

## DEFINITION OF THE TERM "CUSTODIAN"

### FOIA

There is no definition of the term "custodian," but it is used in many sections in reference to public records as demonstrated below (emphasis added):

#### § 2.2-3701

Definition of "public body" states that constitutional officers and private police departments "shall have the same obligations to disclose public records as other **custodians** of public records."

#### § 2.2-3704

"A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the **custodian** of such records. ... The **custodian** may require the requester to provide his name and legal address. The **custodian** of such records shall take all necessary precautions for their preservation and safekeeping.

B. ... Any public body that is subject to this chapter and that is the **custodian** of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing...

\* \* \*

J. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the **custodian** of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the **custodian** of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the **custodian** of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the **custodian** of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter."

#### §§ 2.2-3705.1 through 2.2-3706 (Prefatory language to discretionary exemptions)

"The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the **custodian** in his discretion, except where such disclosure is prohibited by law."

## **Virginia Public Records Act**

§ 42.1-77

"Custodian" means the public official in charge of an office having public records.

### **Freedom of Information Advisory Opinion 07 (2015)**

FOIA does not define the term *custodian*, but does use the term in referring to who receives and responds to records requests under FOIA, and who exercises discretion regarding exempt records. Observing the lack of a statutory definition and turning to common usage of the term *custodian*, this office has previously described a *custodian* as *one in charge of something*. The same opinion observed that that definition of *custodian* makes sense when considered in conjunction with the statutory definition of *public records* in § 2.2-3701, which includes records *prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business*. A later opinion also found guidance in the Virginia Public Records Act (VPRA), which provides a similar definition of the term *custodian* in § 42.1-77 to mean *the public official in charge of an office having public records*. In the context of your question, and following prior opinions, then, the term *custodian* for FOIA purposes is dependent on preparing, owning, or possessing public records.

### **Freedom Of Information Advisory Opinion 19 (2003)**

"The Freedom of Information Advisory Council has previously opined that a public body can be the custodian in a broader sense than just having physical possession of a record. To the extent that a private entity creates or maintains records as an agent for a public body, the public body will remain the legal custodian of those records."

### **Freedom of Information Advisory Opinion 41 (2001)**

"the Chamber would be the custodian of the records since they possess them in their capacity as an agent for the city council in implementing the tourism program. The instant case is distinguishable from the Council's advisory opinion mentioned above.<sup>6</sup> In that advisory opinion, the public body had a statutory duty to collect certain information, and it contracted with a private third party to collect that data. There, the public body remained the custodian of those records, even though it did not have physical custody, because of the statutory duty to maintain the information in those records. Here, there is no statutory duty for the city council to maintain a tourism program, but it has chosen to fund such a program and delegate its administration to the Chamber. There is no statutory duty for the city council to maintain records relating to tourism. In this instance, the Chamber is acting as an agent for the city council. Therefore, while not all records of the Chamber are public records subject to FOIA, those relating to the tourism program that is funded by the city council are subject to FOIA and available to the public. The Chamber, and not the city council, is the appropriate entity to ask for these records."

### **Freedom of Information Advisory Opinion 37 (2001)**

"The term "custodian" is defined in the dictionary as *one in charge of something*. In the context of FOIA, the term is used when accessing public records held by a public body. FOIA defines public records at § 2.1-341 as *all writings and recordings ... prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business*. (Emphasis added.) Construing the ordinary use of the term "custodian" in this context,

in light of the liberal construction required by FOIA, it appears that a public body can be a custodian in a broader sense than just having physical possession of a document.

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In applying this broad definition of a public record in conjunction with the use of the term "custodian," it becomes clear that "custodian" must have a broader application than just physical possession in order to effectuate the purpose and policy of public access behind FOIA, and more specifically, the definition of a public record. The scope of the term "custodian" has a broader application than just physical possession of a document."

*See also Freedom of Information Advisory Opinions 03 (2015), 02 (2014), 05 (2007), 18 (2003).*