

## *FOIA Charges Guide*

### *A Guide to Allowable Charges for Record Production Under the Virginia Freedom of Information Act*

#### I. Introduction

Charges for producing records under the Virginia Freedom of Information Act (FOIA) are often a source of confusion, misunderstanding, and disagreement. There are those who believe public bodies work very hard to charge as much as possible for producing requested records or use charges as a tool to deter requests. Some believe that the government should provide all public records free of charge. At the same time, for many government employees, handling public records requests is an additional task beyond regular job duties that may take up a considerable amount of time and resources, particularly where large volumes of records are at issue. Unfortunately, there are many times when these disparate views result in FOIA disputes. This guide is intended to help both requesters and public bodies understand FOIA's charging provisions to help avoid such disagreements and disputes over costs.

FOIA provides the general rule that a "public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." FOIA also states that "[n]o public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body" (subsection F of § 2.2-3704, see Appendix). FOIA does not, however, provide a practical business model to address the everyday challenges of correctly assigning a value to the work that goes into the production of a record. It should be the goal of a public body and a requester alike to keep production costs as low as possible. Part of the policy of FOIA is that "[a]ll public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested" (subsection B of § 2.2-3700). As of July 1, 2022, FOIA also requires that all public bodies "shall make all reasonable efforts to supply the requested records at the lowest possible cost" (subsection F of § 2.2-3704, see Appendix). These provisions of FOIA can best be achieved through clear communication and adherence to the concept that FOIA permits cost recovery, but not revenue generation.

A wise person once queried, "How many times does the public have to pay for the records?" It is without question that public money pays for the creation and maintenance of public records, as well as the operation of government generally. It is likewise without question that FOIA specifically authorizes public bodies to charge for the production of records. Keep in mind that the public's right to know, as expressed in FOIA, is no less than the everyday application of a government of, by, and for the people.

This document provides guidance regarding how to correctly assess charges under FOIA to ensure compliance with the letter and spirit of the law. It also attempts to set appropriate expectations for requesters. A requester has the obligation to be reasonably specific in making a request. Charges are often the means by which a request becomes even more specific, as narrowing the scope of a broad request can often result in significantly lower costs. It cannot be overstated that clear communication during the process of a FOIA request can alleviate the frustration and avoid the adversarial posture that often results. For example, the public body can



identify the types of records it has, how those records are kept, whether there are particular search parameters that are more effective than others for particular types of records, and whether there may be any additional costs for particular types of records in order to assist the requester in deciding what records to seek. Clear communication facilitates agreements between requesters and public bodies regarding records requests to save time and money for all parties while still satisfying the basic purpose of FOIA to keep the people informed about what their government is doing.

For more information on the procedural rules for requesting and responding to requests for public records, see the separate guide "Access to Public Records Under the Virginia Freedom of Information Act" available on the FOIA Council website.

For practical tips on requesting public records, see the separate guide "Best Practices for Making Requests for Public Records" available on the FOIA Council website.

## **II. What FOIA Says About Charges (Statutory Provisions)**

### ***Notification requirements (subsection F of § 2.2-3704):***

- Subsection F of § 2.2-3704 states the following: "Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records."

### ***Rights and responsibilities statement (subsection A of § 2.2-3704.1):***

- According to subsection A of § 2.2-3704.1, "[a]ll state public bodies subject to FOIA, any county or city, any town with a population of more than 250, and any school board shall" post a rights and responsibilities statement. Among other information, subdivisions A 6 and 7 provide that the statement must contain the following items:
  - 6. The following statement: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records as set forth in subsection F of § 2.2-3704 of the Code of Virginia."; and
  - 7. A written policy (i) explaining how the public body assesses charges for accessing or searching for requested records and (ii) noting the current fee charged, if any, for accessing and searching for such requested records.



***Cost estimates (subsection F of § 2.2-3704):***

- As stated above, requesters must be notified of their right to get a cost estimate in advance. Subsection F of § 2.2-3704 provides that "[t]he public body shall provide the requester with a cost estimate if requested. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. Any costs incurred by the public body in estimating the cost of supplying the requested records shall be applied toward the overall charges to be paid by the requester for the supplying of such requested records."

***Advance deposits (subsection H of § 2.2-3704):***

- Subsection H of § 2.2-3704 provides that "[i]n any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester."
  - Note: If the requester does not ask for a cost estimate and the estimated costs are under \$200, there is no basis to demand the money up front or to toll the response time. In such a situation, the public body should provide the records within the usual time limits and, if there are charges, bill the requester at the same time that the records are provided.

***General cost limits (subsection F of § 2.2-3704):***

- Subsection F of § 2.2-3704 provides that "[a] public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost. No public body may charge any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication."

