



★ VIRGINIA ★
DEPARTMENT *of* ELECTIONS

GREB Handbook

Chapter 21

The Virginia Freedom of Information Act

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21. THE VIRGINIA FREEDOM OF INFORMATION ACT (FOIA)	3
21.1 GENERAL PROVISIONS	3
21.1.1 DUTY OF PUBLIC OFFICIALS TO READ AND BE FAMILIAR WITH FOIA.....	4
21.1.2 PRESUMPTION OF OPENNESS.....	4
21.1.3 ENFORCEMENT	5
21.1.4 PENALTIES.....	5
21.2 ELECTORAL BOARD MEETINGS AND MINUTES	5
21.2.1 WHAT “MEETINGS” FALL UNDER FOIA? CAUTION ON EMAILS	6
21.2.2 THE SOCIAL EXEMPTION.....	8
21.2.3 EXCEPTIONS ALLOWING ELECTRONIC PARTICIPATIONS IN ELECTORAL BOARD MEETINGS.....	8
21.2.4 PUBLIC NOTICE REQUIREMENTS	9
21.2.5 MAINTAIN ANNUAL NOTIFICATION LIST.....	11
21.2.6 AGENDA PACKETS ARE OPEN	11
21.2.7 SPECTATORS MAY FILM OR RECORD MEETINGS.....	11
21.2.8 MINUTES ARE REQUIRED	12
21.2.9 VOTES MUST BE IN OPEN MEETINGS	12
21.2.10 POLLING THE MEMBERS.....	12
21.3 CLOSED MEETINGS	13
21.3.1 CLOSED MEETINGS PERMITTED FOR STRICTLY LIMITED PURPOSES	13
21.3.2 VOTES MUST BE IN OPEN MEETING	14
21.3.3 CONFERENCES PRESUMED OPEN	14
21.3.4 MOTION TO CLOSE MEETING.....	14
21.3.5 CLOSED INTERVIEWS PERMITTED.....	15
21.3.6 DISCUSSION RESTRICTED TO EXEMPTED MATTERS COVERED BY THE MOTION	15
21.3.7 CERTIFICATION OF CLOSED MEETING	15
21.3.8 NONMEMBERS MAY ATTEND CLOSED MEETING.....	16
21.3.9 VOTING EQUIPMENT AND ELECTION SECURITY PLANS.....	16



21. The Virginia Freedom of Information Act (FOIA)

21.1 GENERAL PROVISIONS

[The Virginia Freedom of Information Act \(FOIA\)](#) was enacted in 1968 to ensure public access to state and local government meetings and records. This section focuses on the meetings provisions of FOIA and related election laws. The records provisions of FOIA are discussed in Chapter 20. FOIA establishes a presumption of openness and defines specific exemptions that allow for the closure of meetings or withholding records. FOIA does not direct that any meeting or records covered by its provisions be closed or withheld. It simply *allows* them to be. The choice of whether to exercise FOIA exemptions belongs to the public body or its record custodian. However, other laws may trump FOIA and the electoral board may contact Department of Elections staff or local government counsel about requests or meetings implicating individual privacy considerations.

Other laws may specifically direct that particular information be withheld. For example, Title 24.2 specifically directs that no social security numbers or parts thereof be open to public inspection. Other laws in Title 24.2 restrict access to particular election records. FOIA expressly provides that Title 24.2 controls access to voter registration and election records in the event of conflict.¹ No similar provision applies to meetings. FOIA generally must be followed for meetings of the Department of Elections and electoral boards, or any subcommittee or study committee formed to advise those boards. Certain election preparation activities are not considered "meetings" based on the presence of more than one electoral board member, so long as the members do not engage in discussion or deliberation which would otherwise constitute a meeting under FOIA.² Always carefully review the specific terms of any exemption and consult legal counsel when in doubt. Local government counsel may be able to attend meetings and help with closure procedures. Electoral boards are local government employees entitled to legal support to protect the locality interests.³

FOIA was rewritten in 1999, following a two-year study, and re-codified in 2001, when Title 2.1 became Title 2.2. Various records exemptions for records were reorganized in 2004. [2014 legislation](#) provides for a study of FOIA exemptions with a report by the end of 2016.

