

Chapter 14. Freedom of Information Act

Virginia Code § 2.2-3700 *et seq.*

A. The Virginia Freedom of Information Act (“FOIA”).

The general district courts and the circuit courts have concurrent jurisdiction to enforce the Virginia Freedom of Information Act. Va. Code § 2.2-3713.A.

FOIA’s purpose is to ensure “ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies.” Its policy, as clearly stated in § 2.2-3700, is that it should be “liberally construed” to promote open government. Any exemptions from disclosure of records or the open meeting requirements are to be “narrowly construed.” Va. Code § 2.2-3700. In addition, the Code states that “Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.” Va. Code § 2.2-3713.E.

The Code contains numerous exemptions from disclosure of records and the requirements for open meetings, and the exemptions are amended nearly every year by the General Assembly. *See* Va. Code §§ 2.2-3703 and 2.2-3705.1 through 2.2-3705.8. In any FOIA enforcement case, the burden of proof is on the public body or official to establish an exemption by a preponderance of the evidence. However, under a 2016 amendment, “no court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.” Va. Code § 2.2-3713.E.

B. Requests for Disclosure of Public Records. Va. Code § 2.2-3704.

FOIA makes public records available to “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.” Va. Code § 2.2-3704.A. Note that nonresidents are excluded. The United States Supreme Court affirmed the decision of the Fourth Circuit Court of Appeals holding this provision of FOIA to be constitutional. *McBurney v. Young*, 133 S. Ct. 1709, 2013 U.S. LEXIS 3317 (2013), *affirming* 667 F.3d 454 (4th Cir. 2012).

A request must be made to the public body “that is the custodian of the requested records.” Va. Code § 2.2-3704 (B). A public body that transfers its records to “any entity, including ...any other public body for storage, maintenance or archiving ... shall remain the custodian of such records for purposes of responding to” FOIA requests. Va. Code § 2.2-3704 (J). The Supreme Court has held that the clerks of the circuit courts remain the custodians of their respective court records transmitted to and electronically stored by the Office of the Executive Secretary. Any request for such records must be directed to each individual clerk, rather than to OES. *The Daily Press, LLC v. Office of the Executive Secretary*, ___ Va. ___ (2017).

A request for public records must specify the records with “reasonable specificity.” It is not necessary to mention FOIA in a request. Within five working days, the agency must provide the records or make one of the following responses in writing:

1. The records are being withheld, citing the specific exemption by Code section;
2. The records are being provided in part and withheld in part, citing the Code section for the claimed exemption;
3. The records could not be found or do not exist; or
4. It is not practically possible to respond within five days, with an explanation. When a public body provides this response within five days, an additional seven days are allowed.

Public bodies are not required to compile new records, create summaries, make calculations, or answer questions, although “public records maintained by a public body in an electronic data processing system, computer database or any other structured collection of data shall be made available to a requestor.” Va. Code § 2.2-3704 (G). Failure to respond is considered a denial and a violation of FOIA.

All state and local public bodies are now required to designate a “FOIA officer” to serve as the “point of contact for members of the public in requesting public records and to coordinate the public body’s compliance.” The FOIA officer is required to “possess specific knowledge” of FOIA and to receive annual training. He or she must be identified on the public body’s website. Va. Code § 2.2-3704.2 (enacted in 2016).

The Supreme Court of Virginia has strictly enforced the five-day requirement to provide the requested documents or one of the four written responses. *See Fenter v. Norfolk Airport Authority*, 274 Va. 524 (2007) (responses that FOIA requests had been referred to legal counsel and a federal agency were not sufficient, and violated FOIA).

C. Public Meetings, Notice, Minutes, and the Three-member Rule.

Section 2.2-3707 requires that public bodies make available a schedule of regular meetings by posting. A person may file an annual request to receive mail or e-mail notifications of all meetings. Agendas and material packets must be made available to the public at the same time they are transmitted to members. Written minutes are required for all open meetings. Under the definition in § 2.2-3701, a “meeting” can mean an informal gathering of as many as three members gathered in one place or present by telephone, even if no votes are taken. Section 2.2-3707.G makes it clear that mere attendance at the same event will not violate FOIA so long as the purpose is not to conduct or discuss public business, and the simultaneous attendance was not pre-arranged.

