exceptions to the open meetings requirement. The exceptions most likely to be utilized by Boards to justify closed sessions are:

(1) *the personnel exception*: discussion, consideration, or interviewing of prospective candidates for employment; or the discussion of assignment, appointment, promotion, performance, demotion, salaries, discipline, or resignation of *specific* employees. This exception does not apply to discussion of members of the Board themselves. It is also inapplicable to discussions of general policy or operations – for example, reorganization – that would refer to reassignment or laying off of employees – unless the discussion centers upon *specific* employee(s).

(2) *the scholastic record exception*: discussions or consideration of admission or disciplinary matters, or other matters that would involve disclosure of information in scholastic records (as defined in FOIA) of specific student(s). Generally speaking, however, the student or his lawyer is entitled to attend those closed sessions.

(3) *the real property exception*: discussion or consideration of the acquisition or disposition of real property where open discussion would adversely affect the bargaining position or negotiating strategy of the institution. This exception does not apply once the real property has been acquired or disposed of, and does not include potential use of real property.

(4) *the investment exception*: 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 institution would be adversely affected. This exception might occasionally be invoked during discussion of endowment funds investment.

(5) *the legal advice exception*: consultation with legal counsel for legal advice on specific matters 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.

³⁰ § 2.2-3707

³¹ § 2.2-3707.1

³² For full list of exceptions, *see* § 2.2-3711(A). The statute does refer to the exemptions for "closed meetings" but as will be discussed, a more accurate description is that they are a "closed session" within a meeting. The term "closed session" will be used in these FAQs.

(6) *the development exception*: discussion or consideration of matters related to gifts, bequests, and fund-raising activities, and grants and contracts for services or work to be performed by the institution.

(7) *the honorary degree exception*: discussion or consideration of honorary degrees or special awards.

(8) *the terrorism or cybersecurity exception*: discussions related to plans to protect public safety as it relates to terrorist activity and the response to that activity. This exception also includes discussion of specific cybersecurity threats and vulnerabilities.

(9) *the contract exception*: the discussion of the award of a public contract involving the expenditure of public funds, where discussion in open session would adversely affect the bargaining position or negotiating strategy of the institution.

You should always consult with legal counsel well in advance of going into any closed session. The above are brief descriptions of exceptions for going into closed sessions – the “basics”. In each case, there are additional, specific legal criteria or requirements to be considered.

When are we required to go into closed session?

You are never required by law to go into closed session. FOIA gives the Board the option of doing so when the topic of discussion falls within a FOIA open meeting exception.

What must we do to go into closed session?

First, all meetings must have been properly noticed. FOIA does not permit a “closed meeting.” All meetings are open, but for limited purposes, you may go into a “closed session.” This is so even if the only reason the Board is having the meeting is to go into closed session. A closed session may be held as a small part of a larger open meeting, or a meeting may be called and noticed specifically for the purpose of having a closed session. But in any event, all meetings must first be convened as an open meeting, and then proper procedures must be followed to go into closed session. Closed sessions must be followed by an open session certification that the closed session was proper.

A detailed motion must be made to go into closed session. That motion, which must be included in the open meeting's minutes, must identify: (1) the closed session's subject matter; (2) the closed session's purpose, i.e., what you are talking about and why; and (3) the specific exemption under § 2.2-3711(A) that applies. General references to FOIA or to the subject matter of the meeting do not suffice.³³

Your counsel can provide a “script” to use in going into closed session.

³³ § 2.2-3712

What if we are in open session with only the BOV and President are present, and we want to discuss something that we would ordinarily discuss in closed session. Can't we do that without going through the formalities?

You certainly may hold the discussion without going into closed session, but there are some shortcomings to that approach, including that minutes would have to be taken, whereas minutes would not be required in a closed session.³⁴

What can we discuss in closed sessions?

Once the Board properly goes into closed session, you can discuss only those specific matters identified in the motion to go into closed session. For example, if the Board went into closed session to discuss "personnel matters – specifically the salary of the president," the Board could not discuss any other matter, not even a different personnel matter, even if that other matter might have been the proper subject of a closed session had it been included in the motion.³⁵

It's easy to stray from the topic identified in the motion for closed session. One responsibility of your counsel is to watch closely and call any deviation to your attention.

Who is permitted to go into a closed session with the Board?

Just because the Board goes into closed session, it does not mean that everyone other than Board members must be excluded. The Board can allow anyone to attend that the Board believes is necessary to the discussion. That said, it is best to allow *only* those persons deemed necessary to the discussion.