***Specific cost limits (subsection F of § 2.2-3704):***

- *Scholastic records:* As of July 1, 2022, certain scholastic records must be provided free of charge to parents or legal guardians of minor students or the students themselves if they are 18 years old or older. Specifically, subsection F of § 2.2-3704 provides that public bodies may charge for public records "[e]xcept with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and such requests for scholastic records by a parent or legal guardian of a minor student or by a student who is 18 years of age or older."



- *Geographic information systems/maps*: Subsection F further provides that "[t]he public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres."

#### ***Electronic payment option (subsection F of § 2.2-3704):***

- Subsection F of § 2.2-3704 also provides for an electronic payment option: "Any local public body that charges for the production of records pursuant to this section may provide an electronic method of payment through which all payments for the production of such records to such locality may be made. For purposes of this subsection, "electronic method of payment" means any kind of noncash payment that does not involve a paper check and includes credit cards, debit cards, direct deposit, direct debit, electronic checks, and payment through the use of telephonic or similar communications."

#### ***Collection of past due amounts (subsection I of § 2.2-3704):***

- Subsection I of § 2.2-3704 provides that "before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing."

### **III. Court and FOIA Council Opinions**

- The Supreme Court of Virginia has held that a public body may charge for the review of public records to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law. *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014).
- Generally, the law presumes a ministerial act when assessing charges. The charges should be based on the hourly rate of salary for administrative or support staff. To minimize costs, higher paid staff should only do the work if there is some specific reason lower paid staff cannot. [Advisory Opinion (AO)-05-02, AO-49-01, AO-06-05, AO-07-11, AO-03-12, AO-05-19, AO-01-22, AO-05-24]
- The requester has the choice of (i) inspecting or receiving copies and (ii) the medium in which records are produced. [AO-04-04, AO-06-09]
- Cost estimates under \$200 are not required unless requested by the requester. [AO-06-05, AO-05-13, AO-01-22]
- FOIA does not set out specific requirements for how much detail must be included in a cost estimate, but cost estimates must be made in good faith. As a matter of best practice, it is better to provide more detail when possible as it provides a more informed basis for negotiations with a requester. [AO-01-22]
- Allocation of fringe benefits is not a proper charge. [AO-05-02, AO-04-04, AO-06-05, AO-05-24]
- Allocation for secondary legal review is not a proper charge



- Note: There is a distinction between an initial exclusion review, for which charges are allowed, and secondary legal review, for which charges are not allowed. [AO-1-00, AO-02-07]
- The question of whether a charge is reasonable is for the courts. [AO-1-00, AO-25-01, AO-14-02, AO-23-04, AO-06-09, AO-07-11, AO-05-19, AO-05-24]
- Creating records that do not already exist is not required. [AO-11-00, AO-03-02, AO-04-04, AO-16-04]
- Abstracting or summarizing is not required; consent of the requester is required prior to assessment of any charge for abstracting or summarizing. A public body may not provide a requester with a summary of an existing record instead of the record itself, even when the record may be redacted, unless the requester agrees to accept the summary instead. [AO-11-00, AO-49-01, AO-11-03, AO-04-04, AO-06-05, AO-08-09, AO-02-20]
- Public bodies may require an advance deposit up to the full amount of the estimate whenever the costs are likely to exceed \$200. [AO-21-01, AO-04-04, AO-16-04, AO-07-11, AO-05-14]

#### IV. Putting It All Together: Some Practical Suggestions

- Always tell requesters in advance whether there will be a charge and a general breakdown of how charges will be calculated (e.g., staff time, per-page duplicating charge, etc.).
- Remember that FOIA allows for cost recovery, **not** revenue generation. Actual cost is the ceiling or the maximum a public body may charge. A public body may always charge less than it costs to produce records, but it can never charge more. Yes, government has tremendous actual costs; generally, it owns the buildings and all of the equipment in the buildings and pays for the lights and the air conditioning. But FOIA limits charges to government's **actual cost in producing the requested records**. A public body cannot use FOIA charges to recover or mitigate other costs that are unrelated to producing the requested records.
- The requester has the choice of inspecting records or receiving copies of records.
- The requester always has the choice among available production options.
- Know your actual costs—do periodic cost analyses to determine actual costs. To determine your per-page copying cost, try this formula. First, calculate the copy machine maintenance based on the maintenance contract per year divided by the average number of copies made per year. Second, divide the yearly toner cost by the average number of copies made per year. Third, calculate the paper costs by dividing the cost for the number of reams of paper by the number of sheets in a ream. Finally, add together the maintenance charge per copy with the toner cost per copy and the paper cost per copy to get your per-page copying cost. Keep in mind the actual costs to produce paper copies will not be the same as the cost to send electronic copies.
- If the charge is less than \$200, tender records to the requester even if the requester is unable to pay immediately. Public bodies may bill the requester for the cost of records.
- If the advance determination is more than \$200, do not proceed with the request. Give the requester the estimate and await payment and give an opportunity for the requester to



narrow the request. If charges are likely to exceed \$200, public bodies have the right to require a deposit of the full amount of the advance determination. If the charge turns out to be more, the requester can still be charged, but advise him of the possibility of an additional charge at the time of the advance determination. Also, advise the requester that if the charge turns out to be less than the amount the requester paid in deposit, the public body must refund the difference.

