

Criminal and Other Law Enforcement Records

Virginia Freedom of Information Act

Virginia Freedom of Information Advisory Council

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Roadmap

- FOIA Requests Generally (Policy, Request & Response Procedures)
- Criminal Records (Conflict Resolution, Mandatory Release, Discretionary Release, Prohibitions, Criminal Investigative Files)
- Noncriminal Records
- Other Types of Law Enforcement Records
- Other FOIA Exemptions
- Prohibitions outside of FOIA

FOIA Requests Generally

- Introduction to Records & FOIA
 - FOIA policy - § [2.2-3700](#)
 - Definition of “public record” - § [2.2-3701](#)
- Requesting Records
 - Who and how? - § [2.2-3704](#) (A) and (B)
- Responding to Requests
 - Five-working days - § 2.2-3704 (B)
 - Five responses - § 2.2-3704 (B)
 - For criminal investigative files pursuant to § 2.2-3706.1, 60 work days in which to provide one of the five preceding responses - § 2.2-3704 (B)
 - Charges - § 2.2-3704 (F), (H), and (I)

FOIA & Criminal Records

§§ 2.2-3706 and 2.2-3706.1

- Mandatory release - §§ 2.2-3706 (A) and 2.2-3706.1 (B)
- Discretionary release - §§ 2.2-3706 (B)
- Prohibitions - §§ 2.2-3706 (C)
- Criminal Investigative Files – (mixes mandatory, discretionary, prohibitions, and additional procedures) – §§ 2.2-3706 (B)(1) and 2.2-3706.1 (A, C through F)

Conflict Resolution Rules

- § 2.2-3706 (F): Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control. [NOTE: Applies to various types of criminal and other law-enforcement records]
- § 2.2-3706.1 (I): In the event of a conflict between this section as it relates to requests made under this section and other provisions of law, the other provisions of law, including court sealing orders, that restrict disclosure of criminal investigative files shall control. [NOTE: Applies to criminal investigative files only]

Criminal Records – Mandatory Release

- Adult mugshots, 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- § 2.2-3706 (A)(1)
- Adult arrestee identity, status of charge and arrest - § 2.2-3706 (A)(2)
- Completed unattended death investigations - § 2.2-3706 (A)(3)
- Criminal incident information - § 2.2-3706.1 (B)
 1. A general description of the criminal activity reported;
 2. The date and time the alleged crime was committed;
 3. The general location where the alleged crime was committed;
 4. The identity of the investigating officer or other point of contact; and
 5. A description of any injuries suffered or property damaged or stolen.

Criminal Records – Discretionary Release

- Reports submitted in confidence - § 2.2-3706 (B)(2)
- Records relating to imprisonment - § 2.2-3706 (B)(4)
- Specific tactical plans - § 2.2-3706 (B)(5)
- Records of adult persons under investigation or supervision re: pretrial, probation, or parole services - § 2.2-3706 (B)(6)
- Undercover operations and protective details - § 2.2-3706 (B)(8)
- Identity of any victim, witness, or undercover officer, or investigative techniques or procedures - § 2.2-3706 (B)(10)
- Records of the Sex Offender and Crimes Against Minors Registry - § 2.2-3706 (B)(11)

Criminal Records – Prohibited from Release

§ 2.2-3706 (C)

- The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed. (confidential informants, Crime Stoppers, etc.)

Criminal Investigative Files – Mandatory Release – § 2.2-3706.1 (D)

Criminal investigative files that are not ongoing, are required to be released to the following requesters, regardless of whether any such person is a citizen of the Commonwealth:

- (1) the victim;
- (2) the victim's immediate family members, if the victim is deceased and the immediate family member to which the records are to be disclosed is not a person of interest or a suspect in the criminal investigation or proceeding;
- (3) the parent or guardian of the victim, if the victim is a minor and the parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding;
- (4) an attorney representing a petitioner in a petition for a writ of habeas corpus or writ of actual innocence pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2 or any other federal or state post-conviction proceeding or pardon; and

Criminal Investigative Files – Mandatory Release (continued)

- (5) for the sole purpose of inspection at the location where such records are maintained by the public body that is the custodian of the records,
 - (i) an attorney or his agent when such attorney is considering representing a petitioner in a post-conviction proceeding or pardon,
 - (ii) an attorney who provides a sworn declaration that the attorney has been retained by an individual for purposes of pursuing a civil or criminal action and has a good faith basis to believe that the records being requested are material to such action, or
 - (ii) a person who is proceeding pro se in a petition for a writ of habeas corpus or writ of actual innocence pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2 or any other federal or state post-conviction proceeding or pardon, who provides a sworn affidavit that the records being requested are material to such action.

Criminal Investigative Files – Mandatory Release (continued)

Additional procedures re: release under clauses (4) and (5):

- An attorney or his agent who is in receipt of criminal investigative files or has inspected criminal investigative files pursuant to subdivision 4 or 5 shall not release such criminal investigative files or any information contained therein except as necessary to provide adequate legal advice or representation to a person whom the attorney either represents or is considering representing in a post-conviction proceeding or pardon or represents in a civil or criminal action.
- An attorney who is in receipt of criminal investigative files pursuant to subdivision 4 shall return the criminal investigative files to the public body that is the custodian of such records within 90 days of a final determination of any writ of habeas corpus, writ of actual innocence, or other federal or state post-conviction proceeding or pardon or, if no petition for such writ or post-conviction proceeding or pardon was filed, within six months of the attorney's receipt of the records.
- No disclosure for the purpose of inspection pursuant to clause (iii) of subdivision 5 shall be made unless an appropriate circuit court has reviewed the affidavit provided and determined the records requested are material to the action being pursued. The court shall order the person not to disclose or otherwise release any information contained in a criminal investigative file except as necessary for the pending action and may include other conditions as appropriate.

