



**VIRGINIA SOIL AND WATER
CONSERVATION BOARD**

**GUIDANCE DOCUMENT ON
FREEDOM OF INFORMATION
ACT REQUIREMENTS FOR
RESOURCE MANAGEMENT
PLANS PROGRAM
IMPLEMENTATION BY SOIL
AND WATER CONSERVATION
DISTRICT BOARDS AND
TECHNICAL REVIEW
COMMITTEES**

(Approved May 20, 2015)
(Effective July 1, 2015)

Summary:

This document serves to provide guidance to Resource Management Plan (RMP) review authorities regarding the review of RMPs in a manner which protects personal, proprietary, and confidential information while also remaining in compliance with Virginia Freedom of Information Act (FOIA) (§2.2-3700 et seq. of the *Code of Virginia*) requirements. The document outlines procedures to be utilized in accordance with closed meeting allowances provided for in § 2.2-3711 (A) (46) and referenced in § 10.1-104.7 (E) of the *Code of Virginia* in order to protect such information.

Electronic Copy:

An electronic copy of this guidance in PDF format is available on the Regulatory Town Hall under the Virginia Soil and Water Conservation Board at <http://townhall.virginia.gov/L/GDocs.cfm>.

Contact Information:

Please contact the Department of Conservation and Recreation's Division of Soil and Water at rmp@dcr.virginia.gov or by calling 804-371-0297 with any questions regarding the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for Virginia's Soil and Water Conservation Districts (Districts) and their Technical Review Committees (TRCs) that administer the RMP Program on behalf of the Virginia Soil and Water Conservation Board (VSWCB) and the Department of Conservation and Recreation (Department). This guidance provides a general interpretation of the applicable Code and Regulations but is not meant to be exhaustive in nature. Each situation may differ and may require additional interpretation of the Resource Management Plans Act and attendant regulations.

FOIA Requirements for RMP Review by District Boards and TRCs

I. Background:

The RMP program provides a voluntary way to promote the use of conservation practices that improve farming operations and water quality. RMPs can help farm owners and operators take advantage of all the conservation measures at their disposal. The plans are designed to encourage farmers, either the farm owner or operator, to use a high level of best management practices (BMPs) that reduce runoff pollution to local waters and, in many cases, improve the farmer's financial bottom line.

Section 4VAC50-70-70 (A) of the RMP regulations stipulates that “[u]pon completion of a new or revised RMP in accordance with 4VAC50-70-50 and 4VAC50-70-60, the owner or operator or the RMP developer on behalf of the owner or operator, shall submit the RMP to the review authority.”

Section 4VAC50-70-70 (B) of the RMP regulations stipulates that “[e]ach soil and water conservation district shall establish a Technical Review Committee (TRC). RMPs received by a soil and water conservation district shall be referred to the TRC for review to ensure the RMP fully meets the minimum standards set forth in 4VAC50-70-40 and the components specified in 4VAC50-70-50.”

The definition of Technical Review Committee set out in 4VAC50-70-10 specifies that a TRC is a committee established by a Soil and Water Conservation District Board to review RMPs and provide recommendations to the Soil and Water Conservation District Board regarding RMPs.

FOIA [§ 2.2-3705.6 (25) of the *Code of Virginia*] provides an exemption for information of a proprietary nature furnished pursuant to an RMP, and the Resource Management Plans Act [§ 10.1-104.7 (E) of the *Code of Virginia*] specifies that any personal or proprietary information collected pursuant to the Act shall be exempt from FOIA, except where specifically permitted in accordance with the section. Further, § 2.2-220.3 of the *Code of Virginia* specifies that information collected pursuant to voluntary actions taken by the agricultural and silvicultural sectors shall be maintained as confidential and is also exempt from FOIA.

As it relates to RMP review and discussion, TRCs and District Boards are by definition public bodies, and meetings of the TRC or the District Board are required to be open meetings, unless the subject of the RMP item being discussed would result in the disclosure of personal or proprietary information which allows for such information to be discussed in a closed meeting as provided for in § 2.2-3711 (A) (46) and referenced in § 10.1-104.7 (E) of the *Code of Virginia*.

This guidance serves to clarify procedures that TRCs and District Boards as public bodies should follow regarding the management and discussion of personal, proprietary, and confidential information associated with RMPs and the RMP program.

II. Definitions

"Closed meeting" means a meeting from which the public is excluded. (Pursuant to § 2.2-3701 of the *Code of Virginia*)

"Department" means the Department of Conservation and Recreation.

