



## ACCESS TO PUBLIC RECORDS under the VIRGINIA FREEDOM OF INFORMATION ACT

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### I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and §§ 2.2-3704 and 2.2-3704.01 of the Code of Virginia guides users on how to make or respond to a FOIA request for public records. This outline breaks down these procedural requirements and provides practical advice for adhering to FOIA when making or responding to a request. Further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act.”

#### ***What is a public record under FOIA?***

A “public record” is any writing or recording, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

#### ***Are draft or preliminary versions also considered public records?***

Yes. The definition of “public record” does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA.<sup>1</sup>

### II. MAKING A REQUEST FOR RECORDS

#### ***Who may request records under FOIA?***

- Citizens of the Commonwealth;
- Representatives of newspapers and magazines with circulation in the Commonwealth; and
- Representatives of radio and television stations broadcasting in or into the Commonwealth.

#### ***Must a request mention “FOIA” specifically?***

No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

#### ***Must a request be made in writing?***

No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Writing is recourse for both parties!<sup>2</sup>

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<sup>1</sup> FOIA Council Opinions AO-3-00, AO-05-09.

<sup>2</sup> FOIA Council Opinion AO-07-11.



### ***May a public body require a requester to fill out a request form?***

No. A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request. [NOTE: It is suggested that if the requester refuses to fill in the form or to put the request in writing, the public body should fill out its own form—remember, writing is recourse.]<sup>3</sup>

### ***May a public body require a requester to provide his name and legal address?***

Yes. A public body may require a requester to provide his name and legal address before processing a FOIA request. [NOTE: This is a tool a public body *may* use, but FOIA does not mandate that public bodies get identification first.]<sup>4</sup>

## **III. RESPONDING TO A REQUEST FOR RECORDS**

### ***How long does a public body have to respond to a request?***

A public body must respond within five working days of receipt of the request. [NOTE: Count the day **after** receipt as Day 1.]<sup>5</sup>

**REMEMBER:** Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.<sup>6</sup>

### ***What are the permissible responses to a request?***

As of July 1, 2007, a public body must make one of the five responses allowed by FOIA:

1. Provide the requested records to the requester;
2. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with FOIA;
3. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with FOIA;
4. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body; or
5. It is not practically possible to provide the requested records **OR** to determine whether they are available within the five-work-day period, and the public body

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<sup>3</sup> FOIA Council Opinions AO-18-04, AO-07-11.

<sup>4</sup> FOIA Council Opinions AO-07-11, AO-05-18.

<sup>5</sup> FOIA Council Opinions AO-34-01, AO-47-01, AO-05-06, AO-02-08, AO-07-08, AO-07-11, AO-06-14, AO-01-17.

<sup>6</sup> FOIA Council Opinions AO-10-02, AO-12-03, AO-18-03, AO-01-08, AO-07-08, AO-01-17.



needs an additional seven work days in which to provide one of the four preceding responses.<sup>7</sup>

### ***When does a response need to be in writing?***

If any part of the answer is “NO” (i.e., response 2 OR 3 above), the response **must**:

1. Be in writing;
2. Identify with reasonable particularity the subject matter of withheld records; **and**
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.

If the records are being entirely withheld (i.e., response 2) then the response must also identify with reasonable particularity the volume of the withheld records.

If the answer is “we cannot find it” or “it does not exist” (i.e., response 4 above), the response **must**:

1. Be in writing; **and**
2. **If** the public body knows that another public body has the records, it must provide contact information for the other public body.

If the answer is “we need more time” and the public body would like seven additional working days to respond (i.e., response 5 above), the response **must**:

1. Be in writing; **and**
2. Specify the conditions that make production of the records within the five-work-day period impossible.

### ***How does a public body respond if a record contains exempt and nonexempt information?***

Generally, if a record contains exempt and nonexempt information, the public body must release the record and delete or excise only the exempt portion of the record.

### ***Must a public body create a record in response to a FOIA request?***

Generally, no public body is required to create a new record if the requested record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.<sup>8</sup>

### ***How much may a public body charge for producing records?***

A public body may make reasonable charges for its **actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.** A public body may not

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<sup>7</sup> Prior to July 1, 2007, FOIA permitted four responses to a records request; See FOIA Council Opinions AO-1-00, AO-21-01, AO-12-03, AO-18-03, AO-16-04, AO-05-05, AO-05-06, AO-11-07, AO-12-07, AO-03-08, AO-07-08, AO-13-08, AO-01-09, AO-07-11, AO-02-12, AO-01-17.

<sup>8</sup> FOIA Council Opinions AO-11-00, AO-6-01, AO-11-01, AO-35-01, AO-49-01, AO-01-02, AO-03-02, AO-10-02, AO-11-03, AO-04-04, AO-10-04, AO-16-04, AO-05-05, AO-06-05, AO-09-07, AO-11-07, AO-07-08, AO-12-09, AO-07-11, AO-04-15.



charge extraneous or surplus fees unrelated to the production of the records. [NOTE: This means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees.] Charges for copies must not exceed the actual cost of duplication.