Governing boards are required by law to invite and include legal counsel in all meetings, including closed sessions.³⁶ The Board is focused on conducting its business, and not focused on making sure it discusses only matters for which it went into closed session. It is very easy to stray from the central discussion, and the lawyer can focus attention on keeping the Board within legal bounds. This is important in that each individual Board member must certify upon leaving closed session that nothing was discussed other than the matter(s) mentioned in the motion to go into closed session.³⁷ Your counsel can also identify that legal advice may be needed when Board members are unaware that legal issues are implicated.

Who decides when closed session is appropriate?

The Board as a whole is responsible for deciding whether to go into closed session and who should be included and excluded. The Board decides to go into closed session through passage of the motion to do so. As a matter of governance, the Board as a whole also should decide who should stay and not rely solely on the Chair, the secretary to the Board, or the President to make that call.³⁸

Barring unusual circumstances, for practical reasons, the President should remain in most closed meetings.

³⁴ § 2.2-3712(I)

³⁵ § 2.2-3712

³⁶ § 23.1-1303

³⁷ § 2.2-3712(D)

³⁸ § 2.2-3712(F)

Can we vote in closed session?

Well, yes and no. The Board can take non-binding votes – straw-polls, of sorts – to get a sense of how a public vote will go. No “official” vote, however, may be taken. Any action that is required as a result of discussions in closed session must be taken after going back into the open meeting.³⁹ Members are not legally bound to vote in the open meeting as they indicated they would in closed session.

What do we do when we have finished our closed session discussions?

The Board must reconvene, by motion, in open session following a closed session, even if they have no more business to conduct. After the room is opened and visitors are informed that the meeting is now open, each member of the body must affirm by roll call or recorded vote that only those matters lawfully exempted and identified in the motion to close the meeting were heard or discussed. Any member who believes matters outside the scope of the motion were discussed must say so prior to the vote. A statement that describes the substance of the departure must be included in the minutes.⁴⁰

Board members must take the certification process seriously. Failure to certify that the closed session was held properly does not affect the validity or confidentiality of matters discussed in the closed session or action taken on those matters later in the open meeting.⁴¹ However, a deviation from the proper subject of the closed session and the failure of a unanimous certification vote could subject the Board to public criticism. Furthermore, if a court finds that a public body voted to certify a closed session it should not have certified, a court may impose a penalty on the public body of up to \$1,000.⁴²

May Board members talk with other people about matters that were discussed in closed session?

There is no *legal* prohibition against Board members revealing discussions held in closed sessions and the Board itself may not prohibit such. Board members are officers of the Commonwealth, and within legal parameters, each must decide how to best execute their responsibilities to the Commonwealth and the institution. Common sense, professional norms, and individual consciences must dictate Board members’ actions. One notable exception from Federal law: FERPA generally prohibits all school officials, including Board members, from revealing information obtained from student records. Other privacy requirements outside of FOIA may exist under federal and state law. Please consult counsel if you have questions.

Should minutes be taken in closed session?

Not necessarily. There is no requirement that minutes be taken in closed session.⁴³ Any minutes that are taken need not be disclosed. They *may* be released, however, in the Board’s discretion. In general, a Board may prefer not to take minutes because there would not be any documents that could be released inadvertently.

³⁹ § 2.2-3711(B)

⁴⁰ § 2.2-3712(D)

⁴¹ § 2.2-3712(E)

⁴² § 2.2-3714(C)

⁴³ § 2.2-3712(I)

What is an executive session?

The term executive session no longer has any legal significance. Under FOIA, there is a meeting and you are either in open session or closed session. For that reason, we strongly suggest that Boards abandon using the terminology "executive session." Further, it is common for Board members and others to confuse "executive session" and "executive committee."

Electronic Communication Meetings, or "Telephone Meetings"⁴⁴

May we hold a meeting by telephone or video?

Yes. Under FOIA, meetings to discuss or transact public business *generally* may not be conducted by telephone, video, or other electronic communication means. Instead, members must be physically assembled in one place. However, a Board may conduct a meeting through such means, provided that it strictly complies with the special FOIA provisions governing electronic communication meetings. Electronic communication meetings are referred to as "telephone meetings" throughout these FAQs.

How much notice must be given of telephone meetings?

The notice required for telephone meetings is three (3) working days – the same as for other meetings. As with other meetings, the secretary to the Board ordinarily will handle posting the proper notice. Again, if Board bylaws require more than 3 working days' notice, the longer notice period must be met.