"Director" means the officially appointed individual who directs, and is ultimately responsible for, the overall operations of the Department of Conservation and Recreation.

"Meeting" or "Meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, 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. The gathering of employees of a public body shall not be deemed a "meeting" subject to the provisions of this chapter. (Pursuant to § 2.2-3701 of the *Code of Virginia*)

"Open meeting" or "public meeting" means a meeting at which the public may be present. (Pursuant to § 2.2-3701 of the *Code of Virginia*)

"Operator" means a person who exercises managerial control over the management unit. (Pursuant to 4VAC50-70-10)

"Owner" means a person who owns land included in a management unit. (Pursuant to 4VAC50-70-10)

"Public bodies" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include ... (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. ... (Pursuant to § 2.2-3701 of the *Code of Virginia*)

"Review authority" means a soil and water conservation district or the department where applicable that is authorized under this chapter [the RMP Regulations] to determine the adequacy of a resource management plan and perform other duties specified by this chapter. (Pursuant to 4VAC50-70-10)

"RMP developer" means an individual who meets the qualifications established by this chapter to prepare or revise a resource management plan. (Pursuant to 4VAC50-70-10)

"Soil and water conservation district" or "district" means a political subdivision of the Commonwealth organized in accordance with the provisions of Chapter 5 (§ 10.1-500 et seq.) of Title 10.1 of the Code of Virginia. (Pursuant to 4VAC50-70-10)

“Technical Review Committee” or “TRC” means a committee established by a soil and water conservation district board to review RMPs and provide recommendations to the soil and water conservation district board regarding RMPs. A TRC may include, but not be limited to, the following members: soil and water conservation district directors, associates, and personnel; Virginia Cooperative Extension personnel; department nutrient management specialists; and such other technical resources available to the district. (Pursuant to 4VAC50-70-10)

III. Authority:

The Resource Management Plan Act (§ 10.1-104.7 et seq. of the *Code of Virginia*) contains the following authorities applicable to this guidance:

§ 10.1-104.7 Resource Management Plans; effect of implementation; exclusions.

E. Any personal or proprietary information collected pursuant to this article shall be exempt from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that the Director may release information that has been transformed into a statistical or aggregate form that does not allow identification of the persons who supplied, or are the subject of, particular information. This subsection shall not preclude the application of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) in all other instances of federal or state regulatory actions. Pursuant to subdivision A 46 of § 2.2-3711, public bodies may hold closed meetings for discussion or consideration of certain records excluded from the provisions of this article and the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

The FOIA Act (§ 2.2-3700 et seq. of the *Code of Virginia*) contains the following authorities applicable to this guidance:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

25. Documents and other information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.

§ 2.2-3711. Closed meetings authorized for certain limited purposes.

A. Public bodies may hold closed meetings only for the following purposes:

46. Discussion or consideration of personal and proprietary information that are excluded from the provisions of this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. This exemption shall not apply to the discussion or consideration of records that contain information that has been certified for release by the person who is the subject of the information or transformed into a statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information.

Consideration for maintaining the confidentiality of information included in an RMP regarding voluntary actions taken by the agricultural and silvicultural sectors must also be made.

§ 2.2-220.3. Development of strategies to collect land use and conservation information.

The Secretary of Natural Resources, with assistance from the Secretary of Agriculture and Forestry, shall establish and maintain a database of the critical data attributes for onsite best management practices implemented in the Commonwealth that limit the amount of nutrients and sediment entering state waters. The database shall document voluntary actions taken by the agricultural and silvicultural sectors and should enable the application of the collected data towards projections of progress towards Virginia's water quality goals by sharing the data with the appropriate federal or state agencies. To the extent possible or appropriate, the database shall (i) be uniform in content and format to applications in the other states of the Chesapeake Bay watershed, (ii) maintain the confidentiality of information, and (iii) use existing methods of data collection including reports to the U.S. Department of Agriculture's Farm Service Agency, soil and water conservation districts, and localities for the purpose of land use valuation. Any information collected pursuant to this section shall be exempt from the Freedom of Information Act (§ 2.2-3700 et seq.).

The Resource Management Plans Regulations contain the following authorities applicable to this guidance:

4VAC50-70-70. Review of a Resource Management Plan.

A. Upon completion of a new or revised RMP in accordance with 4VAC50-70-50 and 4VAC50-70-60, the owner or operator or the RMP developer on behalf of the owner or operator, shall submit the RMP to the review authority. If the RMP developer is a district employee or district board member of the district that is the designated review authority, the department shall serve as the review authority for that RMP.

