Virginia Press Association

Reorganizing and Updating the Criminal Records Provisions

of the

Virginia Freedom of Information Act

Position Paper Prepared for the Virginia Freedom of Information Advisory Council

Introduction

Day in and day out, Virginia's working journalists, and many of its citizens, interact more frequently with law enforcement agencies than with any other type of public body. Criminal activity, and the efforts of police, prosecutors, and other public agencies to combat that activity, is at the center of news reporting. It is one of the major categories of information that dominate newspaper content, along with reporting on government, politics and sports.[1]

This is no surprise. The safety and security of a community is a priority for all of its members. The manner in which safety and security are pursued implicates a number of basic social issues: Is crime being prevented? Are crimes being effectively investigated and prosecuted? What are the monetary costs of maintaining the optimal level of law enforcement resources? Is law enforcement being conducted in a manner that ensures the civil and constitutional rights of the citizens? Are there biases or flaws

[1] Media content studies are available from numerous sources. See, for example, "Newspaper Content: Newspaper Industry Results," Kellogg School of Management, Northwestern University (2001), *available at* www.readership.org/content/content analysis.asp.

in the system? Are there trends in criminal activity that demand a reallocation of resources or new ways of thinking about crime? Is my neighborhood safe?

From the date of its enactment in 1968, the Virginia Freedom of Information Act (the "Act") has included provisions for public access to information concerning law enforcement activity, and limitations on access. The entire provision for criminal information was captured in the original Act in these words:

§2.1-342. Official records to be open to inspection; exceptions.

. . .

(b) The following records are excluded from the provisions of this chapter:

(1) Memoranda, correspondence, evidence and complaints related to criminal investigations, and reports submitted to the State Police in confidence.[2]

This simple but vague statement has expanded over four decades into a freestanding Code provision that covers a variety of circumstances, in language that has become more complex, but not always clearer.[3] As a result, law enforcement agencies struggle to interpret its provisions, and those who seek access to public information about crime and law enforcement struggle as well. This leads to frequent contention between citizens and the subject agencies, uneven application of rules among various law enforcement agencies, and loss of access to public information where it seems clear that the General Assembly did not intend such an outcome.

In 2011, the Virginia Freedom of Information Advisory Council ("VFOIAC") formed a work group to consider legislation proposing to amend Va. Code Sec. 2.2-

[2] A copy of the original Act is attached as Appendix 1.

[3] A copy of the current criminal records provision of VFOIA is attached as Appendix 2.

3706. The bill, offered by Senator John Edwards of Roanoke, addressed one of several problems under current law – the silence of the Act on time limits for the release of historical criminal investigative information.[4] The VPA was no stranger to this problem, but considered it one of several problems with the current statute. As a consequence, VPA drafted a restructured statute (the "VPA Proposal") that addresses several ongoing problem areas, including the one raised by Senator Edwards. It reorganized the statute for clarity, retained most of the current rules, and proposed changes to provisions that give rise to recurring problems.

The VPA Proposal was discussed in work sessions held in 2011. In at least two sessions, a point-by-point comparison between the VPA proposal and current law was analyzed by the participants.[5] Although both journalists and law enforcement personnel identified concerns over the convoluted structure of the statute and the unclear guidance it provides on key issues, no consensus was achieved during the 2011 work sessions on any point presented in the VPA Proposal. The stakeholders agreed to continue the discussion in 2012, and to refrain from advocating piecemeal amendments to the criminal records provisions of the Act during the 2012 Session of the General Assembly.

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[4] See S.B. 711 (2010 Sess.); S.B. 1467 (2011 Sess.); S.B. 107 (2012 Sess.). The Freedom of Information Advisory Council formed a subcommittee in 2011 to study S.B. 711. That year, a draft bill was produced by staff. The Council took no action to introduce the draft as legislation. In 2011, the subcommittee chair, Mr. Fifer, recommended no action on S.B. 1497, but instead asked the stakeholders to meet and return with recommendations. The VPA Proposal was the basis for the ensuing stakeholder discussions. In 2012, S.B. 107 was sent to the Council by the General Assembly, and the Council again assigned it to the Fifer subcommittee.

[5] See July 18, 2011, proposal and comparative analysis, copy attached as Appendix 3.

This paper supplements the July 18, 2011, comparative analysis presented to the work group by providing more detailed comments from VPA on the experiences and reasoning that underlie the VPA Proposal.

