



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

AO-05-15

June 10, 2015

[REDACTED]
Norfolk, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your electronic mail messages dated April 9 and 16, 2015, and our telephone conversation April 15, 2015.

Dear [REDACTED]

You have asked whether the minutes of a meeting of the Planning Commission (the Commission) of the City of Norfolk (the City) were sufficient to satisfy the requirements of the Virginia Freedom of Information Act (FOIA). You stated that the Commission met on February 13, 2014 to discuss whether the Commission should allow a design change you requested for a house under construction. At that meeting, one commissioner made comments against allowing the design change to your house that you felt were unprofessional and prejudicial. You indicated that at the meeting you refuted what you felt were misrepresentations made by the commissioner. Afterward, you requested a transcript of the meeting. You were informed that no transcript existed, but you were given meeting minutes after they had been prepared. You stated that the minutes did not include the commissioner's comments at issue or your reply to those comments. You further stated that you complained about the incompleteness of the minutes and a City representative responded that minutes focus on the motions and votes, not the full discussion. However, you wrote that you felt the commissioner's comments and your own should have been included as they concerned the matter at hand before the Commission. You also pointed out that the other commissioners' comments were included. Further, you stated you later were told by a Deputy City Attorney that a stenographer records the meetings, but that the record "does not capture every word spoken, but rather records enough information to memorialize the actions of the board." However, you observed that the minutes contain detailed comments made by your architect, your wife, and all of the commissioners except the one commissioner's negative comments and your reply. You indicated you believe the stenographer did indeed record the commissioner's negative comments and your reply, but those comments were not included in the minutes and have since been destroyed. You further assert that because you complained to the City Council about this matter, "the City should have preserved the record of these comments as evidence. The fact that these comments have apparently been destroyed appears to me to be a cover up" and in your opinion, therefore, a violation of FOIA.

The policy of FOIA stated in subsection B of § 2.2-3700 is to ensure *free entry to meetings of public bodies wherein the business of the people is being conducted*. The definition of *public body* in § 2.2-3701 includes *planning commissions*. Therefore there is no doubt that the Commission is subject to FOIA and the meeting in question is required to comply with FOIA. You have not alleged that the meeting was not open to the public or that it was improperly noticed, so we will focus solely on the minutes requirements. Subsection I of § 2.2-3707 provides in relevant part as follows:

Minutes shall be recorded at all open meetings....

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and

subject to the provisions of this chapter.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken.

This office has considered the requirement to include *a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken* in a prior opinion.¹ Noting that *summary* is not defined in FOIA, we turned to the common usage in the absence of a statutory definition. Merriam-Webster Online defines a summary as *an abstract, abridgment, or compendium especially of a preceding discourse*.² The American Heritage Dictionary defines a summary as *a condensation of the substance of a larger work; abstract; abridgment*.³ Following these definitions and prior opinions of the Office of the Attorney General (OAG), we opined that any matter that was *proposed, deliberated or decided* should be addressed in the meeting minutes in summary form. The opinion elaborated that any matter that is the subject of a motion or vote is a matter that is proposed, deliberated or decided by the public body (regardless of the outcome of the motion or vote) and therefore is required to be contained in the meeting minutes. Public bodies take action by motion and by vote; any matter moved before the public body is a matter that has been *proposed* before that body, even if the motion fails for lack of a second. FOIA explicitly requires that minutes must contain *a record of any votes taken*. Similarly, if there is an agenda for a meeting, any item on that agenda would be considered one that has been *proposed*, even if consideration of that item is deferred until a later date. Therefore public bodies should always include in meeting minutes a summary of any matter that appears on the agenda for that meeting, in addition to any matters that are the subject of a motion or vote.⁴

You have correctly pointed out that the situation you presented may be distinguished from the prior opinion in that the matter in question was an agenda item and portions of the discussion were included in the meeting minutes. There is no allegation that the Commission failed to include mention of an agenda item, a motion, or a vote. The issue you present is instead a question of discretion: in writing meeting minutes, can a public body choose to include some comments about a matter in detail while excluding others? Our prior opinion addressed this question briefly in stating that FOIA does not require a verbatim transcript of every word spoken at a meeting, nor that every detail of a discussion be mentioned in meeting minutes.⁵ In the prior opinion we referred to an earlier opinion of the Attorney General that considered the minutes requirements specific to a board of supervisors under former Code § 15.1-543 which was informative, but not dispositive of the FOIA question. In light of your inquiry it may be helpful to quote that OAG opinion more fully:

"....The term 'minutes' as used in this section means a brief summary of what the Board has considered at the meeting. Of course, all resolutions and ordinances must be transcribed in full. I believe that the minutes should contain all questions of a public nature which have been discussed and considered by the Board, even though a determination of such questions may have been deferred instead of being voted upon. The word 'complete' as used in this section does not, in my opinion, mean that a stenographic record of the proceedings is required. While the Board is the judge of what it shall have included in the minutes, I do not feel that their judgment should be exercised in such manner as to exclude therefrom any question of official nature that has been considered by the Board."

