



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

September 27, 2013

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SEP 30 2013

COUNTY ATTORNEY

James E. Barnett, Esquire
County Attorney, York County
224 Ballard Street
Post Office Box 532
Yorktown, Virginia 23690

Dear Mr. Barnett:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether the email distribution list of a Board of Supervisors member for a newsletter that the member sends out to constituents, "informing them of matters of interest related to York County government, the actions of the supervisor, and soliciting input from" them, is subject to the Freedom of Information Act. Assuming the email distribution list is a public record, you also inquire whether the email addresses contained in the distribution list are exempt from disclosure pursuant to Section 2.2-3705.7(30).

Response

In order to determine whether the email distribution list is a public record subject to the Freedom of Information Act, it is necessary to determine whether the newsletter utilizing the email distribution list is a public record. This is a fact-specific determination that I cannot make based on the facts provided in your letter.

Applicable Law and Discussion

Enacted in 1968, Title 2.2, Subtitle II, Part B, Chapter 37 is titled the Virginia Freedom of Information Act ("FOIA"). Section 2.2-3700 "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Moreover, the Act "shall 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."¹ Any exemption is narrowly construed, but the Act should not be "construed to discourage free discussion by government officials or employees of public matters with the citizens of the Commonwealth."²

¹ *Id.*

² *Id.*

The first determination that must be made is whether the records requested are public records. If they are not public records then they are not subject to FOIA. The definition of "public record" is very broad. Section 2.2-3701 defines a "public record" as

All writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form of characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for use in the transaction of public business are not public records.

As you note in your letter, the "transaction of public business" is not defined in FOIA. Not everything of public interest is public business.³ It is the content of the newsletter that determines whether it qualifies as the transaction of public business, and therefore, constitutes a public record.⁴ "There must be some nexus between the record produced and the public trust imposed upon the official or governmental body."⁵ The determination of whether there is such a nexus is a fact-dependent determination.⁶ For instance, it is not clear from your letter whether the newsletter is sent out by the Board member in his official capacity as representative of his constituents or through his campaign, which would exist to ensure the reelection of the Board member, as opposed to the transaction of public business. In addition, although the information provided generally summarizes the newsletter's representative content, once again, its specific content will bear upon any determination whether it is used in the transaction of public business.

Moreover, a determination respecting how the email distribution list is used bears upon whether it is a public record. The definition of "public record" in § 2.2-3701 includes all writings prepared or owned by the Board member in the transaction of public business and excludes "records not prepared or used for the transaction of public business." While the email distribution list may not appear to transact public business in and of itself, once it is used to send a newsletter that is a public record, it becomes a record used in the transaction of public business and therefore is a public record subject to FOIA.⁷ Conversely, if the newsletter is not a public record, the email distribution list is not subject to FOIA.⁸

Thus, without more information, or a copy of one or more editions of the newsletter, so as to determine its specific origin and content, I cannot determine whether the newsletter would constitute a

³ *Burton v. Mann*, 74 Va. Cir. 471, 474, 2008 Va. Cir. LEXIS 57, *6 (Jan. 30, 2008).

⁴ *Id.*

⁵ *Id.*

⁶ 2004 Op. Va. Att'y Gen. 13, 17-18 (the determination whether certain circumstances constitute the transaction of public business is triggering the open meeting requirements of FOIA requirements is fact dependent).

⁷ See VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, Advisory Op. No.: AO-04-12 (Oct. 17, 2012) (although a phone bill paid personally by a public official is not a public record, if the official sought reimbursement from a public body, the phone bill then would constitute a public record), available at http://foiacouncil.dls.virginia.gov/ops/12/AO_04_12.htm (last visited Sept. 23, 2013).

⁸ Significantly, it may be that some of the newsletters would constitute public records while others would not. Thus, for example, if only *one* newsletter sent utilizing a particular e-mail list constituted a public record, the e-mail list associated with its sending likewise would be a public record.

public record. “The Attorney General ‘refrain[s] from commenting on matters that would require additional facts[.]’”⁹

Assuming the email distribution list is a public record, you next ask whether § 2.2-3705.7(30) would exempt the email addresses from disclosure. Section 2.2-3705.7(30) exempts from disclosure “[n]ames, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident unless the correspondence relates to the transaction of public business.” This section was adopted in 2012 and there are no prior attorney general opinions interpreting its meaning.

“A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”¹⁰ Additionally, “statutes must be construed to give meaning to all of the words enacted by the General Assembly, and a court is “not free to add language, nor to ignore language, contained in statutes.”¹¹ Based on a plain reading of the exemption, it only applies to email addresses (and other personal identifiers) “contained in correspondence” between a resident and a member of his local governing body. Therefore, an email distribution list assembled in a record separately from any correspondence would not fall within this exemption.¹²

Conclusion

I cannot offer an opinion regarding whether the email distribution list is a public record without first resolving the issue of whether the newsletter utilizing the e-mail distribution list is a public record. I cannot make that determination at this time based upon the information provided to this Office.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

⁹ 2010 Op. Va. Att’y Gen. 56, 58.

¹⁰ Davenport v. Little-Bowser, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

¹¹ Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

¹² It should be noted, however, that pursuant to § 2.2-3704(D) if a Board member has not created an email distribution list as a separate record then he would not be required to create a new record in response to a FOIA request.