B. Each soil and water conservation district shall establish a Technical Review Committee (TRC). RMPs received by a soil and water conservation district shall be referred to the TRC for review to ensure the RMP fully meets the minimum standards set forth in 4VAC50-70-40 and the components specified in 4VAC50-70-50. [Following review, the TRC provides recommendations to the soil and water conservation district board regarding RMPs.] ...

IV. Discussion and Interpretation:

The Department's RMP regulations (4VAC50-70-10 et seq.) require a District Board to set up a TRC, which will review the RMPs and provide recommendations to the District Board. The District board votes on the RMP. While conducting the review and associated meetings, the TRC and District Board must protect personal and proprietary information associated with an RMP.

FOIA [§ 2.2-3705.6 (25) of the *Code of Virginia*] provides an exemption for information of a proprietary nature furnished pursuant to an RMP and the Resource Management Plans Act [§ 10.1-104.7 (E) of the *Code of Virginia*] specifies that any personal or proprietary information collected pursuant to the Act shall be exempt from FOIA, except where specifically permitted in accordance with the section. Further, § 2.2-220.3 of the *Code of Virginia* specifies that information collected pursuant to voluntary actions taken by the agricultural and silvicultural sectors shall be maintained as confidential and is also exempt from FOIA.

In order to prevent public disclosure of such protected information, a closed meeting to discuss such information as it relates to RMPs is provided for in § 2.2-3711 (A) (46) and referenced in § 10.1-104.7 (E) of the *Code of Virginia*.

For the purposes of the closed meeting exemption, "personal information" should be understood as information that reveals the identity of the applicant or location of the tract: for example, any and all maps or geographic references. The applicant's suite of BMPs (including the specifics of each component) is not "proprietary information" so long as those BMPs, and any associated soil studies and other information, are not linked to the applicant or the tract's location thus the release of such information would not inhibit a business or have an economic impact on it should such information be generally disclosed. Where a FOIA question arises, the Districts should consult with legal counsel at the Office of the Attorney General.

Documents furnished by an owner or operator are excluded from FOIA and should not be released. Other documents (not furnished by an owner or operator) that contain personal or proprietary information should not be released or should be redacted. Districts should contact legal counsel as questions arise regarding what can be disclosed and in what manner.

Below is a list of items not subject to FOIA:

General Information

- Any 1619 information (farm, tract, and field) [available as a USDA Section 1619 Cooperator]; and
- Social security numbers and tax id numbers.

Specific RMP Information

- RMP-1 and RMP-2 BMP applications/approvals/contracts;
- RMPs and associated documents and plans;
- Farm assessment for an RMP;
- Attachments (pdf, pics, etc) to an RMP;
- Maps developed for an RMP; and
- RMP data contained in the Conservation Planning and RMP Modules.

Below is a list of items that will contain protected personal or proprietary information and which must be redacted if released:

- RMP inspection documents;
- RMP corrective action agreements;
- E-mails and letters associated with a specific RMP regarding RMP development, review, Certificate issuance, modification, and revocation;
- RMP developer applications; and
- Any information regarding an RMP developer except information released on the Department's website.

Because the law specifies a permissible way to release the RMP gathered information (i.e., in statistical or aggregate form) by the Director or upon the certification for release by the person who is the subject of the information, release in other forms is prohibited by law. Thus, if a District receives a FOIA request for an RMP or list of applicants, it should, pursuant to § 2.2-3704 (B) (1) and (B) (3) of the *Code of Virginia*, timely respond that the District is prohibited by law from releasing the RMP information and refer the requester to the Department.

FOIA also requires that all meetings of public bodies shall be open, unless otherwise exempted. A District Board falls within the FOIA definition of a public body. Additionally, a TRC also qualifies as a public body under FOIA, as it is a committee created to advise a public body (despite including citizen members).

However, in accordance with § 2.2-3711 (A) (46) of the Code of Virginia, the discussion or consideration of personal and proprietary information that are excluded from the provisions of FOIA pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7 by a TRC or District Board may be handled in a closed meeting, or other options to protect the disclosure of personal and proprietary information may also be considered.