- Outstanding balances: FOIA gives public bodies the discretion not to proceed with a subsequent FOIA request from the requester when the same requester owes the public body for previous requests for records that have remained unpaid 30 days or more after billing.
- Paper versus electronic medium: you cannot charge "paper" rates for electronic records since the actual costs will be different, and actual cost is always the upper limit. The costs involved in copying and supplying many electronic records, such as attaching a file to an email and sending it, are often nominal.
- Put routinely requested records on agency websites or have extra copies available. Posting records online makes them easier to access—often public bodies receive fewer FOIA requests as a result, while citizens and media get the records they want at their convenience and at no additional cost.
- Consider waiving the charges for small and routine requests. For example, a public body may choose to establish a policy stating that charges will not be assessed unless they exceed a certain dollar amount, a certain amount of staff time, or a certain number of pages copied, or under other conditions. Most public bodies choose not to charge for routine, everyday requests because the time and costs involved in processing payments would often exceed the amount collected.
- Good records management makes for efficient processing of FOIA requests.
- Negotiations between a requester and a public body are encouraged under FOIA. With the prior consent of the requester, a public body may produce the requested records on a mutually agreed-upon timetable and reduced-charge basis, saving both time and money for all parties.

## V. Other Specific Charging Authority

Generally, FOIA sets the rules for determining charges for producing requested public records. There are, however, other provisions in the Code of Virginia that specify a different manner of assessing charges for producing requested public records. In the few instances described below, charges for records production are not subject to the FOIA charging rules.

- DMV (§§ 46.2-214 and 46.2-214.1): Sections 46.2-214 and 46.2-214.1 authorize the Commissioner of the Department of Motor Vehicles (DMV) to "make a reasonable charge for furnishing information" maintained by DMV and, in addition, to "charge \$2 for furnishing information under [Title 46.2]." These sections provide, however, that no fee shall be charged to any officials, including court and police officials, of the Commonwealth and of any of the counties, cities, and towns of the Commonwealth or to court, police, and licensing officials of other states and of the federal government, provided that the information requested is for official use. The fees received by the Commissioner must be paid into the state treasury and are set





- aside as a special fund to be used to meet the expenses of DMV.
- Clerks of Court (§ 17.1-275): Section 17.1-275 sets the fees that may be charged by a clerk of court "for services performed by virtue of his office" for making copies of court records within the control of the clerk.
  - VITA (subdivision B 7 of § 2.2-2007): Subdivision B 7 of § 2.2-2007 authorizes the Chief Information Officer of the Virginia Information Technologies Agency (VITA) to "provide for the centralized marketing, provision, leasing, and executing of licensing agreements for electronic access to public information and government services through the Internet, wireless devices, personal digital assistants, kiosks, or other such related media on terms and conditions as may be determined to be in the best interest of the Commonwealth. VITA may fix and collect fees and charges for (i) public information, media, and other incidental services furnished by it to any private individual or entity, notwithstanding the charges set forth in § 2.2-3704, and (ii) such use and services it provides to any executive branch agency or local government. Nothing in this subdivision authorizing VITA to fix and collect fees for providing information services shall be construed to prevent access to the public records of any public body pursuant to the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). VITA is authorized, subject to the approval by the Secretary of Administration and any other affected Secretariat, to delegate the powers and responsibilities granted in this subdivision to any agency within the executive branch." The final two sentences mean that VITA licensing agreements aside, nothing in this subdivision relieves any public body of its duty to provide records under FOIA and that, in doing so, FOIA's charging provisions still apply.



**APPENDIX****Relevant Provisions of FOIA: § 2.2-3704 (Subsections F through I)**

F. Except with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and such requests for scholastic records by a parent or legal guardian of a minor student or by a student who is 18 years of age or older, a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records. The public body shall provide the requester with a cost estimate if requested. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. Any costs incurred by the public body in estimating the cost of supplying the requested records shall be applied toward the overall charges to be paid by the requester for the supplying of such requested records. Any local public body that charges for the production of records pursuant to this section may provide an electronic method of payment through which all payments for the production of such records to such locality may be made. For purposes of this subsection, "electronic method of payment" means any kind of noncash payment that does not involve a paper check and includes credit cards, debit cards, direct deposit, direct debit, electronic checks, and payment through the use of telephonic or similar communications.

G. 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 requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in





the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

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Advisory opinions of the FOIA Council are available on the FOIA Council [website](#).