D. Procedure for Holding a Closed Session to Discuss Certain Topics.

Section 2.2-3711, which is frequently amended, presently allows closed meetings for more than fifty different purposes. The members must vote in open session to go into a closed session or hold a closed meeting. The motion must specify the subject matter and purpose, with a specific reference to the paragraph number in § 2.2-3711 that allows a closed meeting. Va. Code § 2.2-3712.A. Immediately after finishing the closed session, the body must reconvene in open session and take a roll call vote to affirm that the members only discussed subjects permitted in closed sessions under FOIA, and that were pre-approved in the original motion. Va. Code § 2.2-3712.D.

E. Jurisdiction for Enforcement.

The general district courts and the circuit courts have concurrent jurisdiction to enforce the Virginia Freedom of Information Act. There is no dollar amount threshold or substantive delineation between the jurisdiction of the general district and the circuit courts. The petitioner is entitled to decide which court to use. Va. Code § 2.2-3713.A. The Committee on District Courts has created a form petition for FOIA proceedings, district court form DC-495, PETITION FOR INJUNCTION OR MANDAMUS – FREEDOM OF INFORMATION ACT.

F. Venue. Va. Code § 2.2-3713.A.

1. If the respondent is a local public body, venue is in the courts of the county or city from which the public body has been elected or appointed and in which the plaintiff's rights and privileges under FOIA have been denied. Va. Code § 2.2-3713.A.1.
2. For "regional public bodies" (defined in Va. Code § 2.2-3701), venue is in the courts of the county or city where the principal business office is located. Va. Code § 2.2-3713.A.2.
3. For boards, commissions, agencies of the state government, including public institutions of higher education, venue is in the courts of the City of Richmond, OR the residence of the aggrieved party. Va. Code § 2.2-3713.A.3.

G. The Seven-Day Hearing Requirement.

Section 2.2-3713.C requires that a hearing on a FOIA petition be held within seven days after filing, "provided the party against whom the petition is brought has received a copy of the petition at least three days prior to filing." This presumably is an effort by the General Assembly to promote settlement of FOIA conflicts, while providing for a quick hearing in the event an injunction is needed. Providing a copy of a petition before filing is not a substitute for service of process after filing.

H. Remedies. Va. Code § 2.2-3713.

There is also an official form for the court disposition of a FOIA petition, district court form DC-496, ORDER FOR PETITION FOR INJUNCTION OR WRIT OF MANDAMUS. The Code provides for the following remedies:

1. Writ of Mandamus. The court may issue a writ to require the agency to do something it is required to do, such as provide requested documents or one of the four responses required by § 2.2-3704.
2. Injunction. An injunction would be appropriate to order an agency to stop doing something in violation of FOIA, such as holding an unlawful closed meeting, a meeting without appropriate notice, or destroying public documents. If a violation is likely to continue, the court may issue an injunction in the form of a “cease and desist” order. A temporary injunction may be granted, pending a subsequent hearing date.
3. Costs and Attorneys’ Fees. “If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses and attorneys’ fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body’s position.” Va. Code § 2.2-3713.D.
4. Civil Penalties Against Individuals. If the court finds that the violation was “willfully and knowingly made,” the court “shall impose” a civil penalty against the responsible individual (if he or she was a named party) a civil penalty from \$500 to \$2,000 for a first offense, or from \$2,000 to \$5,000 for a second or subsequent violation. The penalties are to be imposed even if a writ of mandamus or injunction is not ordered. In other words, even if the agency corrects the violation before trial (rendering a writ or an injunction moot), if the violation was willful and knowing when committed, the civil penalties “shall” be ordered. Civil penalties are not damages awarded to the petitioner; such amounts are paid to the Literary Fund. Va. Code § 2.2-3714.

I. Enforcement of Court Orders.

If an order is not obeyed, the petitioner may request enforcement by a show cause for civil contempt. Costs and civil penalties may be collected in the same manner as other fines. *See* Va. Code § 19.2-341.

J. Appeal.

The right of appeal to the circuit court within ten days applies in FOIA cases. Section 16.1-106 provides that “The court from which an appeal is sought may refuse to suspend the

execution of a judgment that refuses, grants, modifies, or dissolves an injunction in a case brought pursuant to § 2.2-3713 of the Virginia Freedom of Information Act.”

The appealing party must pay the writ tax as required under § 16.1-107. Since any civil penalties awarded pursuant to § 2.2-3714 are not judgments in favor of the petitioner, but are to be paid to the State Literary Fund, they are functionally akin to fines imposed in a criminal manner. Therefore, no bond should be required to assure satisfaction of those civil penalties.

