



**2011 FOIA WORKSHOP HYPOTHETICALS**  
*w/ answers*

**1. Must the specific salary of a public employee be released if requested? What about deduction information? Is consent of the employee first required?**

*ANS: Yes, 2.2-3705.8 A. No, deduction information is covered by the personnel exemption, 2.2-3705.1 (1). No, consent is not required before salary can be released. Persons making \$10,000 or less exempt.*

2. A request has been made for the names and addresses of all persons who have taken salsa dancing classes offered by a locality. The registration form for the class contains the registrant's name, home address and telephone number, SSN, date of birth and other types of personal identifying information. **Are these public records? If so, are there any exemptions that may apply?**

*ANS: Yes, definition of "public record" 2.2-3701; No applicable exemption. NOTE: 2.2-3705.1 (10) applies only to "subscriptions" and is not a general provision allowing redaction of personal information.*

3. A request has been made to the local building department for the building plans for the new indoor swimming pool at the YMCA. **Are the building plans subject to FOIA? If not, why not? Are there any exemptions that apply under FOIA?**

*ANS: Of course subject to FOIA--they are public records!! (trick question). See § 2.2-3705.2 (subdivisions 2, 4 (terrorism), & 6 (surveillance techniques, etc., which are set out below)*

*2. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that*

would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code ( 36-97 et seq.) or the Statewide Fire Prevention Code ( 27-94 et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.

Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

4. Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be

*construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.*

*6. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.*

4. Two years ago a citizen made a FOIA request, received the requested records and was billed \$45 for the production of those records. That FOIA charge has never been paid. Now, the same citizen is making another FOIA request. **How should the agency proceed?**

*Ans: 2.2-3704 I--*

*I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.*

**5. Is the humane society a public body? Is the local area agency on aging a public body?**

*Ans: 2.2-3701--Definition of public body--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 (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 ([38.2-5000](#) et seq.) of [Title 38.2](#) and (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. Corporations*

*organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.*

*For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.*

6. You have routinely provided records without charge, even when the requester also includes requests for explanation of the records. Your agency has now decided to charge for providing the records and for the time spent on providing the explanations requested. **Is this permissible?**

*ANS: Yes, the fact that you haven't charged in the past does not bind you to that position.*

7. A reporter requests the following information about Jane Doe, a public employee: what is her position and job description and complete dates of employment with the school system and is she a full time employee or part time? The school system responded to the reporter that the request for the position, job description and dates of employment for Jane Doe and whether she is a full-time or part-time employee is denied under Section 2.2-3705.1(1) of the Code of Virginia as being a personnel record for which no consent from the individual was provided and under Section 2.2-3705.1(10) as being personal information as defined by Section 2.2-3801. **Is this response correct under FOIA? If so, why? If not, why not?**

*ANS: Improper response: Salary information and position description is required to be released. The remainder of request may be withheld under 2.2-3705.1 (1) as a personnel record. HOWEVER, no consent is EVER required for the release of salary information or position description. NOTE: position description may already contain status as full or part time employee.*

8. Your agency is committed to transparency and has put lots of information online. Your agency receives a FOIA request for some documents that are online. You tell the requester that the documents are available online. **Have you properly responded to the FOIA request?**

*ANS: Depends--if requester says OK, thanks, you are done. However if requester wants a copy, you must provide it.*

9. You are a public employee and have filed a grievance for a work related problem you have experienced. To prepare yourself for the grievance proceedings, you have filed a FOIA request for all emails and documents contained in your personnel file. You are told that because you have filed a grievance, FOIA no longer applies. **Is this response true? If so, why? If not, why not?**

*ANS: No, it is NOT true. Your rights under FOIA remain intact and under 2.2-3705.1 (1), you as the subject of a personnel records have an absolute right to it. [Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying. ]*

10. An agency has developed a FOIA request form which contains a signature line and an agreement to pay any charges for the production of requested records. **Can they require that a requester use form as a condition of receiving the record? What can the agency require?**

*ANS: Can't require them to fill out form in any event. Can't be an obstacle. Fill it out yourself. Agency CAN require name and legal address however.*

11. A local public employee and his use of grant money given by the state for a particular program has been the subject of an administrative investigation/audit by the city government where the employee is employed. Pending the investigation, the employee was put on administrative leave with pay. At the conclusion of the administrative investigation/audit, a report was given to the city council and included a recommendation that state grant money be given back to the issuing agency. The city council decided to bring the employee back to work and no action was taken against the employee. A local newspaper reporter has now asked for a copy of the audit report. Qs:

- What are the issues raised by this hypothetical?
- Does FOIA require the release of the audit report?

- What, if any, exemptions may apply?

*Ans: what corrective action taken; what can be withheld, what must be released?*

*Yes; 2.2-3705.3(7); NOTE: If corrective action, report must be released, but may withhold "informant" information. If NO corrective action--can't release name of subject w/out his consent.*

*7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or (v) auditors, appointed by the local governing body of any county, city or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department or program of such body. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.*

12. As part of his records request under FOIA, a citizen has requested that the records, which are contained in an electronic database, be recorded onto a compact disc (CD). Your agency does not regularly store electronic records on CDs and has no in-house ability to copy the records onto a CD. Additionally, the citizen has requested that all applicable charges for supplying the requested records be estimated in advance. **What are the issues raised by this hypothetical? Must your agency produce the requested records in the medium requested? What charges are allowable under FOIA?**

*ANS: 2.2-3704 G.*

- *electronic records--capacity to produce*
- *only if used in regular course of business*
- *actual and reasonable. Work deal!*

