



Date: September 1, 2021
To: Virginia Freedom of Information Act (FOIA) Advisory Council Records Issues Subcommittee
From: Virginia Press Association (VPA)
Re: VPA comments on HB 2196 (Mullin) and HB 2000 (Roem)

The Virginia Press Association (VPA) submits the following comments on the legislation before the FOIA Advisory Council's Records Issues Subcommittee at its September 2, 2021 meeting.

HB 2196 (Mullin) Virginia Freedom of Information Act; required release of law-enforcement disciplinary records; exceptions. – SUPPORT

VPA supports HB 2196. This legislation is important for an accountable government that is open to the public and allows for the press to keep local communities informed. We also believe this legislation is in the best interest of law enforcement officers and the public they serve.

Police officers, by choice, place themselves in a position where a higher standard of transparency is required to maintain or rebuild the public trust. The powers and duties of police officers also come with the responsibility of allowing the public to determine whether there are problematic patterns in the behavior of those police officers, including disciplinary actions.

The records in question will either show that certain behavior members of the public experience during an interaction with an officer was an aberration, or a sign of a broader issue. With this information, the public, law enforcement agencies, and public bodies can then take appropriate action based on facts.

Being able to access all complaints of serious incidents, including founded and unfounded complaints, helps establish patterns *and* dispel negative or untrue rumors. If all complaints are made available to the public and press, this information will help show if the problems are with the entire department, or simply with individual officers. It will also show whether the disciplinary process is working properly.

Fact is always better than rumor. If an officer is accused of a violation but there is no access to the facts or the outcomes surrounding the violation, rumors and distrust can grow in the community concerning that officer. This bill would shine light on the process, supply facts instead of rumor and innuendo, and allow community members to clearly know how an issue was handled.

Lastly, we associate ourselves with the letter submitted by the Virginia Coalition on Open Government regarding HB 2196. We also applaud the FOIA Council for its work on Delegate Hurst's HB 2004, which passed the General Assembly this year and was signed by the Governor. We are grateful for the productive, reasonable, and practical precedent the council established in developing a recommendation on this aspect of FOIA.

Below for your convenience we also include text from a previous memo VPA submitted regarding HB 2000 (Roem) on May 17, 2021.

HB 2000 (Roem) Virginia Freedom of Information Act; charges for production of public records.

As VPA stated at the FOIA Advisory Council meeting on April 28, 2021, we support reform of FOIA fees and an in-depth study of this issue with stakeholders. Please refer to the joint letter dated April 27, 2021 from the Virginia Coalition for Open Government (VCOG) and VPA outlining preliminary comment and research.

Upon further review of the bill, we offer the following comment on the specific provisions of HB 2000:

- *VPA supports prohibiting a public body from charging a requester for any costs incurred during the first two hours spent accessing or searching for requested records.*
- *However, we have concerns with limiting this prohibition to when such requester has made four or fewer individual records requests to such public body within 31 consecutive days.*
This provision is arbitrary and difficult, placing a burden on both the public body and the requester to track and enforce the number of requests an individual makes within a 31-day period. The four-request provision ignores whether those requests were fulfilled in less than two hours.
 - News reporters do not make extraneous or needless FOIA requests—they are in search of specific information to accomplish their work, which is often in the public interest as the press keeps communities informed and holds government accountable.
- VPA believes that public records are exactly that—public. Therefore, providing public records to the public is essential and integral to a public body’s responsibility.
- We understand that there are times when reasonable, actual costs must be incurred and passed on to the requester. As such, we support a straightforward provision allowing the public body to charge for incurred costs after the first two hours.
- *After the first two hours, VPA supports requiring the public body to not charge an hourly rate for accessing or searching for the records exceeding the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$25 per hour, not \$33.*
 - \$33 per hour is excessive, especially considering that providing public records to the public is part of a public body’s responsibilities. Note that this hourly rate is per employee who is fulfilling the request; when multiple employees are fulfilling the same request, charges can quickly add up to an exorbitant amount.
- We support requiring public bodies to post on their website or otherwise publish a written FOIA fee policy, including the provision that the first two hours spent accessing or searching for requested records are free (as described above) and other prohibitions or limitations on charges to the public.

In addition, public bodies and custodians of public records should not charge the public unless an actual expense is incurred.

- Actual incurred costs include employee time or physical materials, such as paper and ink. Electronic copies, such as e-mail, electronic images and digital photos, should not be charged as physical copies.
- Simply making public records available for inspection (versus producing copies) and electronic/digital copying by the *requester* (versus the custodian) should *not* be charged beyond an employee's time spent making the records available for inspection, consistent with the provision that the first 2 hours are free of charge.

VCOG has released a white paper on FOIA fees that includes a chart of relevant provisions from other states. We encourage the FOIA Council to consider useful precedents from other states that will help achieve a reasonable balance here in Virginia when charging for public records.

Please contact VPA lobbyist Mark Hickman (mark@commonwealthstrategy.net) with any questions.

Thank you for your consideration and service.

/VPA