¹ [§ 2.2-3703.](#)

² [§ 24.2-107.](#)

³ [§ 24.2-122.](#)



For those with questions about the Act, please contact (804) 225-3056 or 1-866-448-4100 (toll-free). The Council's web site provides valuable reference materials on the administration of FOIA and news on training conducted by Council staff.⁴ The Virginia Municipal League also offers [FOIA guidance tailored to local public bodies](#).

21.1.1 Duty of Public Officials to Read and be Familiar with FOIA

All members of the electoral board, the general registrar, and *all* employees of the registrar's and electoral board's offices are required to be familiar with how FOIA affects them.⁵ The local government administrator or legal counsel are required to provide new members of local public bodies a copy of FOIA within two weeks of appointment or election. All individuals should be aware that FOIA not only covers *written* documents, but also *electronic* documents, including e-mails. Care must be taken not to destroy "records" (including electronic records) that concern the transaction of public business, except as directed by the appropriate [retention schedules](#).

The general registrar should request the current FOIA for each electoral board member appointed or reappointed, and to new members of the registrar's office staff or the electoral board's staff. A copy of the current FOIA can be printed from the FOIA Council website or accessed on-line and in searchable format.⁶

21.1.1.1 What Entities are Covered Under FOIA?

The three-member State Board of Elections and each three-member electoral board are "public bodies" under FOIA; only two members are required for a quorum to conduct public business. All meetings of two or more members are covered under FOIA.

21.1.2 Presumption of Openness

Unless a public body, its officers or employees expressly invoke a specific exemption provided by FOIA or another statute, every meeting must be open to the public. All public meetings are presumed open, unless properly closed.⁷

⁴ See, <http://foiacouncil.dls.virginia.gov>

⁵ § 2.2-3702.

⁶ The Department of Elections previously printed FOIA along with some of the other acts supplemental to the election laws. All such printed publications (last published in 2001) are totally outdated and should not be used. The entire Code is now available for free on the internet, and the Department of Elections no longer provides this secondary publication. See <http://foiacouncil.dls.virginia.gov/> or [searchable format](#).

⁷ § 2.2-3700.



The provisions of FOIA must be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption must be narrowly construed, and no meeting closed to the public unless specifically made exempt by FOIA or other specific law.⁸

21.1.3 Enforcement

In any action to enforce FOIA, the public body must show an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by FOIA is presumed to be a violation. At least three working days advance notice must be given before a court petition to enforce FOIA can be filed.⁹

21.1.4 Penalties

In a proceeding against members of public bodies, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000. For a second or subsequent violation, the civil penalty shall be not less than \$2,000 or more than \$5,000.¹⁰ Responsible officers and staff of the public body can be liable for civil penalties. The public body can also be required to pay the requestor's attorneys' fees.

Electoral board members, registrars, and their staffs should be aware that this applies to each person individually, and that a minimum \$500 fine may be applied for "willful" violations of FOIA requirements.

21.2 ELECTORAL BOARD MEETINGS AND MINUTES

With few exceptions, all meetings of public bodies must be open.¹¹ "Open meetings" or "public meetings" carry certain requirements under FOIA. See Chapter 19 for specific rules governing the electoral board canvass and consideration of provisional votes.

⁸ [§ 2.2-3700](#).

⁹ [§ 2.2-3713](#).

¹⁰ [§ 2.2-3714](#).

¹¹ [§§ 2.2-3701, 2.2-3707, 2.2-3711](#).