A TRC or District Board may utilize either one or a combination of the following three options to discuss the RMP. It is important to realize; however, that the TRC or District Board must always conduct the recommendation for approval or RMP approval vote, respectively, in an open meeting. This document will provide further guidance regarding each of the options listed below:

1. A TRC or District Board may go into closed session to discuss personal and proprietary information regarding an RMP. (This option will provide for the most streamlined process and create the least opportunity for the accidental disclosure of personal, proprietary, or confidential information.)
2. A TRC or District Board may redact personal, proprietary, and otherwise confidential information from the discussion packet and conduct the entire meeting in an open meeting. In an open meeting, the plan must be referenced only by a plan number.
3. A District Board may delegate RMP approval (following TRC review and recommendation) to a single individual who would approve the RMP outside of a meeting. [It is strongly recommended that such actions should be reported back to the District Board and be reflected in District Board minutes to ensure continuity of RMP records.]

1) CLOSED MEETING GUIDELINES FOR DISCUSSION OF PERSONAL AND PROPRIETARY INFORMATION ASSOCIATED WITH A RESOURCE MANAGEMENT PLAN

Closed meetings of public bodies are permitted only for one or more of the purposes specified in the Virginia Freedom of Information Act (FOIA), § 2.2-3711 (A). Any exemption from public access to meetings or records shall be narrowly construed.

A TRC or District Board may go into closed session to discuss personal and proprietary information regarding an RMP. Section 2.2-3711 of the *Code of Virginia* authorizes a closed meeting for discussion or consideration of personal and proprietary information that are excluded from the provisions of this chapter pursuant to (i) subdivision 25 of Code § 2.2-3705.6 or (ii) subsection E of Code § 10.1-104.7. This exemption shall not apply to the discussion or consideration of records that contain information that has been authorized for release by the person who is the subject of the information. It also does not apply to information that has been transformed into statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information.

This amendment will allow the TRC or District Board to go into closed session to discuss only the portions of an RMP that are considered personal and proprietary information. Any motion to recommend a plan or decline a plan by the TRC, or to approve or decline a plan by the District Board, must happen in open session. The vote must also occur in open session. Members may state on the record why they voted the way they did, but may not reveal any personal or proprietary information. The meeting minutes must be in writing and must capture: (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 (§ 2.2-3707 (I) of the *Code of Virginia*). When the meeting becomes open, the plan should be referenced by the plan number. Only redacted plans should be allowed in the open meeting. If the person who is subject of the information has authorized release of such information, the exemption no longer applies.

Going Into Closed Meetings:

1. A motion by a public body to hold a Closed Meeting must specifically state the purpose(s) for the session and reasonably identify the subject matters to be discussed. Specific reference must be made to the statutory authority for the Closed Meeting. A general reference alone is not sufficient. § 2.2-3712 (A) of the *Code of Virginia*.
*See sample motion 1 below.
2. Nothing may be discussed in the Closed Meeting except matters included in the motion to go into Closed Meeting. § 2.2-3712 (C) of the *Code of Virginia*.
3. Minutes during a Closed Meeting are not required, and if taken are not subject to public disclosure. § 2.2-3712 (H) of the *Code of Virginia*.

4. Only public body members and those individuals with relevant information useful in the plan review process invited by the public body shall be included in the session. § 2.2-3712 (F) of the *Code of Virginia*.
5. Though not specifically required by law, an estimated time to reconvene should be announced or included in the motion so that the public will know when to return.

*Sample Motion 1

I move the [public body] go into Closed Meeting in accordance with the Virginia Freedom of Information Act § 2.2-3711 (A) (46) for discussion or consideration of personal and proprietary information excluded from the provisions of this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of §10.1-104.7, Review of a Resource Management Plan.

This closed meeting will be attended only by members of the [public body]. However, pursuant to § 2.2-3712 (F), the [public body] requests [ex. the RMP developer for plan # XXX] to also attend this meeting, as it believes their presence will reasonably aid the [public body] in its consideration of topics that are the subject of the meeting.

Coming Out of Closed Meetings:

1. At the conclusion of any closed meeting, the public body must reconvene into the open meeting. § 2.2-3712 (D) of the *Code of Virginia*.
2. The public body must have a roll call and recorded vote of a motion that states the members in the Closed Meeting discussed only:
**See sample motion 2 below

(1) Business matters specifically identified in the original motion to convene into Closed Meeting

AND

(2) Business matters lawfully exempted from open meeting requirements. § 2.2-3712 (D) of the *Code of Virginia*.

3. A Certification of Closed Meeting that becomes a part of the official minutes must be adopted when the open meeting reconvenes. This resolution assures the public body fulfills the obligations set forth in FOIA. (See attached Certification example.)
4. Any resolution, motion, or decision made during the Closed Meeting must be presented and voted on during an open meeting of the public body. §§ 2.2-3711(B) and 2.2-3712(G) of the *Code of Virginia*.
5. Any member of the public body who believes that there was a departure from the requirements of clauses 2. (1) and (2) outlined above shall so state prior to the

vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body. § 2.2-3712 (D) of the *Code of Virginia*. [The Certification of Closed Meeting document included below may be used to certify the meeting].