Criminal Investigative Files – Discretionary Release (Ongoing Investigations) – §§ 2.2-3706 (B)(1) and 2.2-3706.1 (C)

- 2.2-3706 (B)(1): The following records are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law: Criminal investigative files, defined 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 not required to be disclosed in accordance with § 2.2-3706.1
- 2.2-3706.1 (C): Criminal investigative files relating to an ongoing criminal investigation or proceeding are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except as provided in subsection E or where such disclosure is prohibited by law.

Criminal Investigative Files – Discretionary Release (Not Ongoing) – § 2.2-3706.1 (D)

- 2.2-3706.1 (D): Criminal investigative files relating to a criminal investigation or proceeding that is not ongoing are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except as provided in subsection E.

Criminal Investigative Files – Exceptions to Release – § 2.2-3706.1 (E)

- 2.2-3706.1 (E) The provisions of subsections C and D shall not apply if the release of such information:
 1. Would interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner;
 2. Would deprive a person of a right to a fair trial or an impartial adjudication;
 3. Would constitute an unwarranted invasion of personal privacy;
 4. Would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by a law-enforcement agency in the course of a criminal investigation, information furnished only by a confidential source;
 5. Would disclose law-enforcement investigative techniques and procedures, if such disclosure could reasonably be expected to risk circumvention of the law; or
 6. Would endanger the life or physical safety of any individual.
- Nothing in this subsection shall be construed to authorize the withholding of those portions of such information that are unlikely to cause any effect listed herein.

Criminal Investigative Files – Prohibitions (Notice & Injunction) § 2.2-3706.1 (F)

Release under § 2.2-3706.1 (C) and (D) – except clauses (D)(4) and (D)(5)(i) [release to certain attorneys] - is prohibited unless public body first:

- Makes reasonable efforts to notify victim, victim's immediate family if victim deceased, or parents or guardians of victim is a minor
- And give those persons opportunity to file petition for injunction against release
 - Person notified must file petition for injunction in court within 14 days of receipt of notice
 - Public body shall not respond to the request until at least 14 days has passed from the time notice was received by an individual listed in clause (D)(5)(i), (ii), or (iii) unless such individual has waived the 14-day period or at the request of the victim's insurance company or attorney
 - Response time tolled pending the notification process and any subsequent disposition by the court

Criminal Investigative Files – Prohibitions (Victim ID) – § 2.2-3706.1 (G)

- No photographic, audio, video, or other record depicting a victim or allowing for a victim to be readily identified shall be released pursuant to subsection C or D to anyone except:
 - (i) the victim;
 - (ii) the victim's family representative, if the victim is deceased and the family representative to which the records are to be disclosed is not a person of interest or a suspect in the criminal investigation or proceeding;
 - (iii) the victim's parent or guardian, if the victim is a minor and the parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding; or
 - (iv) the victim's insurance company or attorney.

Noncriminal Records

§ 2.2-3706 (D)

- The rule - First responders (medical, fire, and law enforcement) and call centers must disclose noncriminal records
- Except may redact as follows:
 - Personal, medical, and financial information
 - To protect safety or privacy
 - Of any person

Other Records of Law Enforcement Agencies

- Records relating to neighborhood watch programs - § 2.2-3706 (B)(3)
- Cell phone numbers (agency-issued) - § 2.2-3706 (B)(7)
- Background investigations, allegations of wrongdoing (internal affairs) - § 2.2-3706 (B)(9)
- 911 Tapes - § 2.2-3706 (E) – subject to FOIA (contents/context/CAD)
- Dash and body camera videos – depends on what is shown
 - Dash cam video is usually in public place
 - Body cam video may be in public or private places
- Roster of vehicles – release, except do not have to ID undercover vehicles

Other FOIA Exemptions

- Exemptions applicable to all public bodies (personnel, contracts, attorney-client, procurement, etc.) - §§ [2.2-3705.1](#) and [2.2-3705.6](#) (3)
- Public safety exemptions - § [2.2-3705.2](#)
 - Access to computer or phone system - § 2.2-3705.2 (2)
 - Statewide Agencies Radio System (STARS) - § 2.2-3705.2 (10)
 - Various types of information that would jeopardize safety or security if made public; homeland security notification requirement - § 2.2-3705.2 (14)
- “Feuding neighbors” exemption - § [2.2-3705.3](#) (8)
- Fatality review teams exemption - § [2.2-3705.5](#) (7)

Prohibitions – Other Provisions Outside of FOIA

- Social Security Numbers - §§ [2.2-3815](#) and [2.2-3816](#)
- Tax returns and related information § [58.1-3](#)
- Juvenile arrest and court records - § [16.1-301](#)
- Certain school records - § [22.1-287](#) et seq. (K-12), § [23.1-405](#) (higher ed), federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g)
- Crime victim information - § [19.2-11.2](#)
- Certain records/reports submitted to Department of State Police relating to ongoing criminal investigation - § [52-8.3](#)
- Criminal history record information/juvenile record information - §§ [19.2-389](#) and [19.2-389.1](#)