There are very specific requirements regarding the notice that require many details about the meeting to be known in advance. For example, the notice must include the remote locations that are open to the public and the electronic communication means by which members of the public may listen to or observe the meeting. It is a good idea to consult with counsel prior to issuing the notice that includes participation by telephone.

May members of the board call in from different locations?

Yes, with some limitations. First, a quorum of the body must be physically assembled at the primary meeting location. If a quorum is not present in one place, members may not transact business. If a quorum is present in one location, other members may call in from remote locations if other statutory requirements are met.

May a member call in from wherever he or she happens to be at the time of the meeting?

No, if the remote location is open to the public. In order to conduct a telephone meeting, each remote location open to the public must have been determined in advance and advertised to the public as a remote location of the meeting. Public access to remote locations is encouraged but not required. If public access is afforded at a remote location, the location must be equipped with a speakerphone so that the public can hear and participate. Any person attending the meeting at any of the public meeting locations must be given the same opportunity to address the Board as persons attending the primary location where the quorum is located, and members

⁴⁴ All rules regarding Electronic Communication Meetings can be found in: § 2.2-3708.2.

of the public must be provided with the agenda, agenda packets, and all other materials provided to the Board, unless the information is prepared for a closed session, or otherwise exempt.⁴⁵

If a remote location that is open to the public is noticed, then the member decides to attend at another location, may we then omit the original location?

No. Once a location is noticed as a remote location, public access must be provided at that location unless the entire meeting is cancelled and re-noticed for at least 3 working days later.

If something comes up after the three working days' notice that prevents a board member's physical attendance, can a board member still participate?

Yes, but only under certain conditions. A member may participate by telephone if on or before the day of the meeting, a member notifies the chair that he or she has a temporary or permanent medical condition or personal matter that prevents his or her physical attendance at the meeting. The Board must have a written policy that allows for such participation and the Board must approve the board member's participation. There are several other requirements, so please consult with counsel if this issue arises.

May we hold all of our meetings as telephone meetings?

No. You must hold at least one meeting annually where members are physically assembled at one location and where no members participate by electronic communication means.

Are there any special voting requirements for telephone meetings?

Yes. All votes at telephone meetings must be roll-call votes, recorded by name, and included in the minutes. This includes *pro forma* motions, such as motions to adjourn.

Must the telephone meeting be tape recorded or minutes kept?

There is no requirement that the meeting be tape recorded. However, minutes must be kept just as with non-telephone meetings.

What if a phone goes out or there is some other problem with communication during the meeting?

If during the meeting there is any interruption in the audio or video communication, the meeting must be suspended immediately and may not be resumed until repairs are made. The notice of the meeting must include a phone number to notify the primary meeting location of any interruption.

May a member call in on the telephone and participate in discussion at a meeting so long as the member does not vote?

If the institution cannot satisfy all statutory requirements to conduct a telephone meeting, a member may call in from a location, provided that the member *only listens*, and does not

⁴⁵ § 2.2-3708.2(D)(5)

otherwise participate in any manner. However, the more conservative and safer approach would be to avoid this scenario.

May a Board set up remote sites for public participation without 3 days' notice?

Yes, provided that no member of the Board participates from those remote sites. The telephone meeting provisions of FOIA are designed to limit *member* participation by electronic means, not *public* participation. Public bodies may allow members of the public to call in and may otherwise set up remote sites for public participation. Telephone meeting provisions only apply when a member is participating from a remote location.

What types of meetings may be held by telephone?

Any otherwise-permitted meeting of the Board, including closed sessions and emergency meetings, may be held as a telephone meeting. Meetings of committees or subcommittees of the Board also may be held as telephone meetings, but must comply with the same requirements as telephone meetings of the entire Board.

May we use email to communicate between meetings?

The nature of the email use is an important factor in determining whether its use is proper.

There is nothing improper or illegal about using email in and of itself. Email provides a fast, efficient means of communication for you in your public service life, just as it does for you in your personal and professional life. Nothing prohibits the use of standard email for general communication between or among members. This type communication is analogous to mailing copies of a letter or mass distribution by fax, and is not specifically governed by the meeting provisions of FOIA.

It is important to note, however, that the *nature of e-mail use* will determine the legality of its use. No *lawful* meeting may be held by email. That is to say, if three or more members of a public body (or a quorum if less than three) communicate by instant e-mail or texts, or if members are present at computers to receive and send e-mail simultaneously, that may well constitute an *illegal* meeting.

When the use of e-mail more resembles communication through ordinary mail, with significant delay between receipt and response, there is no "meeting" under FOIA. In contrast, when the exchange of e-mails resembles an assemblage of members of a public body, in that e-mails are being sent and responded to in quick fashion, such that there is a feature of simultaneity, then such an exchange may be a "meeting" under FOIA, albeit an unlawful meeting.