K. Legal Sources.

In addition to the cases cited in the Code, there is a good summary of FOIA entitled “Local Government Officials’ Guide to the Virginia Freedom of Information Act” (5th ed. 2012), by Roger C. Wiley, published by Weldon Cooper Center for Public Service at the University of Virginia, and the Local Government Attorneys of Virginia, Inc. There is also a useful website maintained by the Virginia Coalition for Open Government, which contains a collection of opinions on FOIA, including Attorney General’s Opinions and court decisions, including written opinions by circuit and general district court judges.

See <http://www.opengovva.org>.

L. To What Extent Does FOIA Apply to the General District Courts?

Not only do the courts adjudicate FOIA petitions, but courts themselves may well receive FOIA requests seeking access to their own records. The court system’s website (www.vacourts.gov) contains a page that directs members of the public to the clerk of each district court as the person to whom requests for public records should be directed. See paragraph B, *infra*. Va. Code §§ 2.2-3704.1 and 2.2-3704.2.

As discussed in Paragraph B, *infra*, in *Daily Press v. OES* the Supreme Court held that the clerks of the circuit courts remain the custodians of their respective court records that have been transmitted to and electronically stored by the Office of the Executive Secretary. Although the case involved circuit court records and the statutory designation of circuit court clerks as custodians thereof, the same reasoning would apply to district courts. Section 16.1-69.54 provides that “(e)ach district court shall retain and store its court records as provided in this article.” Therefore, requests for district court records should be directed to the clerk of each court.

Section 2.2-3703.A.5 provides that FOIA does not apply to “the records required by law to be maintained by the clerks of the courts of record ... and courts not of record ... However, other records maintained by the clerks of such courts shall be public records and subject to the provisions of this chapter”.

What records are required to be maintained? Title 16.1 requires that clerks maintain “court records”, which are defined to include “case records” (“all documents, dockets and indices”), “financial records” (“all papers and records related to the receipt and disbursement of money by the district court”), and “administrative records.” (“all other court papers and records not otherwise defined.”). Va. Code §§ 16.1-69.53, 16.1-69.54. The Code specifies various

periods of time for retention of different types of records. *See* Va. Code §§ 16.1-69.54 through 16.1-69.58. These definitions cover just about everything in our courts. However, OES has advised district court clerks that their e-mails may be subject to FOIA, depending upon the content. (For example, e-mails dealing with personnel issues may be exempt under a FOIA exemption.) So, while courts are under an obligation to allow records to be inspected and copied, generally court records are not subject to the strictures of FOIA.

There are specific exceptions under FOIA which support the nondisclosure of certain types of documents such as personnel records, courthouse security plans, computer software, and the personal financial information of persons dealing with the courts.

FOIA does not require records to be produced if they are confidential or protected under another provision of law. Va. Code § 2.2-3704.A (“*Except as otherwise specifically provided by law, all public records shall be open . . .*”). For example, communications protected by common law or statutory privilege would not be subject to FOIA. Also, in *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219 (1991), the Supreme Court of Virginia construed FOIA not to apply to the Governor’s telephone logs. The Court reasoned that requiring the logs’ disclosure would violate the separation of powers by chilling the Governor’s communications. A similar argument might be viable in favor of the judicial branch.

Another significant type of record exempt from disclosure is memoranda produced by the attorneys in the Department of Legal Research of the Office of the Executive Secretary of the Supreme Court, when they are writing to judges, singly or jointly, in their role as law clerks to the trial judges of Virginia. *See, e.g.* Va. Code § 2.2-3705.1 (2) (attorney-client privilege); Judicial Canon 3 (B)(7)(c) (judicial consultation with law clerk is permissible *ex parte* communication). The privilege and confidentiality claimed in such law clerk – judge communications would typically be noted on the communication itself.

The standards for confidentiality are entirely different in the Juvenile and Domestic Relations District Courts. *See* Title 16.1, Chapter 11, Article 12 of the Code (Va. Code §§ 16.1-299 through 16.1-309.1).

M. Other Laws Enforceable in General District Court by Mandamus or Injunction.

The general district courts also have concurrent jurisdiction with the circuit courts to enforce the Government Data Collection and Dissemination Practices Act (“GDCDPA”), Va. Code §§ 2.2-3800 *et seq.*, and the Protection of Social Security Numbers Act, Va. Code §§ 2.2-3815 *et seq.* As with FOIA, general district courts may issue writs of mandamus or injunctions and order costs and attorney’s fees to the petitioner, and under GDCDPA, civil penalties against individual public officers or employees. Va. Code §§ 2.2-3809, 2.2-3816.