



2013 FOIA WORKSHOP HYPOTHETICALS
w/ answers

1. A request has been made for the names and addresses of all persons (adults and children) who have taken fly fishing classes offered by a locality's park and recreation department. 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? (Hint: 2.2-3701 and 2.2-3705.7)

ANS: Yes, definition of "public record" 2.2-3701; Applicable exemption for kids--2.2-3705.7 (22), but not one for adults, except first 5 digits of SSN under 2.2-3815. NOTE: 2.2-3705.1 (10) applies only to "subscriptions" and is not a general provision allowing redaction of personal information.

2. A request has been made to the local building department for the building plans for the new court house. **Are the building plans subject to FOIA? If not, why not? Are there any exemptions that apply under FOIA? (Hint: 2.2-3705.2)**

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.*

3. Two years ago a citizen made a FOIA request, received the requested records and was billed \$100 for the production of those records. That FOIA charge has never been paid. Now, the same citizen is making another FOIA request. **Can this latest FOIA request be ignored? (Hint: 2.2-3704)**

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.

4. 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. **Is this now permissible? (Hint: 2.2-3704)**

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

5. Your locality/agency has recently hired a consultant to do a study of the economic benefits of building a large, upscale shopping mall in the locality. The consultant does extensive background research and prepares his report reflecting his research, projections, and recommendations. A local citizen makes a FOIA request for the consultant's report, which is provided to him. The citizen is now asking for the background research done by the consultant. **Must the background research be provided to the requester under FOIA? (Hint: 2.2-3701 and 2.2-3705.8)**

ANS: Unless otherwise specified in the contract with the consultant, the background research belongs to the consultant and therefore it is not a public record that was

prepared or owned by or in the possession of the agency. The consultant is an independent contractor and not an agent of the public body.

6. A reporter requests the following information about Jane Doe, a public employee: 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? (Hint: 2.2-3705.8)**

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. Persons making \$10,000 or less exempt.

7. 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.

8. 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? (Hint: 2.2-3705.1)**

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.] NOTE: You may also use the grievance procedure for getting access to your records. Both access rights are NOT mutually exclusive. You may proceed under both.

9. 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? Is there any information the agency can require of the requester? (Hint: 2.2-3704)**

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

10. The use of state grant money for a particular program has been the subject of an administrative investigation/audit by the city government. The program manager has had many meetings with city auditors and it appears that the program manager has not been properly supervising the program. Pending the investigation, the program manager is 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. It is decided to bring the program manager back to work with a formal reprimand in his personnel file. A local newspaper reporter has now asked for a copy of the audit report. **Does FOIA require the release of the audit report? What, if any, exemptions may apply? (Hint: 2.203705.3 (7))**

ANS: Yes; 2.2-3705.3(7); NOTE: Final report must be released, but may withhold "informant" information. If NO corrective action--can't release name of subject w/out his consent. Here there was corrective action, so the program manager's name cannot be redacted out of the final report.

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.

11. 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? (Hint: 2.2-3700 and 2.2-3704)**

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.)

12. 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? (Hint: 2.2-3701)

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.

13. 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? (Hint: 2.2-3704)

*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.*

14. 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? (Hint: 2.2-3704)

*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. BEST PRACTICE: Send the 7-day extension letter with the notice of the advance deposit.

15. 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? (Hint: 2.2-3704)**

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.

16. A local blogger 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? (Hint: 2.2-3700)**

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.

17. 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? (Hint: 2.2-3704)**

ANS: 2.2-3704 (B3) Required response. "Records do not exist."

18. A reporter has requested the travel vouchers for all members of the Board of Supervisors for the last two years. **Does FOIA require you to release these records? If so, are there any exemptions that might apply to withhold any portion of these vouchers? Also, do the actual receipts that are attached to the travel voucher have to be released? (Hint: 2.2-3708)**

ANS: Yes, travel vouchers/expense reimbursements must be released, however, the home address on the voucher may be redacted as a personnel record under 2.2-3705.1

(1). Also, the first 5 digits of the SSN if on the voucher **MUST** be redacted (i.e. a prohibited release) under 2.2-3815. Yes, copies of the actual receipts must also be released; however, credit card account and bank account numbers may be redacted under 2.2-3705.1 (13).

19. A public employee has had some performance issues at her job. At this point, only her supervisor had had a discussion with her about these issues, which was recorded by the supervisor. The employee suspects that her supervisor has emailed others higher in the organization about the situation and makes a FOIA request for "any and all records of which she is the subject that relate to her employment." The agency responds in writing that it is not obligated to provide the requested records because although she is employed in Virginia, she lives in North Carolina. **Is this a proper response under FOIA? (Hint: 2.2-3704)**

ANS: No, even though she may live in North Carolina, she is a public employee in Virginia and as such has the right to any records, including the audio tape, of which she is the subject. NOTE: As a public employee you have separate access rights under the grievance procedure in any event.

20. Sally, a citizen makes a FOIA request to a local public college via email for some specific records. The college responds that she must make her request to Larry at the college, who handles FOIA requests. Sally complies with this directive and emails her request to Larry. Larry is out of the office for a week and his email auto responder states this. **When does the 5-working day period begin to run? (Hint: 2.2-3704)**

ANS: First, the public body is the college and Sally is not required by FOIA to know who handles FOIA for the college and submit her FOIA request to him. Therefore, the college cannot require Sally to make her request to Larry. The 5-day clock begins the day after the college receives her request.

21. The most recent FOIA request your agency has received is for all emails sent and received by five of the agency's top brass for the last six months. The requester has specifically stated in his request that he does not want any duplicative emails. You know that by weeding out duplicative emails, the cost of production of these emails will increase because the extra time to do this. **What should you do in this situation? (Hint: 2.2-3704)**

ANS: Advise the requester that the extra time to weed out duplicative emails will raise the cost and it would be cheaper to provide the emails and let him weed them out. (Not to mention the time it will save you!). Also, it is likely a request like this will exceed \$200 and therefore you must provide an estimate and can require prepayment of your advance determination. Bottom line: if the requester insists that you weed out duplicative emails, you may charge for this time as a cost of supplying the requested records.

22. Your locality is conducting its annual "employee survey" to see how things are going with the locality's employees and whether employees are satisfied with how things are run. The instruction email that accompanies the survey form says that the survey is "confidential", so you can be frank and no one will know what you said. To reinforce this notion, the instruction email also said that the survey was being done at the request of the chief executive officer and therefore exempt from FOIA as a working paper. A reporter requests copies of the completed surveys. As the FOIA officer for the locality, you've been directed to respond that the surveys are exempt as personnel records and as working papers. You know, however, that the surveys have been circulated to all department heads, supervisors, and everyone in human resources. **Are these exemptions proper under the circumstances? (Hint: 2.2-3705.1 and 2.2-3705.7)**

ANS: The surveys are not entirely personnel records and under 2.2-3705.1 (1) any portions of the survey containing information about identifying individuals may properly be redacted. Working papers, defined in 2.2-3705.7 (2), must be prepared by or for the executive for his personal or deliberative use. The instructions said so, but the surveys were so widely disseminated that they could no longer be deemed working papers b/c they are outside of the zone of privacy reserved for the executive.

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