Board members should exercise extreme caution in the use of email. Use of distribution lists could set the stage for an illegal meeting. Consider, for example, that a Board member sends an email to all members of the Board, and two of those members happen to be sitting at their computers – not an unlikely situation. If those two members respond to the message using function "reply all" within a short timeframe, we have an *illegal meeting*, subjecting the members to public criticism and the monetary penalties of FOIA. Please avoid sending a reply to all Board members at the same time.

Also, keep in mind that emails that discuss the transaction of public business are "public records" under FOIA and must be produced in response to a request. (See below under "Records.") Be careful what you write.

Emergency Meetings

What if the University or Board has an emergency? Can we meet without three days' notice?

Yes. The public body must give notice that is "reasonable under the circumstances." In an emergency, notice must be given to the public and to Board members at the same time.⁴⁶ An "emergency" is an unforeseen circumstance rendering the notice requirement impossible or impracticable and which circumstance requires immediate action.⁴⁷ Delay or procrastination on the part of the Board or institution does not constitute an "emergency" under FOIA.

If we have an emergency, may we have a telephone meeting without 3 days' notice?

Yes. If an emergency telephone meeting is called, reasonable notice under the circumstances must be provided to the public. Generally, that would mean providing notice to the same persons as in a non-emergency by the most expedient method possible. Notice must be given to the public contemporaneously with that given members of the Board.⁴⁸

If an emergency telephone meeting is held, must public access be provided?

Public access to the primary meeting location is required. Public access to remote locations is encouraged, but not required. The Board must meet all other telephone meeting requirements; for example, minutes must be kept. Furthermore, the minutes of the meeting must state the nature of the emergency.⁴⁹

RECORDS

What does FOIA require regarding public records?

In general, FOIA requires that unless an exception applies, all records in the possession of a public employee or officer (including Board members) that relate to public business must be made available to Virginia citizens and members of the media upon request. They are entitled to read and inspect the document and to make copies. (Generally, institutions find it easier to provide requestors with copies rather than requiring the requestor to make the copies.) We generally refer to a request for public records as a "FOIA request."⁵⁰

What is a "public record"?

Public records are basically anything the institution and its officials and employees use to transact public business and record data, whether produced by them or others. Records include (among other things) paper documents such as copies of letters, contracts, memos, etc. Also included are video tapes and audio tapes; digital documents on computer hard drives and

⁴⁶ § 2.2-3707(D)

⁴⁷ § 2.2-3701

⁴⁸ § 2.2-3708.2(D)(2)

⁴⁹ § 2.2-3708.2(D)(7)

⁵⁰ § 2.2-3704

servers; and text messages on cell phones – in short, anything that records or documents public business is a public record.⁵¹ If it is about public business, it's a public record. This includes anything in a member of the Board's home or work computer or otherwise in his or her possession.

Do FOIA requests have to be in writing?

Absolutely not. Any request made for records is a FOIA request, whether made orally, by letter, or by email. Additionally, the person requesting records need not use any magic words, such as “records,” or “FOIA.”⁵² The requestor is not required to tell you why he or she is asking for the records or what they intend to do with them and you should not ask.

Whenever anyone asks you for anything related in *any way* to the business of your institution, you should report it immediately to the institution's FOIA officer – even if you do not have any records you believe to be responsive to the request. Others within the institution may have responsive records, and the institution is under a very tight time frame within which to produce the records or object to production.⁵³

Are there exceptions to the requirement that we produce requested records?

Yes. In fact, there are well over a hundred exceptions. Your responsibility as a Board member is to report any request for records to your institution's FOIA officer or counsel. They will help you and others determine what exemptions might apply and how best to respond to the request.⁵⁴ The role of the FOIA officer is to assist in document collection to be responsive. Legal questions should be directed to legal counsel.

How long do I have to produce records in response to a FOIA request?

The institution has only 5 working days to respond initially, thus the importance of reporting any request immediately to the institution's FOIA officer. The FOIA officer will assist you and others in gathering documents and properly responding to the request. Even if the institution invokes the permitted extension of time, the initial response still must be made within 5 working days, and a final response must be made within 12 working days of the initial request, unless other arrangements are worked out between the FOIA officer and the requestor.

Never attempt to respond to a FOIA request on your own without consulting your FOIA Officer or counsel.

Would a FOIA request require me to give an account of some event I witnessed, for example, write a description of a discussion I had with another Board member?

