

## Greve, Lisa

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**From:** Robert Falconi <robert.m.falconi@gmail.com>  
**Sent:** Wednesday, November 13, 2019 9:43 PM  
**To:** Greve, Lisa  
**Subject:** [External] Re: Timed Writing Exercise: November 13, 2019 9:00 p.m.

1. The School Board would have a number of defenses to the suit brought by a citizen under the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 3714 (VFOIA). As a threshold matter, under VFOIA a "Meeting" or "meetings" includes:

Work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.

Va. Code 2.2-3701. Because the School Board is a public body, than any gathering of three members would constitute a meeting under VFOIA provided that meeting does not otherwise fall under one of the exceptions under Va. Code 2.2-3701. However, the Supreme Court of Virginia has held that "e-mail communications at issue in this case do not constitute a "meeting" under FOIA." Beck v. Shelton, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004). While text messages are different from emails, the Supreme Court of Virginia makes clear that whether an electronic communication may constitute a meeting is dependent on the simultaneity inherent in the meeting. In other words, if the Board members are texting back and forth instantaneously, then this may constitute a public meeting. If the Board members are using the text messages in order to send automated text messages or the messages are more akin to email messages, then they may not be considered

Whether a series of text messages would constitute a meeting is dependent on several factors. First, the discussions must be about the public business. A "gathering of employees of a public body nor the gathering or attendance of two or more members of a public body at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body" would not be subject to VFOIA. While we don't know the subject of the Board members' text messages, the text messages would not constitute a public meeting if the text messages do not discuss or transact any public business.

Finally, another possible defense is that under Va. Code 2.2-3708.2(A), even if the text messages constitute a meeting, the meeting may be permissible under VFOIA if the Board has adopted a policy which allows them to conduct meetings electronically. I am not optimistic that this particular defense would be successful because the Board electronic communication policy must require the Board members voices to be audible to the audience, and if the Board members are communicating by text messages, then it its likely that they are not complying with that particular policy, but text messages which include audio memoranda may be permissible.

2. It would not be a defense to say that the devices were on personal phones. VFOIA does not provide any exception that would allow personal email, personal accounts, or personal phone messages to prevent the public from having access to the transaction of public business.

3. In the future, the Board members would need to be educated about VFOIA and how it interacts with modern day media. Public officials may sometimes be unaware of how these devices may inadvertently create problems. I would recommend every Board member receive a FOIA training at the beginning of their term, with a special emphasis on mobile devices, social media accounts, and other ways new media may inadvertently create the transaction of public business. I would also recommend that Board members simply not use group text messages either since this kind of communication makes it far more likely that a public meeting will have taken place as opposed to a one-to-one text.

Very truly yours,  
Robert M. Falconi

On Wed, Nov 13, 2019 at 9:01 PM Greve, Lisa <l|greve@fcps.edu> wrote:

Bob –

Thank you for applying for the position of staff attorney with Fairfax County Public Schools Office of Division Counsel.

Please complete the writing exercise below and e-mail it back to me within 45 minutes.

The writing exercise must be your own work, but you should plan to have either Westlaw or Lexis access or the Virginia Code and Virginia Reporter available (at most law libraries) when you do the writing exercise. You should refer to Va. Code §§ 2.2-3701, 2.2-3708(A) and Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004).

**Writing Exercise**

“School board members are texting one another from their personal smartphones. In some cases, there are three or more members of the school board communicating by text message. A member of the public hears rumors about this texting and files suit against FCPS under Virginia FOIA, claiming that the texting among members of the School Board violates Virginia’s open meeting requirements. What are some arguments you would make to defend the school board in this suit? Do you think that it would be a valid defense to argue that the smartphones are not owned by FCPS and that any communications on said phones are therefore not subject to FOIA? What recommendations would you make to the School Board to avoid such suits in the future?”

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Kind regards,

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Lisa Greve

Executive Administrative Assistant

To Division Counsel

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