13. A newspaper reporter has made a request to a local governing body for records relating to the operation of a landfill in the locality. He invokes the federal Freedom of Information Act and says that under federal law, you must waive any charges for the records as the request is made in the public interest. **Is he correct?**

*ANS: No, federal FOIA applies only to federal agencies. For access to Virginia government records VA FOIA applies. VA FOIA does not have any provision for the waiver of charges for requests made in the public interest. (NOTE: There is nothing that would prevent you from waiving the charges if your agency chooses to.)*

14. Several localities have agreed to participate in a regional commission to facilitate cooperation among the localities with regard to economic development opportunities. The commission is incorporated as a 501 c 3 organization (tax exempt) and has an executive director and staff. The members of this commission are the "mayors and chairs" of the local governing bodies. Each locality contributes financially for the operation of the commission. **Is this commission a public body under FOIA? What are the factors to be considered in making this determination? Are its records accessible under FOIA? To whom should a request for records be made?**

*ANS: § 2.2-3701--Definition of Public Body. Yes it is a public body. Wholly or principally funded with public funds (definition of public body). As a public body, it is subject to both the open records and open meeting requirements of FOIA. Requests should be addressed to the commission; however, to the extent any of the participating localities is in possession of commission records, they must produce them under FOIA if requested.*

15. A public official is using emails and blogs to express her personal opinions about her agency's actions in a controversial matter. Her emails carry the "signature" of her office, even though they are set up as a personal account for that official by the agency. The blogs are posted from a home computer. **Are the emails public records under FOIA? What about the blogs?**

*ANS: To the extent the matter is the business of the agency, any email relating to the agency's transaction of its public business is a public record and subject to FOIA. With reference to the blogs (or any public business conducted from a home computer), the*

*equipment doesn't matter, the content of the record matters. Again, to the extent the matters upon which she is opining is before her agency, then they may be considered public records. NOTE: blogging is new and there are no hard answers yet--fact specific.*

**16. Can a private citizen's "excessive" FOIA requests ever reach a point that they could be considered harassment of the public body under FOIA? If so, what is the recourse under FOIA?**

*ANS: Making FOIA requests is a right and therefore, even if made in bad faith and considered harassment, it is still a FOIA request. However, 2.2-3704 allows a public body to petition circuit court if the requests are such that the operational responsibilities of the public body cannot be met for **more time**. But first you must try to reach agreement with the requester about production of the records.*

**17. A member of city council has received a letter from a constituent who needs some assistance. The member forwards the constituent letter to the appropriate department for handling. Is there any liability to the council member for releasing the constituent letter?**

*ANS: No. If concerned with privacy, best practice is for council member to send his own letter to the department describing the constituent's problem.*

**18. You have advised a requester that the cost of producing the requested records will be \$450. Your letter advising him of that amount was sent on day five after receiving the request. The requester makes the \$450 payment several days later. You begin processing the request, but realize while gathering the records and applying exemptions, you will not be able to produce them within five working days. You decide to send the extension letter for seven additional days. The requester complains that FOIA requires you to produce the records within the first five working days and you have already spent that time in making the advance determination. His position is that you should have had the records ready for pick up when he tendered payment as the five days have already run. Is he correct?**

*ANS: FOIA says: "The period within which the public body shall respond under this section shall be **tolled** for the amount of time that elapses between notice of the advance determination and the response of the requester." The question is does the clock reset or does it stop running? Clearly, having the records available upon payment is unrealistic. But you need to be as quick as possible in making the advance determination. The*



*statute does NOT say, the clock doesn't start to run until you have the \$\$.* Real world advice--make a deal.

19. Daily calendars of members of a public body (i.e. a local governing body, state board or council) were maintained electronically with software that will allow the members to mark certain entries "private" (i.e. dental appointments, etc.) to segregate them from public business entries. A FOIA request is made for these calendars. **Are these electronic records "public records" under FOIA? If so, what must be provided? What should your response include?**

*ANS: 2.2-3701 def. of public record. Sounds like a good idea. Should include in letter that "private" records are not public records under FOIA and are not included.*

20. A citizen requests copies of a lengthy report (over 100 pages) and wants you to provide both hard copy and an electronic version. You maintain this report only in electronic form. **Must you provide the report in both media requested?**

*ANS: 2.2-3704 G 2nd Paragraph-- must produce records maintained in an electronic database in any tangible medium identified by the requester if that medium is used by the pbod in the ordinary course of business. Also, can charge for producing the paper copies.*

21. A local business owner whose business has failed has been making repeated requests of your agency. These requests are for answers to his questions. He does not want any records. He is very persistent that this is his right under FOIA. **Is he correct? Why or why not? How is the best way to handle this?**

*ANS: 2.2-3700, Policy of FOIA to "... ensure ready access to public records in the custody of a public body or its officers and employees." FOIA is about providing records, not answers to questions. May be best to schedule appointment and give him an opportunity to air his concerns. Additionally, you can refer him to FOIA Council for back-up.*

22. A citizen has made a request for records that have been properly destroyed under the agency's record retention schedule in accordance with the VA Public Records Act. **How should the agency respond to this citizen?**

*ANS: 2.2-3704 (3) Required response. "Records do not exist."*

23. An agency has received a request for any electronic records that contain the words "staff recommends." The agency believes that this request lacks reasonable specificity as required under FOIA. **Is this request reasonably specific? What are the agency's obligations under FOIA in this situation? What should the agency do?**

*ANS: 2.2-3704 B, although "reasonable specificity" is not defined in FOIA. . Ask for clarification. Communication is the key. The FOIA Council has written an opinion on what is "reasonable specificity"--see AO-1-00.*

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