No. FOIA only requires the production of already-existing public records. It never requires that a record be created. (Please note that pulling data from an existing database or other structured collection of data is not creating a record.) At times, an institution may find it preferable for any number of reasons to create a new document rather than producing the existing documents that were requested. That's fine, as long as the requester agrees.

⁵¹ § 2.2-3701

⁵² § 2.2-3704(B)

⁵³ § 2.2-3704

⁵⁴ To view the exclusions, *see* §§ 2.2-3705.1-2.2-3705.8 and § 2.2-3706(B).

What about my personal documents, including for example, handwritten notes such as those from meetings or discussions with alumni, email at home on my personal computer, etc.?

First, please understand that *any* record (letter, memo, scribbled note, email, audio recording, or any other) that in any way relates to the business of the institution is *not* a personal document or record, it is a *public record*. This is the case no matter where it is located. Therefore, if the institution, officers, or employees receives a FOIA request, records would have to be produced if responsive to the request.⁵⁵

PENALTIES⁵⁶

So what if we violate FOIA? What's the big deal?

First, members of the Board are entrusted with the public confidence, and a FOIA violation is breach of that trust. The General Assembly has determined that, with specific exceptions, the public's right to open government is not to be violated. Extreme embarrassment to the University and you personally can result from FOIA violations.

Beyond that, any citizen can file a complaint in court if he believes that the institution has violated FOIA. It is up to the officer or employee to prove that an exception to FOIA was cited appropriately. Anyone may rely in good faith on Virginia FOIA Council opinions.⁵⁷ However, if not successful, the offending officer or employee can be fined personally up to \$2000 for the first occurrence and up to \$5000 for additional occurrences. In addition to these penalties, any officer or employee that alters or destroys requested records with the intent to avoid complying with a FOIA request can be fined personally up to \$100 per record altered or destroyed.⁵⁸

⁵⁵ § 2.2-3701

⁵⁶ For violations and penalties, *see* § 2.2-3714.

⁵⁷ § 2.2-3715

⁵⁸ As mentioned previously, a public body also may be fined up to \$1,000 if it votes to certify a closed session that was not held in accordance with FOIA.

Duties and Responsibilities of Boards of Visitors

August 15, 2019



Michele Schumacher, Board Liaison

Mike Melis, University Counsel - Office of University Counsel

Jake Belue, Office of University Counsel

Karen Helderman, Executive Director, Audit and Compliance Services

Overview

- BOV Member Duties
- Legal Issues/Responsibilities
- Role of University Counsel
- Audit and Compliance Services

Board Member Duties and Responsibilities

BOARD MEMBERS AS FIDUCIAIRES

Fiduciary – One who holds some asset(s) in trust for another and is charged to act beneficially on behalf of the other in managing that asset.

The Asset – The college/university, including mission & identity, property, human resources and educational product.

For Whom – The founders of the asset, which for public universities is the state, and its sponsors, which include students, donors, alumni, and taxpayers.

Member Fiduciary Duties – in general

- **Duty of Care** - Act prudently, diligently and deliberately in light of all reasonably available information.
- **Duty of Loyalty** - Put the interest of the university before self/others. Actively disclose existing or potential conflicts of interest.
- **Duty of Obedience** - Advance the mission of the university, consistent with its mission/goals and in accordance with statutory authority.

Four Areas of Responsibility

- Understand the institution's mission
 - Ensure that the institution's mission is kept current and is aligned with public purposes
- Chief Executive Officer
 - Select a chief executive officer to lead the institution
 - Support and periodically assess the performance of the president and establish and review the president's compensation

Four Areas of Responsibility - continued

- Strategic Planning / Long-Term Vision
 - Charge the president with the task of leading a strategic planning process, participate in that process, approve the strategic plan, and monitor its progress
- Act in accordance with Code of Virginia and Board Bylaws
 - Comply with federal state and local laws as required
 - Confirm that Board policies and processes are current

Guidelines for Effective Governance: Implementing the Duties of Care, Loyalty, and Obedience

- Attend meetings
- Read and evaluate the materials
- Ask questions and probe assumptions and get answers
- Remain informed about operations, performance, and challenges
- Understand the terms of transactions
- Make decisions after candid discussion and receiving appropriate advice
 - Create a culture of inclusion, seek/listen to diverse views

Guidelines continued

- Support board decisions
- Understand financial statements and monitor related controls
- Understand and uphold the mission of the university
- Review/monitor performance of chief executive
- Honor Confidentiality
- Take reasonable efforts to confirm that the university:
 - is legally and ethically compliant with the law and applicable internal and external rules
 - has instituted effective internal controls to achieve compliance and to identify and address problems