A citizen may request that the public body estimate the cost of supplying the requested records in advance. The five-working-day period to respond is tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. As mentioned previously, further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act.”<sup>9</sup>

### ***Can a public body require advance payment?***

When a public body determines in advance that the charges for supplying the requested records are **likely to exceed \$200**, it may require the requester to pay a deposit before proceeding with the request. This deposit may not exceed the amount of the advance determination, and the public body must credit it toward the final cost of supplying the records. If a public body asks for the advance deposit, the five-working-day period to respond to the request is tolled until the deposit is paid.<sup>10</sup>

### ***What can a public body do if a requester does not pay for records provided under FOIA?***

Before responding to a new 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.

### ***Do these same requirements apply to a request for electronic records?***

Yes. Like all other records, regardless of format, a public body may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. And like other records, when electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information. The excision of exempt fields from a database or the conversion of data from one available format to another is not considered the creation of a new record under FOIA.

A public body must provide electronic records in any medium identified by the requester if that medium is used by the public body in the regular course of business. If the public body has the capability, this includes the option of posting the records on a website or delivering the records to an email address. A public body is not required to produce records in a format not regularly used by the public body. However, a public body must make reasonable efforts

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<sup>9</sup> FOIA Council Opinions AO-1-00, AO-21-01, AO-25-01, AO-32-01, AO-39-01, AO-49-01, AO-05-02, AO-10-02, AO-14-02, AO-08-03, AO-20-03, AO-21-03, AO-01-04, AO-04-04, AO-16-04, AO-23-04, AO-06-05, AO-02-07, AO-09-07, AO-06-09, AO-07-11, AO-03-12, AO-05-13, AO-02-14, AO-04-15.

<sup>10</sup> FOIA Council Opinions AO-21-01, AO-14-02, AO-04-04, AO-16-04, AO-08-09, AO-07-11.



to provide records in any format under such terms and conditions as agreed between the requester and the public body, including the payment of reasonable costs.<sup>11</sup>

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<sup>11</sup> FOIA Council Opinions AO-11-00, AO-10-02, AO-11-02, AO-14-02, AO-21-03, AO-05-05, AO-08-09, AO-05-13.



## APPENDIX

### Records Exemptions of General Applicability

FOIA contains over 100 exemptions for records. Although many of these exemptions apply to specific agencies or to very content-specific records, there are several records exemptions of general applicability that may be used by virtually all public bodies. The records exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

**§ 2.2-3705.1(1): Personnel.** Provides an exemption for:

Personnel 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 such information 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, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

**§ 2.2-3705.1(2): Attorney-client privilege.** Provides an exemption for:

Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

**§ 2.2-3705.1(3): Attorney work product.** Provides an exemption for:

Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

**§ 2.2-3705.1(4): Tests and examinations.** Provides an exemption for:

Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of



test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

**§ 2.2-3705.1(5): Closed meetings.** Provides an exemption for:

Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

**§ 2.2-3705.1(6): Vendor proprietary information.** Provides an exemption for:

Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, “vendor proprietary information software” means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

**§ 2.2-3705.1(7): Computer software.** Provides an exemption for:

Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

**§ 2.2-3705.1(8): Cost estimates of real property.** Provides an exemption for:

Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

**§ 2.2-3705.1(10): Personal contact information.** Provides an exemption for:

Personal contact information furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, “personal contact information” means the information provided to the public body for the purpose of receiving electronic mail from the public body and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device.

**§ 2.2-3705.1(12): Contracts.** Provides an exemption for:

Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect



the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

**§ 2.2-3705.1(13): Account numbers.** Provides an exemption for:

Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, “financial institution” means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

**§ 2.2-3705.2(2): Security systems.** Provides an exemption for:

Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

**§ 2.2-3705.2(14): Critical infrastructure, cybersecurity, antiterrorism and related public safety information.** Provides an exemption for:

Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

- a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;
- b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;
- c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or
- d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.





The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection 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, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, “critical infrastructure information” means the same as that term is defined in 6 U.S.C. § 131.

**§ 2.2-3705.4(A) (1): Students.** Provides an exemption for:

Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent’s parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic 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, such records shall be disclosed.

**§ 2.2-3705.4 (B) Students.** Provides a prohibition as follows:

The custodian of a scholastic record shall not release the address, phone number, or email address of a student in response to a request made under this chapter without written consent. For any student who is (i) 18 years of age or older, (ii) under the age of 18 and emancipated, or (iii) attending an institution of higher education, written consent of the



student shall be required. For any other student, written consent of the parent or legal guardian of such student shall be required.

**§ 2.2-3705.5(1): Health.** Provides an exemption for:

Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § 16.1-338 or 54.1-2969, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

**§ 2.2-3705.6(3): Economic development and retention.** Provides an exemption for:

Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

**§ 2.2-3705.6(10): Virginia Public Procurement Act.** Provides an exemption for:

Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.



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