

Appendix B

The Freedom of Information Act: Responding to a Request for Records

This appendix lists ten things a locality's officers and employees should know about responding to requests for public records.

1. All records in the possession of the locality are presumed to be public records.

All public records are presumed to be open for inspection during regular business hours, unless an exemption is properly invoked. *Virginia Code* § 2.2-3700. Ultimately, it is the subject of the record that determines whether it is a public record, not where the record is kept. *Burton v. Mann*, 74 Va. Cir. 471 (2008) ("Central to the issue of production is whether the record can be tied to the 'transaction of public business.' Whether a record is found in a public databank, or one privately contracted for by the officer, agent, or employee of a public body is not determinative of the outcome"). Only records that are "prepared or used in the transaction of public business" are "public records." *Virginia Code* § 2.2-3701. For example, emails between members of a public body that are not related to the transaction of public business are not "public records" under FOIA. *40-1-00*. As stated by the court in *Burton*, "while it may be of interest what our public officials are eating, personal diet in most cases has nothing to do with the public business of the official. Thus, '[p]ublic business encompasses those matters over which the public governmental body has supervision, control, jurisdiction, or advisory power.' [citation omitted]."

In addition, if a locality transfers possession of its public records for storage, maintenance or archiving, it remains the custodian of the records. *Virginia Code* § 2.2-3704.

2. Many types of records are public records.

Any record pertaining to the transaction of public business and which is prepared, owned or in the possession of the locality or its officers or employees is a public record, and public records include:

- A. Draft documents, such as draft staff reports, which are retained.
- B. Previously unreleased documents, such as final staff reports that will be provided to the planning commission and the governing body.
- C. Handwritten notes that pertain to the transaction of public business and which are retained. *1983-84 Va. Op. Atty. Gen. 437*.
- D. Documents received from the public in confidence when they come into the possession of the locality. *1983-84 Va. Op. Atty. Gen. 420*.
- E. Electronic communications such as e-mail if their content otherwise makes them public records.

The intersection of federal copyright law and the Virginia Freedom of Information Act

Subdivision plats, site plans and other engineered drawings submitted by applicants for review and approval by a locality are copyrighted. Making those records available to the public for copying in response to a request under FOIA likely falls under the "fair use" rules (17 U.S.C. § 107) that allow copyrighted documents to be used in a fair and reasonable manner. In *Lindberg v. County of Kitsap*, 133 Wn.2d 729 (1997), two citizens requested copies of engineering drawings to be used by them in preparation for their comments and criticism on the residential development proposals in public hearings and appeals. The county refused to release the drawings because they were copyrighted. The Washington Supreme Court held that the use of the documents by the citizens as proposed was a reasonable fair use and, therefore, the county improperly failed to release the records under Washington's freedom of information laws.

The intersection of federal copyright law and the Virginia Freedom of Information Act
Under FOIA, a locality may not ask the requestor the purpose for the request. When these types of records are copied or made available to the requestor for copying, the Virginia Attorney General has suggested that the response letter include a notice that the documents may be protected from use by copyright: “These documents are being provided because they are public records under the Virginia Freedom of Information Act and their disclosure is required. These documents may be protected from use by copyright laws and permission should be obtained from the copyright owner before making any further copies, public distribution or other copyright-protected use of the work.”

3. Public records must be in existence in order to be subject to the Freedom of Information Act.

Public records subject to disclosure under the Freedom of Information Act are only those that exist at the time of the request. *Virginia Code* § 2.2-3704(D). The locality is not required to create a public record; however, it may abstract or summarize information under terms and conditions agreed to between the requester and the locality.

4. Some public records are exempt from mandatory disclosure.

There are few records that may be in the possession of a locality’s planning, zoning and similar departments that may be exempt from mandatory disclosure. Public records exempt from mandatory disclosure include:

- A. The names, addresses and telephone numbers of complainants of zoning violations, violations of the Uniform Statewide Building Code or the Statewide Fire Prevention Code, if furnished in confidence. *Virginia Code* § 2.2-3705.3(10). Note that the locality has the burden of proof to establish that the information was provided in confidence. *McChrystal v. Fairfax County Board of Supervisors*, 67 Va. Cir. 171 (2005). The burden of proving confidentiality requires more than general evidence of a policy of confidentiality; rather, the burden must be satisfied by the testimony of one with personal knowledge than an express or implied promise of confidentiality was given. *McChrystal, supra*.
- B. Personnel records. *Virginia Code* § 2.2-3705.1(1).
- C. Those portions of public records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body, except when requested by the subject of the records. *Virginia Code* § 2.2-3705.1(13).
- D. Written advice of the locality’s attorney; legal advice protected by the attorney-client privilege. *Virginia Code* § 2.2-3705.1(2).
- E. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting. *Virginia Code* § 2.2-3705.1(3).
- F. Records recorded in or compiled exclusively for use in closed meetings. *Virginia Code* § 2.2-3705.1(5). If minutes are prepared for a closed meeting, the minutes are exempt from mandatory disclosure. *Virginia Code* § 2.2-3712(H). “[M]inutes of closed meetings (if any are taken), records recorded in closed meetings (such as individual members’ notes), and records prepared exclusively for use in closed meetings (which may include records prepared solely for distribution and use by members during a closed meeting) are all exempt from mandatory disclosure under FOIA.” AO-03-10.
- G. Portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the building code or for obtaining a building permit that would identify specific trade secrets, and those that reveal certain information that would jeopardize the safety and security of the occupants of any building other than a single family dwelling in the event of terrorism. *Virginia Code* § 2.2-3705.2(2).
- H. Working papers of the mayor or chief executive officer of any locality; provided that no record, which is otherwise open to inspection under the Freedom of Information Act, is exempt by virtue of the fact that it

has been attached to or incorporated within any working paper or correspondence. *Virginia Code* § 2.2-3705.7(2). “Working papers” are records prepared by or for the mayor’s or chief executive officer’s personal or deliberative use. *Virginia Code* § 2.2-3705.7(2).

5. Public records are open to inspection and copying during regular office hours.

Unless an exemption applies, all public records are open to inspection and copying during the regular office hours of the custodian of records. *Virginia Code* § 2.2-3704.

- A. *Who is eligible to request.* Access to these records may not be denied 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. *Virginia Code* § 2.2-3704. The denial of access to public records to non-citizens of the Commonwealth and others not violate the privileges and immunities and the commerce clauses of the United States Constitution. *McBurney v. Young*, 569 U.S. ___, 133 S. Ct. 1709 (2013).
- B. *Who may receive request.* The request may be given to any officer or employee, and it needs to be immediately forwarded to the custodian.
- C. *Form of the request.* A request for public records must identify the requested records with *reasonable specificity*. *Virginia Code* § 2.2-3704. However, the request *need not be made in writing*. 1990 Va. Op. Atty. Gen. 9. The request also *need not refer to the Freedom of Information Act* in order to invoke the provisions of the Act or to impose the time limits for a response by the locality. *Virginia Code* § 2.2-3704.
- D. *Production.* Although the methods and extent of records searches may vary, any searches for records requested under FOIA must be carried out in good faith. *AO-02-12; AO-04-10*. A public body producing copies of records, or making them available for inspection and copying, is not required to sort or categorize the records into the categories of records identified by the requestor. *AO-02-12 (noting that public bodies retain their records in different ways, and that there is no express requirement in FOIA for a public body to provide numbered responses, or their equivalent, to a request)*. All that is required is that the public body make the records available in good faith and that it produce the records in a manner that would not obfuscate the information or otherwise make it more difficult for the requestor. *AO-02-12*.

6. Locality response required in 5 working days.

The locality must respond to a records request within 5 working days after its receipt. *Virginia Code* § 2.2-3704(B). The failure to make any response to a request for records is a violation of the Act and is deemed a denial of the request. *Virginia Code* § 2.2-3704(E); *Fenter v. Norfolk Airport Authority*, 274 Va. 524, 649 S.E.2d 704 (2007) (responses to citizen’s requests for information concerning the airport’s authority to subject any vehicles to search violated FOIA where the airport’s response to his second request was that it had contacted the Transportation Security Administration and would respond upon receipt of advice from that agency, and its response to his third request was that it had referred the matter to its legal counsel). If the requested records are not provided within 5 working days, one of the following four responses must be provided within 5 working days:

- A. *Records entirely withheld.* The records are being entirely withheld because their release is prohibited by law or the custodian has exercised his or her discretion to withhold the records in accordance with FOIA. *Virginia Code* § 2.2-3704(B)(1).
- B. *Records partially provided, partially withheld.* The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his or her discretion to withhold the records in accordance with FOIA. *Virginia Code* § 2.2-3704(B)(2).