Guidelines continued

- Avoid Conflicts of Interest
 - Conflict in fact
 - Conflict in appearance
 - ❖ Do not use the position of authority to obtain, directly or indirectly, a benefit for yourself or for another organization
- Engage in governance not management
- Maintain integrity and ethical awareness in all actions

Key “Takeaways”

- Duties in **your role** as a BOV Member
 - Remember: A BOV Member is VCU.
- Boards should only approve an action after reasonable inquiry has provided sufficient opportunity for a well-informed decision (i.e. **Ask!**).
- Contribute to VCU through appropriate governance, and enhancing the tone at the top for ethical decision making.
- A board member does not become empowered to act for the institution individually. The authority of the university to take action resides with the full governing board.

What does the law say?

Board powers and Duties

§ 23.1-2305.

- Appoint all teachers, staff members, and agents, fix their salaries, and prescribe their duties
- Generally direct the affairs and business of the University
- Confer degrees, including honorary degrees
- Receive gifts

What does the law say?

Executive Committee Responsibilities

§ 23.1-1306.

- Organize working processes and recommend best practices for governance
- Review the board's bylaws and recommend amendments
- Advise board on committee structure, appointments, and meetings
- Develop orientation and continuing education process
- Develop and monitor compliance with a code of ethics for board members
- Develop a set of qualifications and competencies for membership

Code of Virginia – Educational Requirements

§ 23.1-1304

- SCHEV delivers annual educational programs for governing boards
- New members must attend at least once within first two years
- Eighteen elements of educational program

Code of Virginia – this might get your attention

Term and Conduct

- Two full terms, then waiting period of four years
- Board Policy on Ethical Leadership
- Process for removal without sufficient cause for absence

Removal for:

- Failure to attend meetings for one full year
- Failure to attend SCHEV orientation in first two years
- Malfeasance, misfeasance, incompetence, or gross neglect of duty

VA Freedom of Information Act (FOIA)

What Every BOV Member Absolutely *Must* Know about FOIA:

- All **meetings** must be open
- All **records** must be available to the public – the format or medium does not matter

Importance of Compliance

- BOV records have become a target of interest to:
 - Faculty & Students
 - Press
 - Alumni
 - General Assembly and other Elected Officials
- Meetings not handled appropriately = Board actions could be challenged
- Negative publicity for the university
- Perceived violation of public trust
- Possible fines for deliberate actions

Meetings

- All meetings of public bodies must be open with public access permitted *unless there is a specific statutory exemption*
- What is a meeting?
 - When three or more members are gathered, and
 - Public business is discussed
- It doesn't have to be a "Meeting" to be a meeting (social events, unplanned conversation at coffee shop).

Requirement for a Legal Meeting

Meetings Must Be “Noticed”

- Three *working days*’ notice
- Posted in 4 specific public places
- Public has the right to attend

Meetings: *What does this mean to me?*

- Cocktail parties and golf games?
- Avoid discussion of Board or Board Committee business with *more than two* members
 - in person
 - telephone
 - internet chat **or email**

Electronic and Telephone Meetings

- Generally, meetings must be in person
- BOV members may call in but a quorum of the BOV must be physically present
- The notice required for telephone meetings is 3 working days –same as for other meetings.
- Very specific requirements exist for the notice that require details about the meeting to be known in advance. For example, the notice must include the remote locations that are open to the public and the electronic communication means by which members of the public may listen to or observe the meeting. Public access to remote locations is encouraged but not required.
- Consult with counsel prior to issuing the notice for electronic meeting

Closed Meetings

Common exemptions for closed meetings

- Legal advice
- Discussion of contract negotiations
- Discussion of ***identifiable*** employees or applicants

Requirements for Closed Meeting

- **Specific exemption** and reason for closed meeting must be cited
- Committee may discuss **only matters identified in the motion** to go into closed meeting – even if subject would otherwise qualify for a closed meeting discussion
- **Certification** required after closed meeting.
- Any action the BOV wishes to take as a result of discussion in closed session must be **voted on in open session**.

Closed Meetings: *What does this mean for me?*

- Remember the stated purpose of closed meetings, and do not stray from that discussion
- Gently remind others if discussion strays
- Cast a truthful certification vote
- Legal counsel cannot play “FOIA cop” but should be relied upon for guidance

Public Records

- All public records not subject to a specific exclusion/exception must be made available to the public upon request.
- Public records - *anything* that records *any* public business
 - letters or other documents
 - handwritten notes
 - video/audio recordings
 - emails
 - text messages
- Location doesn't matter (at the university, home, office, personal devices, etc.)

