



LAW-ENFORCEMENT RECORDS and the FREEDOM OF INFORMATION ACT

Law-enforcement agencies in Virginia continue to enjoy one of the broadest exemptions from releasing information in all of the states. The Virginia FOIA contains ample provisions to safeguard information essential to the accomplishment of the law-enforcement mission. Adequate protection is also provided for sensitive information gathered by law-enforcement agencies in the course of conducting investigations of noncriminal matters.

With the ability to withhold much information comes the responsibility not to abuse that discretion. This can best be accomplished by adopting a "predisposition to disclose." Using this approach, an agency identifies only that information which must be withheld rather than that which must be released under FOIA. It is important to keep in mind that FOIA does not prohibit the release of any information. Information that is exempted may be released at the agency's discretion, and frequently an agency may find that it serves its best interests to do so. It is an established fact that law enforcement benefits when citizens are informed to the maximum extent possible.



PART I--REQUIRED RELEASES

1. Information in the custody of law-enforcement officials relative to the **identity of any individual, other than a juvenile, who is arrested and charged and the status of the charge or arrest shall be released.** This includes felony, misdemeanor, and traffic arrests. Any chronological listing of adult arrests is a public document. However, reflecting federal mandates, VA law prohibits the dissemination of "criminal history record information" to individuals outside of the law-enforcement community. The release of arrest information is commonly understood to apply to "reasonably contemporaneous" arrests. Requestors seeking older information should be directed to check court records, which are public;

2. **Adult arrestee photographs** taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in **felony** cases, until such time as the release of the photograph will no longer jeopardize the investigation;

3. **Records of completed unattended death investigations** to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. "Unattended death" is defined as a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated. "Immediate family" means the decedent's personal representative or, if no personal representative has



qualified, the decedent's next of kin in order of intestate succession as set forth in § 64.2-200; and

4. Criminal incident information relating to felony offenses. Criminal incident information includes a general description of the criminal activity reported, the date the alleged crime was committed, the general location where the alleged crime was committed, the identity of the investigating officer or other point of contact, and a general description of any injuries suffered or property damaged or stolen.

This is undoubtedly the type of information most frequently requested from law-enforcement agencies, not only by the news media, but also by interested citizens. As defined in FOIA, this is minimal information about an event, frequently much less than an agency would typically disclose. Note, for example, that suspect descriptions, which are commonly made public in such cases as robbery, are not required components of "criminal incident information." Let's look at each of the required components.

"General description of the criminal activity reported": This means the nature of the offense, though the specific criminal charge that may be involved need not be specified. For example:

"Sexual assault" may be used rather than the more specific terms of rape, sodomy, sexual battery, and similar offenses.

"Malicious wounding" instead of stabbing or beating.

"Drug law violation" could be used without specifying the



substance involved or whether the case involved possession or distribution.

"The date the alleged crime was committed/The general location where the alleged crime was committed": A specific date should generally be provided, though in some cases a time frame may be appropriate. While the approximate time an event occurred is not required, it may be provided. Street and hundred block is one of the most frequently used methods of identifying location. However, if a street or block contains only several residences or buildings, use of a geographic, community, or subdivision locator identity may be appropriate if protection of a victim's identity is desired.

"Identity of the investigating officer or other point of contact": Self-explanatory, but could include either an officer taking an initial report or a detective assigned to follow up on a case. While this information must be furnished if a requestor wants it, as a practical matter it generally is not needed as long as there is a point of contact for additional information, such as a public information officer.

"A general description of any injuries suffered or property damaged or stolen": Phrases such as "stab wound," "life-threatening injuries," or "injuries which are not life threatening" are appropriate. Property may be described in such terms as "construction materials," "household goods," or "assorted merchandise" instead of books, chairs, desk, computer. "Cash" vs. a specific amount.



NOTE: A **verbal response** as agreed to by the requester and the public body is sufficient to satisfy the requirement to provide criminal incident information.

Permitted Withholding of "Criminal Incident Information"

Even this minimal amount of information may be withheld if the release of the information is likely to do one or more of the following: (1) jeopardize an ongoing investigation or prosecution; (2) jeopardize the safety of an individual; (3) cause a suspect to flee or evade detection; or (4) result in the destruction of evidence. It is important to note that the "criminal incident information" may be withheld only until the specified damage is no longer likely to occur from release of the information.

Financial crime investigations are a good example of why you would want to withhold criminal incident information. Otherwise, the misappropriating treasurer will flee town, burning records as he goes!!

NOTE, HOWEVER: FOIA specifically requires the release of those portions of such information that are not likely to cause the above-referenced damage.

PART II--CRIMINAL RECORDS

DISCRETIONARY EXEMPTIONS FROM RELEASE

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



1. Criminal investigative files.

NOTE: "Criminal investigative file" is specifically defined in FOIA as "any documents and information including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information."