*Sample Motion 2

Pursuant to the § 2.2-3712 (D) of the *Code of Virginia*, I move to certify that, to the best of each member’s knowledge, only matters lawfully exempted and identified in the motion by which the Closed Meeting was convened were heard or discussed by this [public body] during the Closed Meeting. (This motion is considered a Certification of a Closed Meeting)

I move for the adoption of resolution #[X], Certification of Closed Meeting, which confirms that we only discussed those matters in Closed Meeting that were identified and lawfully exempted. (A sample Certification is included below.)

Certification of Closed Meeting

MEETING DATE: _____

RESOLUTION # _____

MOTION:

WHEREAS, the [public body] has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, § 2.2-3712 of the Code of Virginia requires a certification by the [public body] that a closed meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, BE IT RESOLVED that the [public body] hereby certifies that, to the best of each member’s knowledge, (i) only public business matters lawfully exempted from open meeting requirements by Virginia law were discussed in the closed meeting to which this certification resolution applies, and (ii) only such public business matters as identified in the motion convening the closed meeting were heard, discussed or considered by the [public body].

MOTION BY: _____

SECOND BY: _____

VOTES (requires roll call vote)

AYES:

NAYS:

[For each nay vote, the substance of the departure from the requirements of the Act should be described]

ABSENT DURING VOTE:
ABSENT DURING MEETING:

Secretary of [public body]

2) OPEN MEETING GUIDELINES FOR DISCUSSION OF A RESOURCE MANAGEMENT PLAN

A TRC or District Board may redact personal information from the information packet and conduct the entire meeting in an open meeting. Confidential information regarding voluntary BMPs must also be redacted. In an open meeting, the RMP must be referenced only by a plan number and personal and proprietary information must be protected from disclosure to the public.

If the TRC or District Board reviews or discusses personal or proprietary RMP information in an open meeting, District staff should mask or otherwise redact personal information (name, address, etc.) from the RMP packet before it is copied and provided to the TRC. To the extent it is possible to redact other identifying information without compromising the TRC's ability to evaluate the RMP, District staff should do so.

Each RMP should have an assigned plan number to be referenced in public meetings of the TRC and District Board.

Staff should attach a cover page or header reminding the TRC or District Board that disclosure of identifying information is prohibited by law.

TRC and District Board members should be reminded at the meeting that personal and proprietary information is protected from disclosure and that they should tailor their discussion accordingly. The following announcement, or one like it, would be appropriate: "It is prohibited by law to disclose personal or proprietary identifying information of an RMP applicant. Members are reminded to take care to ensure that identifying information is not disclosed."

In open meetings where the public is present, reference should be made to page/line numbers ("the BMP identified on page 4, line 10" or "the acreage identified on page 7 line 2", etc.) to the extent reasonably possible. Common sense should be utilized to discuss each RMP in a fashion that will not reveal personal or proprietary information of the protected individuals.

3) DELEGATION OF RMP APPROVAL TO A SINGLE INDIVIDUAL

Following development of a recommendation by the TRC, and in lieu of action by the full District Board, a District Board may delegate RMP approval to a single individual who would approve the RMP outside of a meeting. District directors "may delegate to their chairman or to one or more district directors, agents or employees such powers and duties as they may deem proper." § 10.1-533 of the *Code of Virginia*. A District Board is therefore empowered to

delegate to one director, agent, or employee the power and duty of RMP approval. [It is strongly recommended that such actions should be reported back to the District Board and be reflected in District Board minutes, in accordance with the delegation charge, to ensure continuity of RMP records.]

MEETING PACKETS

FOIA requires that "[a]t least one copy of all agenda packets and, **unless exempt**, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body." (§ 2.2-3707 of the *Code of Virginia*). However, the protected RMP documents printed for the TRC and District Board (unless properly redacted) **need not be provided to the public**. Because the information remains protected after a meeting, it is also advisable that the packets provided to the members be collected at the close of a meeting.

V Adoption, Amendments, and Repeals:

This document was adopted by the Virginia Soil and Water Conservation Board on May 20, 2015 and may be amended or repealed as necessary by the Board.



Herbert L. Dunford
Chair



Clyde E. Cristman
DCR Director

May 20, 2015
Date