What is a “FOIA Request”?

- Any request from any eligible person (Virginia citizen or certain media)
- Does not have to be a written request – oral is fine
- Need not reference “FOIA”
- Five workdays to initially respond
- Can charge reasonable fees, but this rarely covers actual costs
- Report any records request *immediately* to the Rector and Board staff

Records: What does this mean for me?

- Be thoughtful about what you write in email, notes, memos
- Favor telephone over email
- Use your official VCU email for VCU business; or keep all VCU business communications in a separate folder if you use a personal or business account
- Do not trash or delete official messages/documents. State law requires preservation of records for certain time periods.

Records: What does this mean for me?

- Expect that some communications will come to you from legal counsel to maintain confidentiality/privilege.
- If you share a privileged communication with someone else, privilege may be lost – let counsel help.
- If you need to communicate regarding a difficult issue via email, work with the Rector and copy legal counsel for review/advice.

Email and social media can be a record and a meeting!

- Simultaneous e-mail can easily result in discussion between “more than two members” = *Illegal* meeting
- Social media interactions may result in a meeting (e.g. “liking” posts)
- Recommendation
 - Use the telephone when possible!
 - Avoid e-mail to more than one member when possible
 - ***Never*** use REPLY ALL

Office of University Counsel

Mike Melis

Jake Belue

Liz Brooks

Sarah Johns

Jim Fiorelli

Bill Norris

Elizabeth Griffin



University Counsel Services

- ▶ Represent Virginia Commonwealth University on:
 - Contracts and Business Transactions
 - Development/Foundations
 - Labor and Employment
 - FOIA
 - Research Compliance
 - Intellectual Property Issues
 - Student and Faculty Issues
 - Civil Rights (all the “Titles”)
 - Litigation
 - *Lay Psychotherapy*
- ▶ We can only handle legal matters related to University business

Legal and Compliance Challenges for Higher Education

- [Accounting](#)
- [Accreditation](#)
- [Affirmative Action](#)
- [Athletics](#)
- [Campus Safety](#)
- [Conflicts of Interest](#)
- [Copyright and Fair Use](#)
- [Disabilities and Accommodations](#)
- [Donors and Gifts](#)
- [Environmental Health and Safety](#)
- [Export Controls](#)
- [Financial Aid](#)
- [Foundations and Affiliated Enterprises](#)
- [Governance](#)
- [Grants Management](#)
- [Health Care and Insurance](#)
- [HEOA Compliance Obligations](#)
- [Human Resources](#)
- [Immigration / International Students and Employees](#)
- [Information Technology](#)
- [Intellectual Property and Technology Transfer](#)
- [International Activities and Programs](#)
- [Lobbying and Political Activities](#)
- [Privacy / Student Records](#)
- [Program Integrity Rules](#)
- [Research](#)
- [Sexual Misconduct](#)
- [Tax Compliance](#)
- [Telecommunications](#)

AUDIT AND COMPLIANCE SERVICES

Karen Helderman, Executive Director

Audit and Compliance Services

- University and Health System Responsibilities
- Reports to both Boards (BOV and BOD)
 - Provides audit, integrity and compliance operations on behalf of the Boards
 - Executive Director is accountable to the Boards through their respective audit and compliance committees
- University Functions
 - University Audit and Management Services (Internal Audit)
 - Integrity and Compliance Office

University Audit and Management Services (Internal Audit)

- Institute of Internal Auditor's *International Standards for the Professional Practice of Internal Auditing*
- Risk-based audits of information systems, financial and compliance controls
- Investigative reviews
- Special requests
- Advisory services
- Audit reports provided in Audit, Integrity and Compliance Committee materials

Integrity and Compliance Office

- Oversees VCU's Compliance and Ethics Program
- Utilizes compliance partners throughout the University
- Software provides visibility into areas of concern
- Compliance Program based on Chapter 8 of the US Department of Justice *Federal Sentencing Guidelines* – Seven Elements of an Effective Compliance Program