21.2.1 What “Meetings” Fall Under FOIA? Caution on Emails

A “Meeting” occurs any time a public body or entity sits physically, or gathers via telephonic or video equipment, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three constituent members are present.¹² These types of gatherings are “meetings” regardless of their location, whether minutes are taken, and whether votes are cast. For the purposes of FOIA, “meeting” also *includes work sessions*.¹³

The gathering of employees of a public body is not considered a meeting subject to the provisions of FOIA.¹⁴ 2015 legislation expanded this exclusion. FOIA does not apply when two or more members of a public body gather:

- Someplace where the purpose for gathering is unrelated to public business. The gathering cannot be prearranged with any purpose of discussing or transacting any business of the public body.
- At a public forum, candidate appearance, or debate. The purpose of these gatherings must be to inform the electorate, not to transact or discuss public business. However, the performance of the members, individually or collectively, may be a topic of discussion at such public meeting.

A quorum of an electoral board is two members. The “social exemption” (described below) may cover many occasions when two or more electoral board members are present (for example, traveling together), but no public business is being conducted. It is best to avoid even the appearance that any public business has been discussed outside of the board's public meetings.

¹² [§ 2.2-3708](#).

¹³ [§ 2.2-3701](#).

¹⁴ [§ 2.2-3701](#).



Use of email for communications between electoral board members can present issues about blurring of the line between “correspondence” and “meetings.” The [Council’s](#) guide to *E-mail and Meetings under the Virginia Freedom of Information Act* addresses this issue. A 2012 Supreme Court of Virginia opinion found that emails between school board members did not constitute a meeting subject to notice and open meeting requirements.¹⁵ The Court’s stressed the fact-bound nature of this determination: the e-mails did not involve sufficient simultaneity; the back-and-forth exchanges were limited to two members and those sent to more than two conveyed information unilaterally, in the manner of an office memorandum. The broadening of the provision for electronic participation in noticed meetings discussed below could make it even more difficult and expensive to defend against a charge of conducting public business by email. [Virginia Freedom of Information Advisory Opinion 19 \(2004\)](#) advises that two members of a three-member electoral board may communicate using e-mail without violating FOIA, so long as it is not a simultaneous communication that would comprise a meeting for FOIA purposes (that is, it acts more like a letter than a phone call). Since such e-mails are public records, the opinion also recommends a system where all e-mails are copied to the registrar and kept on file for public inspection. If the electoral board has its own staff, they could be copied to that person for public inspection.

Two or more electoral board members may be present for the following purposes without a meeting, provided that no discussion or deliberation takes place that would otherwise constitute a meeting¹⁶:

- To prepare ballots, election materials, or voting equipment
- To inspect current or potential polling places
- To train election officials

The exemptions may only be used to carry out the specified tasks. One electoral board member may call another member to prepare for a meeting without that being considered a meeting; the same rule applies to member of the State Board of Elections under [legislation](#) passed in 2013.

¹⁵ [Hill v. Fairfax Cty. Sch. Bd.](#), 284 Va. 306 (2012).

¹⁶ [§ 24.2-107](#).



21.2.2 The Social Exemption

Nothing in FOIA shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting.¹⁷

21.2.3 Exceptions Allowing Electronic Participations in Electoral Board Meetings

In 2007, FOIA was amended to allow members to participate in meetings electronically under certain strict circumstances (provided a quorum is still physically assembled in a public location). This provision was expanded in 2013 to allow a member of a public body to participate in a meeting by electronic communication means due to a personal matter, in addition to current reasons.¹⁸ [2014 legislation](#) allows electronic participation without majority approval under *a uniform written policy* adopted by the body to govern electronic participation, including the approval process; this policy must be strictly applied regardless of the who or what subject matter is involved. Still, electronic participation may not exceed two meetings or if less, 25% of all meetings annually.

Electoral boards and local boards generally may not conduct meetings to discuss or transact public business through telephonic, video, electronic, or other means of communication where the members are not physically assembled.¹⁹

It is important to note that specific exceptions to the electronic meetings prohibition for *state* and regional public bodies, the UVA Board of Visitors, and certain licensing proceedings do not apply to local electoral boards.

As a result of the 2013 changes, electoral board member electronic participation electronically from a remote location is authorized for the following reasons and subject to certain conditions:

- Emergency
- Personal Matter

¹⁷ Va. Code [§ 2.2-3707](#).

