



# **A Guide to Handling FOIA Requests for GIS Data**

*Prepared by the FOIA Council in conjunction with the Virginia Information Technologies Agency*

## **What is a public record?**

Any writing or recording in any format prepared by, owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.

## **How should GIS data be treated?**

Generally, GIS data is a public record that includes location information and should be treated like any other public record. GIS data can include shapefiles, geodatabases, databases, text files, photographs, imagery, etc.

## **Does GIS data need to be disclosed?**

Yes, the default rule under FOIA is that all public records must be disclosed upon request unless there is an exclusion that allows the record to be withheld. One must always review the record's contents and context to determine if any part of it should be excluded. If the record is exempt under FOIA, that means that the custodian can either hold or release the record in his or her discretion, unless some other law prohibits its release. A full list of exclusions is beyond the scope of this guide, but the following exclusions may apply to GIS data:

- Records relating to public safety, which includes critical infrastructure information, cybersecurity, antiterrorism, and other related records. Subdivision 14 of § 2.2-3705.2.
- Subscriber data, which for the purposes of this subdivision means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, as well as information collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act. Subdivisions 6 and 7 of § 2.2-3705.2.
- Criminal investigative files relating to a criminal investigation or prosecution and the identity of any victim, witness, undercover officer, or informant. Subdivisions A 2 a, A 2 j, and A 3 of § 2.2-3706.

- Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historical and archaeological sites. Subdivision 10 of § 2.2-3705.7.
- The Virginia Base Mapping Program’s Orthoimagery product, which has an exemption from FOIA in Item 84.10B of the Commonwealth’s Appropriation Act (Acts of Assembly of 2019, c. 854).
- Personally identifiable information and medical information, which are excluded in several instances. *See, e.g.*, the various exemptions for health and social services records in § 2.2-3705.5.

**Might some GIS data be prohibited from release?**

While FOIA exemptions permit custodians to withhold OR release records at their discretion, other sections of the Code and the Appropriation Act can prohibit the release of certain data. While a comprehensive list of prohibitions is beyond the scope of this guide, as one example, certain tax information is prohibited from release under Code § 58.1-3 (but note that matters on public roll books, such as real estate assessments, are still public). If you are unsure whether a particular record is prohibited from release, consult your attorney.

**What is the nature of the GIS records request?**

**Does the requested record already exist?**

If the requested record already exists, then release it as required. If the record does not exist, then there is nothing to release and no requirement to create a new record in response to a FOIA request. Specifically, subsection D of § 2.2-3704 provides that “no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.”

**What is the difference between being required to provide information (in this case GIS data and/or a generated map) and creating a new record or providing a GIS service?**

As previously stated, GIS data should be treated like any other public record, and if it exists, it should be provided as required. As quoted above, FOIA also states that a public body may abstract or summarize information. Additionally, subsection G of § 2.2-3704 provides that “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.” Therefore, if a public body already has the GIS data and the software to produce a requested map, then generating that map is the conversion of data from one format to another, and not the creation of a new record, and is required of the public body. However, creating new data to generate a requested map is not required under FOIA. Similarly, a public body would not have to write or buy new mapping software or combine different databases in ways it never had before. Such instances would be equivalent to creating new records and providing GIS services, which are not required under FOIA.

Each case must be addressed on its own facts. The conclusion reached about whether a request is for new or existing records may vary to the extent that public bodies use GIS for different purposes, use different GIS software, and have different GIS data. It is the decision of the public body whether they want to provide a GIS service beyond the requirements of FOIA.

## **How should a request be handled?**

### **What if the public body's GIS data has portions that are excluded (exempt) or prohibited from release and portions that are not?**

Under FOIA, if a record contains portions that are excluded and portions that are not, you may only withhold the portions that are exempt or prohibited from release. The nonexempt portions must be released upon request.

### **What if the public body is asked to provide GIS data that they have but did not create?**

Under FOIA, barring an exemption, the public body must release the data. However, notifying the requester that the data is maintained by and more current from another source, and that they should also contact that public body to request the data, is recommended.

### **Is GIS data that is subject to copyright handled differently?**

In 1982, the Virginia Attorney General addressed the issue of copyright and disclosure in the context of topographic maps created by a county, opining that FOIA

requires that the maps you refer to be made available for public inspection and allow the county to make reasonable charges for copying and search time expended in the supplying of such records. The U.S. copyright laws give the county, as owner of the copyright, the exclusive right to reproduce such maps, thereby prohibiting reproduction of the maps by anyone other than the county without its consent.<sup>1</sup>

Applying the reasoning of this opinion to other GIS records, the rule would be that GIS records produced and copyrighted by a public body must be made available under FOIA, but any copyright infringement would be addressed under copyright law.

A 1998 opinion of the Attorney General addressed the issue of copyright held by third parties, in the context of the state song competition. The Attorney General opined that

the copyrighted nature of a work does not preclude reproduction and release in response to a Freedom of Information Act request or other activity within the exclusive rights granted under the Copyright Act if the copyright owner has given his express or implied consent or if the activity constitutes a fair use of the work.<sup>2</sup>

Following that opinion, we recommend that if you receive a request for public records that you have in your possession in the transaction of public business but those records are subject to another party's copyright, you take the following actions:

- Provide one copy to the requester as required by FOIA (presuming there is express or implied consent, or the release constitutes a fair use under copyright law);
- Notify the requester that the record(s) are subject to the other party's copyright;
- Notify the copyright holder of the request and your reply; and
- Keep documentation of the request, your reply, and the notifications you sent.

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<sup>1</sup>1981-1982 Op. Atty. Gen. Va. 443.

<sup>2</sup>1998 Op. Va. Atty. Gen. 5.

For other questions about copyright generally, or specific questions about how to handle particular records, please consult your attorney.

### **Is GIS data that is subject to a licensing agreement handled differently?**

It has come to the Council's attention that sometimes companies will provide GIS data to public bodies, but they do so subject to licensing and nondisclosure agreements. If there is an exemption that applies to the GIS data in question, then the public body may agree to exercise that exemption to withhold that GIS data so long as the exemption applies. If there is no exemption, however, then the public body will have to provide the records upon request as required under FOIA. Generally, a nondisclosure agreement by itself cannot act as a FOIA exemption, because the statutory access rights of citizens and the media under FOIA cannot be taken away by contracts to which they are not parties.

### **What are acceptable charges?**

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. Remember that FOIA allows for the recovery of costs incurred in providing public records, NOT revenue generation. Further detailed guidance regarding charges for the production of records is provided in a separate document entitled "Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act."

### **There is a special provision for charges related to topographic maps in subsection F of § 2.2-3704:**

"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."

### **Additional questions?**

#### **Please contact the FOIA Council if you have specific questions:**

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*Last updated July, 2019.*