In light of the above-quoted language, I conclude that the Board's minutes must include, as a minimum, a brief summary of the matters considered by the Board. Supporting documents, which are presented to the Board for background, may be included as a part of the minutes, filed with the official minutes, or excluded therefrom, at the discretion of the Board.⁶

Applying the same reasoning, it is again clear that a verbatim transcript or full stenographic record of every comment made is not required under FOIA. A public body has discretion to

decide what comments to include or exclude from its minutes, so long as all matters that are proposed, deliberated, or decided, and all motions made and votes taken, are properly summarized in the minutes. The minutes you provided appear to consist of about three pages reflecting the discussion of changes to a previously approved certificate of appropriateness regarding your property. The minutes reflect the discussion of specific design issues, opinions of neighbors, and various other concerns that concluded with a motion made and seconded to continue the application for two weeks. The comments that were included appear to be fairly detailed, but they are not quotes. It is not clear whether the only comments excluded were those of interest to you, or whether other comments were excluded as well. You indicated that the comments of all the other commissioners were included, but there is no way to tell if all of their comments were included in their entirety, or whether instead the minutes reflect a selective summary of those other commissioner's comments. As the minutes are not a transcript, it is presumable that some commentary was excluded in the process of creating the summary. In other words, it appears that discussion of the matter at issue was set forth in some detail, but that certain comments about the matter that you wished to see included were omitted. There is no doubt that the matter itself was addressed, as it appears to be the only topic of the meeting in the minutes you provided. The exact level of detail to include in summary minutes, as previously opined by both this office and the Attorney General, remains a matter of discretion left to each public body. The exclusion of some commentary does not appear to be a violation of FOIA when the minutes otherwise are a *summary of the discussion on matters proposed, deliberated or decided*.⁷

However, you made five points asserting that the exclusion of the negative comments and your reply was an improper use of discretion. The first two points will be addressed together. First, you stated that you complained in writing about the matter to the City Council and therefore "surely someone among them would have looked into the matter to determine whether there was any substance to my complaint." Second, you observed that no one on City Council responded to your complaint, and ask if the "complaint had been found to be groundless, would the City Council have remained silent?" On these two points, note that the minutes in question are the minutes of a Commission meeting, not a City Council meeting. For purposes of this opinion, the City Council's reaction to your complaint, or lack thereof, would only matter if the City Council exercised some direct authority to control the contents of the Commission's meeting minutes. That does not appear to be the case. Therefore what the City Council did or did not do in response to your complaint is not relevant to the outcome of this opinion.

We now consider your third, fourth and fifth points together. Your third point is that the comments of all the other planning commissioners appear in the minutes in detail. You ask whether it is "glaringly questionable that the comments of one commissioner would be missing?" Perhaps it is questionable, but as explained above, excluding some comments while including others appears to be within the discretion granted to a public body. FOIA does not set forth any specific limits on that discretion, other than to require that minutes include a *summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken*. So long as such matters are summarized, then the minutes would appear to be sufficient. Fourth, you stated that the commissioner who made the excluded comments has acknowledged in a subsequent email that she had commented at the meeting. Again, merely because comments were made does not mean they must be included in the minutes, as the public body only has to include a summary, not a transcript. Fifth, you ask whether it is "not the case that the only proper grounds for striking the comments of a commissioner from the minutes would be if those comments were not relevant to the matter at hand?" The answer is clearly no, those would not be the only proper grounds for omitting comments. In fact, the most common reason comments are excluded in my experience is simply for the sake of brevity. As defined above, summary minutes are an abstract, an abridgement, a condensation of the substance of what happened at a meeting. A summary by definition is something shorter than a full transcript, something which includes salient points but of necessity will not include every comment - or necessarily even every relevant comment - made at a meeting. While we generally encourage public bodies to include mention of each person who spoke at a meeting and the gist of their comments as a matter of best practices, we cannot say it is outside the discretion of the public body to exclude some comments when the legal requirement is only to provide a *summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken*.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

¹ See Freedom of Information Advisory Opinion 01 (2006).

² Definition available at <http://www.m-w.com/cgi-bin/dictionary> (last accessed February 15, 2006).

³ The American Heritage Dictionary 1218 (2d College ed. 1982).

⁴ Freedom of Information Advisory Opinion 01 (2006). Note that this prior opinion also addressed whether to include in meeting minutes the discussion of other matters that were not agenda items and not the subject of any motion or vote. As the matter at issue in the facts you present was an agenda item, that portion of the prior opinion is not relevant for purposes of today's opinion.

⁵ *Id.*

⁶ 1977-1978 Op. Atty. Gen. Va. 39 (quoting 1959-1960 Op. Atty. Gen. Va. 77) (note that at the time these opinions were issued by OAG, FOIA did not contain any requirements for the contents of meeting minutes. The current requirements for meeting minutes were enacted in 2004 (2004 Acts of Assembly, c. 730)).

⁷ Note that generally as a matter of parliamentary procedure public bodies approve their own minutes and that is the check on the accuracy and completeness of the minutes. Members usually have the opportunity to object or suggest changes if they feel the minutes are inaccurate, incomplete, or otherwise deficient. In this instance it is not clear whether the minutes provided are final approved minutes or not. However, once minutes are approved by the public body, that approval represents tacit agreement by the members that the minutes accurately summarize what happened at the meeting.