Summary of Topics Discussed

This paper addresses the following matters that are included in the VPA Proposal:

(1) Overall reorganization of the statute for clarity.

(2) Disclosure of criminal incident information.

(3) Disclosure of materials relating to closed, historical or stale investigations.

(4) Simplification of 911 record disclosure language.

Other matters addressed in the VPA Proposal are not discussed in this paper, but the items listed above are key policy issues that reflect areas of ongoing concern.

Discussion

I. Reorganization of Virginia Code Section 2.2-3706.

The present Code section, Va. Code §2.2-3706, is the product of a steady evolution that started with the few words in the original 1968 Act. The criminal information provision thereafter moved from its initial location in the general records exclusions section of the Act, and developed into a freestanding statute that purports to deal broadly with information held by public bodies engaged in law enforcement and related activities. Other provisions in the Act govern specific exclusions relating to

records of law enforcement activities, but this paper does not attempt to review those provisions.[6]

The current statute, Va. Code §2.2-3706, addresses two different subjects: (1) information concerning day-to-day investigative activities and arrests, and (2) information concerning high-level strategic planning, personnel and miscellaneous administrative matters. The former provisions are located in subsections A. through F.2. of current Section 2.2-3706. The latter are located in current subsections F.3 through H. The VPA Proposal, for clarity and ease of use, creates two statutes, new Sections 3706.1 and 3706.2, in an effort to set a more workable boundary between information gathered and generated in connection with specific investigations and arrests, and information gathered and generated for other administrative or strategic purposes. Although particular categories of information might arguably be placed in either new section, the objective is to simplify the Act for its users.

Proposed Section 3706.1 has three parts. Subsection A sets the basic rules for release of information concerning criminal incidents, arrests, and charges. The working assumptions underlying subsection A are that, in a free society, there must be transparency in three areas: (1) timely description of criminal activity in the community, (2) timely, accurate identification of adults who have been taken into the custody of the state, and (3) timely release of information when an adult has been charged by the state with a crime.[7] Subsection B. addresses the treatment of records relating to active criminal investigations, and sets presumptive end dates for the withholding of

[6] See, for example, Va. Code Sec. 2.2-3705.2, listing exclusions involving public safety, and Va. Code Section 2.2-3705.3 relating to administrative investigations.

[7] The VPA Proposal presumes that an "adult" in the criminal justice context is an adult as defined by the General Assembly in the juvenile justice system.

investigative information. Subsection C. provides protections for sensitive information relating to investigations, permitting its redaction from materials released under subsections A. or B.

Proposed subsection 3706.2 collects the current rules that relate to administrative or tactical records. It continues to provide specified exclusions for certain mobile telephone data, undercover operations, tactical plans, personnel matters, neighborhood watch organizations, and prisoner and probation information. Although some of the language in the VPA proposal is not identical to current law, the objective is not to narrow any exclusion in this group, but to restate the exclusions with clarity.

II. Disclosure of Criminal Incident Information.

Over time, the most frequent disagreements between requesters and law enforcement agencies have been over the scope of the obligation to disclose accurate, timely criminal incident information. Current law sets the basic rule that law enforcement agencies "shall make available upon request criminal incident information relating to felony offenses." Va. Code § 2.2-3706.B. This phrase contains several critical concepts about the release of information (1) it is mandatory, (2) it relates to felony offenses, and (3) it must occur upon request.

"Criminal incident information" is a defined term that describes what is to be released: "a general description of the criminal activity reported, the date and general location the alleged crime was committed, the identity of the investigating officer, and a general description of any injuries suffered or property damaged or stolen." Va. Code § 2.2-3706.A. Three categories of problems are encountered under current law: (1) response time, (2) content of the information released, and (3) format of the information.

Response time. The statute makes the release mandatory and prompt, using the words "shall make available" and "upon request." Nonetheless, some agencies have taken the position that they may wait five working days before releasing information, referencing the Act's general rule for record production in Va. Code § 2.2-3704.B. This interpretation gives no meaning to the language adopted by the General Assembly, and as a practical matter opens a five-day window during which no information or misinformation about criminal activity may persist in a community.

Content of the information. The definition of "criminal incident information" specifies the content to be released, and only in connection with felony offenses. The information is generic, and current law does not require the disclosure of details such as the address where the crime occurred or the identity of the victim. Nonetheless, even the high-level information required by current law is not released in all jurisdictions.

