

Access to Public Records

Virginia Freedom of Information Act

Virginia Freedom of Information Advisory Council

<http://foiacouncil.dls.virginia.gov/>

foiacouncil@dls.virginia.gov

(804) 698-1810

Introduction to Records & FOIA

- All public records are presumed open unless specifically exempt.
- Definition of “public record” (§ 2.2-3701 of the Code of Virginia)
 - all writings and recordings that consist of letters, words or numbers, or their equivalent . . . however stored, and regardless of physical form or characteristics,
 - prepared or owned by, or in the possession of a public body or its officers, employees or agents
 - in the transaction of public business.

Requesting Records

§ 2.2-3704

- Who can make a request?
 - Citizens of the Commonwealth (*McBurney v. Young*, (569 U.S. 221 (2013)))
 - Representatives of newspapers & magazines with circulation in the Commonwealth
 - Representatives of radio & television stations broadcasting in or into the Commonwealth
- How to make a request
 - Identify records with reasonable specificity
 - Name & legal address may be required

Responding to Requests

§ 2.2-3704

- Five working days to respond
 - First day to respond is the day after the request is received
 - “Working days” does not include weekends, legal holidays, or days when the public body is closed
- Five permissible responses to a request
- Creation of new records not required, but may abstract or summarize by agreement
- Make reasonable efforts to agree on the production of records

Five Permissible Responses

1. Provide the requested records
2. Requested records are being entirely withheld
3. Requested records are being provided in part and withheld in part
4. Requested records could not be found or do not exist
5. Additional time needed to search for/produce records (up to seven additional working days)

How to Respond to a Request

- If any part of the answer is “no,” the response must:
 - Be in writing;
 - Identify with reasonable particularity the subject matter of the withheld records; AND
 - Cite the specific section(s) of the Code of Virginia that authorizes the records to be withheld
- **NOTE:** if the record is being entirely withheld, the response must identify with reasonable particularity the volume of the withheld records

How to Respond to a Request

- If the records cannot be found or do not exist, the response must:
 - Be in writing AND
 - If the public body knows that another public body has the records, provide contact information for the other public body.
- If the public body needs more time, the response must:
 - Be in writing AND
 - Specify the conditions that make production of the records within the five-working-day period impossible.
 - If $5 + 7 = 12$ working days is not enough, negotiate with requester; if cannot reach agreement, can petition court for additional time

Charging for Records

A public body:

- May make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.
- Cannot charge more than the actual cost to the public body.
- Cannot charge for certain scholastic records if requested by a parent or guardian (of a minor student) or student (if 18 years or older).
- Shall make all reasonable efforts to supply the requested records at the lowest possible cost.
- May charge for exclusion review (*ATI v. UVA*, 287 Va. 330 (2014)).

Charging for Records (continued)

A public body:

- Before searching for records, must notify the requester of the public body's right to charge and the requester's right to a cost estimate.
- If requester asks for an estimate, must provide it.
 - Time period is tolled from time estimate is sent until requester responds
 - If no response within 30 days, request deemed withdrawn
- May request a deposit for charges in excess of \$200
 - Time period is tolled until deposit is paid
 - If a bill goes unpaid for 30 days or more, do not have to respond to new requests until the outstanding balance is paid

Electronic Records

- Requester may choose any format the public body uses in the regular course of business
- Converting format or redacting exempt fields is not considered creating a new record
- Use and retention of e-mail
 - Virginia Public Records Act, § 42.1-76 et seq.
 - Definition of “public record”
 - Retention schedules set by the Library of Virginia
 - Tips for using and managing email

Exemptions of General Application

- Personnel records - § 2.2-3705.1 (1)
- Attorney-client privilege - § 2.2-3705.1 (2)
- Legal memoranda and other work product - § 2.2-3705.1 (3)
- Contract negotiations - § 2.2-3705.1 (12)
- Procurement exemptions - § 2.2-3705.6 (10) and (11)
- Account & routing numbers - § 2.2-3705.1 (13)
- Economic development and retention - § 2.2-3705.6 (3)

Q&A