¹⁸ See 2013 [HB2026](#) and [SB1263](#).

¹⁹ Va. Code [§§ 2.2-3707, 2.2-3708](#).



- A temporary or permanent disability or other medical condition that prevents the member's physical attendance

The following conditions apply in all cases of electronic participation:

- The body must adopt a uniform written policy governing electronic participation;
- A quorum (two members) is physically assembled at a public location.
- The public body must arrange for the voice of the remote participant to be heard by all persons at the primary or central meeting location.²⁰
- If remote participation is disapproved, that must be recorded in the minutes.

The emergency and personal matter reasons are subject to a further limitation – such participation cannot exceed two meetings in a calendar year or 25 percent of the meetings of the public body, whichever is fewer.

The prohibition on local boards holding electronic meetings (outside of the exceptions) must be considered whenever electoral board members are on the phone, as two members are a quorum. Members should use caution using the phone to avoid any discussion that would otherwise constitute a meeting.

 Interactive audio or video may be used to expand public participation.²¹

21.2.4 Public Notice Requirements

Election law requires the electoral board of each city and county to meet during the first week in February and during the month of March each year at a time set by the board and at any other time on the call of any board member.²² Two members constitute a quorum. Notice of each meeting must be given to all board members either by the secretary or the member calling the meeting at least three business days in advance, except in the case of an emergency.²³ Notice must also be given to the public.²⁴ All meetings must be conducted in accordance with the requirements of the Virginia Freedom of Information Act, except as [§ 24.2-107](#) provides for certain election preparation activities.²⁵

²⁰ [§ 2.2-3708.1](#).

²¹ [§ 2.2-3708](#).

²² [§ 24.2-107](#).

²³ [§ 2.2-3701](#).

²⁴ [§ 2.2-3707](#).

²⁵ [§ 2.2-3700](#) et seq.



There is an exception that allows electoral board members to discuss Election Day matters without formally noticing a meeting provided that “an effort has been made by all available means to give notice of the meeting to all board members.”²⁶ Even though this exception exists, the recommended best practice is to formally announce an Election Day meeting of the electoral board so that the public is aware that the board may be meeting to discuss issues arising that day. The State Board of Elections also notices a meeting for Election Day.²⁷

- The electoral board and any other public body must give public notice of the date, time, and location of its meetings. This notice must be posted in a prominent public location where notices are regularly posted (such as a public bulletin board or the Clerk of the Court’s office) and at the registrar’s or electoral board’s office. Electronic publication of meeting notices is encouraged. If the locality maintains an electronic bulletin board for meeting notices (either online or on the local government cable access channel), posting notice there fulfills the requirement.
- **Notice must be posted at least three working days prior to the meeting.**²⁸

Notice, reasonable under the circumstances, of special or emergency meetings must be given at the same time notice is provided to members of the public body conducting the meeting.²⁹ “Emergency” means an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which requires immediate action.³⁰

A meeting by the electoral board on Election Day to solve a problem which needs immediate attention is a public meeting, and the public cannot be excluded (if any public is present). However, such meetings are exempt from the public notice requirement.³¹ Efforts must be taken, however, by all available means to give notice of the meeting to all board members. These are still “meetings,” and minutes must be kept.

The State Board of Elections notices and convenes for a public meeting early on Election Day then goes into recess. This allows them to meet if needed on Election Day while fulfilling the notice requirements of FOIA.

²⁶ [§ 24.2-107](#).

²⁷ See Regulatory Town Hall and the Department of Elections website.

²⁸ [§ 2.2-3707](#). This computation excludes the meeting day. [A0-08-07](#).

²⁹ Va. Code [§ 2.2-3707](#).

³⁰ [§ 2.2-3701](#).

³¹ “Notwithstanding the public notice requirements of [§ 2.2-3707](#), two or more members of an electoral board may meet on election day to discuss a matter concerning that day’s election, where such matter requires resolution on that day, and an effort has been made by all available means to give notice of the meeting to all board members.” [§ 24.2-107](#).