2. **Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police departments of public institutions of higher education established pursuant to Article 3 (§23.1-809 et seq) of Chapter 8 of Title 23.1;**

3. Records of local law-enforcement agencies relating to **neighborhood watch programs** that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;

4. **All records of persons imprisoned in penal institutions** in the Commonwealth, provided such records relate to the imprisonment;

5. Records of law-enforcement agencies, to the extent that such records contain **specific tactical plans**, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;

6. All records of adult persons under (i) investigation or supervision by a



local pretrial services agency in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision, or monitoring by a **local community-based probation services agency** in accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by **state probation and parole services** in accordance with Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1;

7. Records of a law-enforcement agency to the extent that they disclose the **telephone numbers for cellular telephones, pagers, or comparable portable communication devices** provided to its personnel for use in the performance of their official duties;

8. Those portions of any records containing information related to **undercover operations or protective details** that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. HOWEVER, information concerning the overall costs or expenses associated with undercover operations or protective details must be released;

9. Records of (i) **background investigations of applicants** for law-enforcement agency employment, (ii) **administrative investigations** relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;

10. **The identity of any victim, witness, or undercover officer, or**



investigative techniques or procedures. However, the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted under § 19.2-11.2¹; and

11. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, including information obtained from state, local, and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913.

PART III--PROHIBITED RELEASES

FOIA specifically **PROHIBITS** the disclosure of the identity of any individual providing information about a crime or criminal activity under a promise of anonymity.

¹ § 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege.

Upon request of any witness in a criminal prosecution under § 18.2-46.2, 18.2-46.3, or 18.2-248 or of any violent felony as defined by subsection C of § 17.1-805, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the witness or victim or a member of the witness' or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause.

Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault, sexual abuse or family abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim.

Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.



PART IV--NONCRIMINAL INCIDENT RECORDS

Those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person. [EXAMPLES: credit card numbers and other identifying information recorded on lost property reports, and response to domestic disputes where no violence occurs.]

ALL other noncriminal records of law-enforcement agencies must be released.

NOTE: Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision A 2 i of § 2.2-3706 (regarding background, internal affairs, and other administration investigations) and subdivision 1 of § 2.2-3705.1 (general personnel records exemption), as applicable.

PART V--SPECIFIC TYPES OF RECORDS and HOW TO HANDLE

1. **911 Tapes:** Records of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system are subject to FOIA. As a result, records involving criminal investigations may be withheld; those involving noncriminal incidents may only be withheld as discussed above (Part IV--



Noncriminal Incident Records). [EXAMPLES: The words of a caller reporting a medical emergency could be excised from a recording or deleted from a transcript in order to protect individual privacy, but many of the words of a call taker or dispatcher would be subject to release, as would records of response times.]

2. **In Car Videos:** Felony traffic stop and apprehension of a criminal suspect may be withheld as part of a criminal investigation BUT NOT routine traffic stop (noncriminal). Officer misconduct may be withheld as internal affairs investigation.

3. **Cell Phone #s:** § 2.2-3706(A)(2)(g) May withhold "records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties."

4. **Roster of Vehicles:** Generally would have to be released EXCEPT identity of undercover cars.

PART VI--OTHER EXEMPTIONS FOUND IN FOIA THAT IMPACT LAW ENFORCEMENT

FOIA contains several other specific exemptions applicable to or of interest to law-enforcement agencies in addition to those enumerated in § 2.2-3706. These other provisions can be found in §§ 2.2-3705.1, 2.2-3705.2, and 2.2-3705.5, and include:



1. 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. [§ 2.2-3705.2(14)]



2. 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(2)]
3. Information and records acquired during a review of any child death conducted by the State Child Fatality Review Team. [§ 2.2-3705.5(7)]
4. Confidential information, including victim identity, provided to or obtained by staff of a rape crisis center or a program for battered spouses. [§ 2.2-3705.2(1)]
5. Computer programs used to process data that may be included within official records. [§ 2.2-3705.1(6) and (7)]

PART VII--FOIA VS OTHER LAWS

In the event of conflict between § 2.2-3706 of FOIA and other provisions of law, the provisions of § 2.2-3706 shall control.

PART VIII--SPECIFIC PROHIBITIONS ON THE RELEASE OF RECORDS IN OTHER LAWS

- Social Security Numbers
 - Where collected by tax official are treated as tax information that is exempt from FOIA (§ 58.1-3017)
- AND
- The first five digits of an SSN are prohibited from release under the Protection of Social Security Numbers Act (§ 2.2-



3815 et seq.)

- Tax returns and other information relating to the income or property of any person or business, EXCEPT for real estate assessments, information relating to building permits, certain personal property assessments (§ 58.1-3)
- Juvenile arrest and court records (§ 16.1-301)
- School records (§ 22.1-287; 20 USC § 1232g)
- Crime victim information (§ 19.2-11.2)
- Certain records or reports submitted in confidence to the Department of State Police relating to an ongoing criminal investigation (§ 52-8.3)
- Criminal history record information (§ 19.2-389) and juvenile record information (§ 19.2-389.1)

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