Format of the information. As a general rule, the Act applies to "public records" and "meetings" as defined in Va. Code § 2.2-3702. However, Section 3706 is unique in the Act, in that it does not use the term "records" in connection with mandating information disclosure. It demands the disclosure of "information" without limiting the format of the disclosure. Notwithstanding this fact, requesters have repeatedly encountered situations over the years where law enforcement agencies have evaded the plain command of the statute with some version of the argument, "we don't keep that record, and the Act only requires us to release records."

VPA Proposal. Although the assertion that law enforcement agencies keep no "record" with the information described in the statute is dubious,[8] it is clear that the agencies must maintain basic incident information somewhere in some format in order to do their work. The legislature has, for good policy reasons, commanded that specified information be provided upon request. The VPA Proposal rewrites the language relating to disclosure to remove any ambiguity by requiring that the information be provided verbally if a record is not produced. "Upon request" is eliminated; it is replaced with "as soon as possible, but in no event later than one business day after the request is made."

The VPA Proposal also makes more explicit the content of the required disclosure:

- all criminal incidents, not just felony-level incidents, are covered
- location of the crime must be provided
- name, age and gender of victim must be provided
- date and approximate time of the crime must be provided
- list of property allegedly damaged or stolen must be provided
- name of primary investigator must be provided

The VPA Proposal also provides that these basic disclosures remain subject to the protections provided by law for victims of sexually-based offenses, recognizes other

[8] In the past, Virginia law enforcement officials involved in monitoring compliance with the Act have suggested that the General Assembly compel law enforcement agencies to use a simple, uniform criminal incident reporting form. The idea has merit. In any event, is it beyond argument that law enforcement agencies are required by federal law to capture criminal incident information in any event. The Justice Research Statistics Association reports on its website (www.jrsa.org/ibrrc) that Virginia is fully compliant with the National Incident Based Reporting System, and that six of the twenty-five largest local agencies reporting to the system are located in Virginia.

sensitive circumstances as set forth in subsection C., and provides for the redaction of sensitive information.

III. Disclosure of Material Relating to Closed Investigations.

Many investigations are completed relatively swiftly, and are resolved by taking no action or by presenting the matter to the prosecutor and the courts. Prosecuted cases are resolved by trial or by plea agreement, and a public court record typically emerges from that process (to a far greater extent in Circuit Courts than in courts not of record). In some cases, however, an investigation is begun and no prosecution or other resolution emerges. In some cases, years pass without any apparent activity on the investigation of a crime. Acknowledging the fact that some investigations literally consume years, or that new facts can arise in "cold" cases, VPA is of the view that some presumption of public access to investigative records should arise after the passage of significant time without action. Thus, the VPA Proposal offers a two-part test for the release of criminal investigative records: (1) where the Commonwealth has prosecuted all persons associated with the alleged crime and there is no likelihood of further prosecutions, or (2) when three years have passed from the date of the criminal incident and no prosecution has been initiated against any person for the crime.

The latter provision creates a presumption of access after the passage of a defined period of time. Obviously, there will be cases where an investigation is still active after three years, or where the file relates to the ongoing investigation of connected crimes. The VPA proposal acknowledges these possibilities in subsection C. The VPA proposal places the burden on the public body, after a reasonable period of time, to justify its continued refusal to produce criminal investigative records.

IV. Release of 911 or Equivalent Records.

The current provision requiring the release of emergency 911 system and similar records is convoluted, largely the result of efforts to conform the Act to preexisting statutes and a decision of the Supreme Court of Virginia. Consequently, Section 2.2-3706.G. requires the release of 911 records through indirect language, and a user of the Act who is not familiar with the unique history of that subsection would not be able to "decode" it. This provision has already spawned costly circuit court litigation, and it should be replaced with language that is simple to understand.

The VPA Proposal, in Section 3706.1.A.2, uses direct language to state both the rule of presumed access to records of emergency communications systems used by the public, and to describe materials that may be redacted when the information is released.

Conclusion

Many provisions of the Act of the rules that have been developed over four decades concerning the release of law enforcement information are both sensible and necessary. Those rules should be retained. However, the present criminal records statute has a structure that is difficult to interpret, and that structure should be repaired.

Problems continue to arise in well-known areas when the public seeks access to law enforcement information. Those problems should be identified accurately, discussed in a forthright manner, and where possible fixed. If the General Assembly wishes for the public to have access to specific law enforcement information within reasonable timetables, Virginians would be well served by a clarification of this critical statute.

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