21.2.5 Maintain Annual Notification List

Although public bodies may require those requesting meeting notices to annually file a written request, it is often easier to maintain an ongoing list (adding or subtracting as requested). Many people will agree to receive notices by email; though if someone prefers U.S. Mail, his/her choice must be honored.

To promote public relations, include any reporters or news outlets covering elections in the jurisdiction on the notification list.

Your local government administration may have resources to facilitate FOIA compliance such as electronic lists and calendars. Electoral board members, general registrars, and staff are generally considered local government employees entitled to local support services, including legal advice on FOIA compliance affecting the local government budget.³²

21.2.6 Agenda Packets are Open

At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting must be made available for public inspection upon request at the same time these documents are furnished to the members of the public body.³³

21.2.7 Spectators May Film or Record Meetings

Spectators have the right to photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. Public bodies cannot select meeting facilities that prohibit recording but may adopt rules governing the placement and use of equipment to prevent interference with the proceedings.³⁴

³² [§ 24.2-122](#).

³³ [§ 2.2-3707](#).

³⁴ [§ 2.2-3707](#). Updated 7.1.2010.



21.2.8 Minutes are Required

Because the electoral board's minutes must be available for public inspection in either the general registrar's office or the board's office, the secretary should promptly prepare and deliver the draft minutes to that office after each meeting.³⁵ Once finalized and adopted by the board (preferably at the next meeting), the final minutes should then be promptly filed with that same office. If the board or registrar has its own website, the draft and final minutes may also be posted there.³⁶

- ① Minutes of the State Board of Elections' meetings are available on the Virginia Regulatory Town Hall and Department of Elections websites.³⁷

21.2.9 Votes Must Be In Open Meetings

FOIA requires that all public business be transacted by public votes in open meetings unless a specific statutory exception applies or allows closure. For example, certain electoral board election preparation activities are not considered meetings, and certain topics such as voting equipment security may allow closing a meeting.³⁸ FOIA does not allow voting in secret, written ballots, or telephone polling by one board member of the others. Voting by telephone or other electronic communication is permitted only in limited emergency circumstances.³⁹

21.2.10 Polling the Members

The law allows individually "polling" members of a public body. However, because two electoral board members are a quorum, such "polling" cannot be done by the members. That would be a "meeting" under FOIA. If one member polled others by telephone, the polling would also be an *illegal* electronic meeting.

A common use of "polling" is for the registrar or a staff member to contact each of the board members to determine when they are available to meet before the Commissioner of Elections issues the meeting notice or asks which items should go on the agenda.⁴⁰

³⁵ Department of Elections must post draft minutes within 10 business days. [§ 2.2-3707.1](#).

³⁶ The 2002 General Assembly required all *state* boards to post their minutes on the Internet. While this requirement does not currently extend to local boards, the policy preference for prompt and easily accessible minutes has been established. [§ 24.2-107](#).

³⁷ See Chapter 1 Governance.

³⁸ [§ 24.2-107](#), [§ 24.2-625.1](#)

³⁹ [§ 2.2-3710](#).

⁴⁰ [§ 2.2-3710](#).



21.3 CLOSED MEETINGS

21.3.1 Closed Meetings Permitted For Strictly Limited Purposes

Public bodies may hold closed meetings only for strictly limited, enumerated purposes.⁴¹ Those most often needed by the State Board or electoral boards are discussed below. The exact wording of the statutory exemption must be considered as set out in [§ 2.2-3711\(A\)](#) or other applicable law such as §§ [24.2-625.1](#) (voting equipment security) and [24.2-653](#) (provisional ballots deliberations).

Authorized purposes for closing public meetings include (the numbers below correspond to the closed meeting purposes in the law):

- (1) 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.
- (4) The protection of the privacy of individuals in personal matters not related to public business.
- (7) 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 which 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.
- (15) Discussion or consideration of medical and mental records excluded from this chapter [FOIA] pursuant to subdivision A 5 of [§ 2.2-3705.5](#).
- (19) Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of records excluded from this chapter pursuant to subdivision 3 or 4 of [§ 2.2-3705.2](#), where discussion in an open meeting would jeopardize the safety of any person or

⁴¹ [§ 2.2-3711](#).



the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

- (35) Discussion or consideration by the Department of Elections or local electoral boards of voting security matters made confidential pursuant to [§ 24.2-625.1](#).

i FOIA does not require that these discussions be held in closed meetings. The board members will need to decide if a closed meeting is warranted, if allowed.