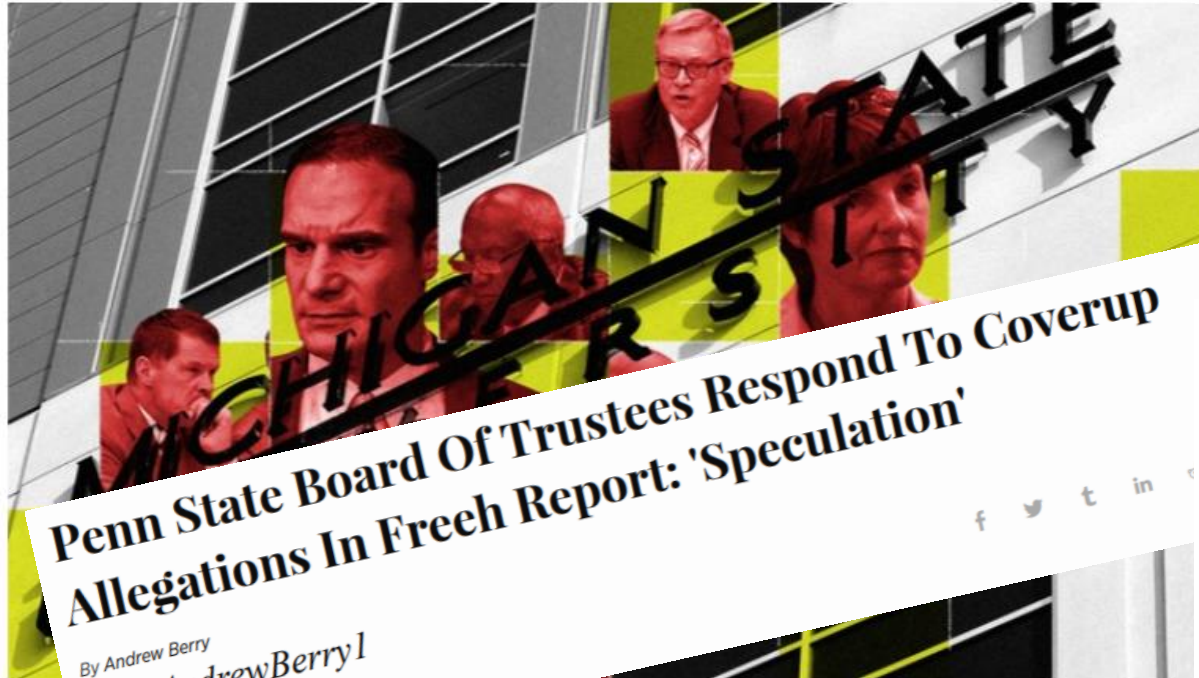
Integrity and Compliance Office

- Standards & Procedures – Code of Conduct, written policies and procedures
- Oversight – designated compliance officer and Board compliance committee
- Education & Training – education program on policies and expectations
- Reporting – methods to communicate concerns without fear of retaliation
- Monitoring & Auditing – track policy updates, analyze trends, staff surveys
- Enforcement and Discipline – enforce our compliance program by taking action
- Response and Prevention – analyze violations, refine or adopt policies, provide additional training

Michigan State's Untouchable Board of Trustees

Members of the board have been accused of covering up Larry Nassar's abuse, and yet they've somehow emerged from the scandal unscathed.

CAROLINE KITCHENER SEP 26, 2018



Penn State Board Of Trustees Respond To Coverup Allegations In Freeh Report: 'Speculation'

By Andrew Berry
@AndrewBerry1

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The Washington Post

Enron Board Aided Collapse, Senate Panel Says

By Carrie Johnson
July 7, 2002

The members of Enron Corp.'s board of directors contributed to the firm's collapse by failing to curb the Houston energy trader's risky accounting tactics, approving conflicts of interest, and rubber-stamping enormous cash payouts to executives, according to a harshly worded Senate report to be released today.

"The board witnessed numerous indications of questionable practices by Enron management over several years, but chose to ignore them to the detriment of Enron shareholders, employees, and business associates," the report said.

March 21, 2019 04:03 PM

U-Maryland Medical System CEO put on leave after board conflict scandal

HARRIS MEYER

TWEET SHARE SHARE EMAIL



Robert Chrencik

The University of Maryland Medical System has put CEO Robert Chrencik on temporary leave of absence following reports that nine of the system's 30 board members, including elected public officials, have substantial business deals with the system.

Board Chairman Stephen Burch announced that the board, at an emergency meeting Thursday, also voted to hire an independent firm to review board members' contractual relationships with the system.

Typical Oversight Questions

- How does VCU's compliance program compare to its peers?
- Are we satisfying the seven requirements of an effective compliance program?
- What are our most significant risks and how are we mitigating them?
- How are we monitoring and responding to misconduct?
- Are we effectively communicating our ethics and compliance commitment?
- How do senior leaders determine which risks to report to the Board?
- How is the Board assured that controls for key risks are working?

Integrity and Compliance Office



www.codeofconduct.vcu.edu