21.3.2 Votes Must Be in Open Meeting

To be effective, any action taken in a closed meeting must be followed by a vote in an open meeting; the substance of the action must be reasonably identified in the open meeting.

Noncompliance with open meeting requirements in selecting public officers results in their having *de facto* officer status: their official actions are valid until they obtain notice of the legal defect in their selection.⁴²

21.3.3 Conferences Presumed Open

Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings that apply to any other public body.⁴³

21.3.4 Motion to Close Meeting

Any closed meeting must be "surrounded" by an open meeting.⁴⁴ The open meeting must be convened, with proper public notice (unless the interview exception below applies), prior to the motion being made to close the meeting. The motion must identify the subject matter, purpose, and applicable exemption for discussing that subject in a closed meeting. The motion should identify the subject matter without providing details that are the basis for closure.⁴⁵

⁴² [§ 2.2-3711](#).

⁴³ [§ 2.2-3711](#).

⁴⁴ [§ 2.2-3712](#).

⁴⁵ For sample motion, see Appendix A in the FOIA Council's guide, [Access to Public Meetings](#).



21.3.5 Closed Interviews Permitted

The notice provisions of FOIA do not apply to closed meetings of a public body held solely for the purpose of interviewing candidates for the position of "chief administrative officer" (i.e., general registrar). Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within fifteen days thereafter.⁴⁶

21.3.6 Discussion Restricted to Exempted Matters Covered by The Motion

The public body holding a closed meeting must restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of FOIA and identified in the motion as required above.⁴⁷

An open meeting with notice is required before a public body may take action on matters discussed in any closed meeting unless some specific statutory exemption applies.⁴⁸

21.3.7 Certification of Closed Meeting

At the conclusion of any closed meeting, the public body must immediately reconvene in an open meeting and 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 FOIA** 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**. Any member of the public body who believes that there was a departure from the requirements of subdivisions (i) and (ii), should so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement must be recorded in the minutes of the public body.⁴⁹

⁴⁶ [§ 2.2-3712](#).

⁴⁷ [§ 2.2-3712](#).

⁴⁸ [§§ 2.2-3707, 2.2-3712](#).

⁴⁹ [§ 2.2-3712](#).



At the end of the closed meeting, the board must immediately reconvene the open meeting. The board should send someone outside to tell anyone waiting to attend the open meeting that the meeting is reconvening. The public should be given sufficient time to reenter the room before the board proceeds to certify the closed meeting and proceed with any other business. Any agreement made, or votes taken in the closed meeting are invalid unless they are taken again in the public meeting, with their "substance reasonably identified."⁵⁰

21.3.8 Nonmembers May Attend closed Meeting

A public body may permit nonmembers to attend a closed meeting if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting.⁵¹ It is recommended that permission for such nonmembers to remain in the room during the closed meeting be stated in the motion to close the meeting.

21.3.9 Voting Equipment and Election Security Plans

Certain State Board or electoral board meetings and records concerning voting equipment and election security may be closed. However, records may only be excluded from inspection and copying, and meetings may only be closed under both of the following conditions:

- Records or discussions in meetings describe protocols for maintaining the security of ballots or voting and counting equipment, *or* reveal the results of risk assessments of specific local electoral procedures.
- The release of such records or discussion of such matters in an open meeting would compromise the security of an election.

This exemption specifically states that it does not authorize a closed meeting to discuss any breach of security in an election.⁵²

⁵⁰ See [§ 2.2-3711](#) and [21.3.2](#) (above).

⁵¹ [§ 2.2-3712](#).

⁵² [§§ 24.2-625.1](#) and [2.2-3711\(35\)](#).