When a portion of a requested record is withheld, the locality may delete or excise only that portion of the record to which an exemption applies and must release the remainder of the record. *Virginia Code* § 2.2-3704(B)(2). Responses that all or some records will be withheld must: (1) identify with reasonable particularity the volume and subject matter of the withheld records; and (2) cite, as to each category of the withheld records, the specific section of the Virginia Code that authorizes the withholding of the records. *Virginia Code* § 2.2-3704(B)(1), (2).

- C. *Records not found or do not exist.* The requested records could not be found or do not exist. *Virginia Code* § 2.2-3704(B)(3). However, if the public body knows that another public body has the requested records, the response must include contact information for the other public body. *Virginia Code* § 2.2-3704(B)(3).
- D. *Time extension to respond required.* It is not practically possible to provide the requested records or to determine whether they are available within the 5 working day period. *Virginia Code* § 2.2-3704(B)(4). The response must specify the conditions that make a response within the 5-day period impossible. *Virginia Code* § 2.2-3704(B)(4). If the response is made within 5 working days, up to an additional 7 working days is allowed. *Virginia Code* § 2.2-3704(B)(4). It is recommended that for voluminous requests, the custodian should contact the requester to reach an agreement for a reasonable time to make the records available.

7. Situations arising from records kept in certain form.

Certain forms of records may impose additional obligations, and certain requests may create unusual problems:

- A. Public records maintained in an electronic data processing system, computer database or any other structured collection of data not exempt from disclosure must be made available to a requester at a reasonable cost. *Virginia Code* § 2.2-3704(G).
- B. The locality must produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester. *Virginia Code* § 2.2-3704(G).

8. Reasonable charges for costs.

The locality may make reasonable charges for its actual costs incurred in accessing, duplicating, supplying, or searching for the requested records. *Virginia Code* § 2.2-3704(F). Factors to be taken into account in determining reasonable charges include, but are not limited to: (1) the number of hours reasonably necessary to compile, copy and assemble the records; (2) the cost of computer time used; and (3) the cost of reproducing the records. *1983-84 Va. Op. Atty. Gen. 436*. Following are some additional considerations:

- A. *Duplicating a record.* For duplicating a record, the locality may not charge more than the actual cost of duplication. *Virginia Code* § 2.2-3704(F). The Virginia Freedom of Information Advisory Council has long advised that a public body may not charge the same rates for providing electronic records as it does for providing paper records because the actual costs are not the same. *AO-05-13* (opining that it was not clear how \$1.00 per page charge for a 53-page electronic document reflected the actual costs because the number of pages in an electronic document does not affect the actual cost or time spent).
- B. *GIS records.* For supplying records produced from a geographic information system, the locality may not charge more than the actual cost of supplying the records. No charge may be imposed upon the owner of the land that is the subject of the request. *Virginia Code* § 2.2-3704(F).
- C. *Reviewing records.* A locality may charge the time spent to review records to confirm that the records are responsive to the request, whether they are exempt from disclosure under FOIA, and whether they are prohibited from disclosure under other law. *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014); see also *AO-02-07* (“a public body may charge for staff time spent redacting portions or records as part of the actual cost of supplying the records”).

- D. *Employee or official time.* An officer or employee's time may not be charged at a rate that exceeds his or her rate of pay. *AO-03-12.* A public body may not charge the salary of an employee whose sole function for the time charged is to watch a requester as he reviews public records. *1989 Va. Op. Atty. Gen. 12.* A locality also may not charge to have an attorney review or double-check responses to a FOIA request when the review is part of the general business of the public body and is not a necessary part of accessing, duplicating, supplying, or searching for the requested records. *AO-02-07.*

9. Advance deposit of costs may be required for large requests.

If the locality determines in advance that the charges for producing the requested records are likely to exceed \$200, it may require that the requester agree to pay a deposit not to exceed the amount of the advance determination, and the period within which the locality must respond to a request is tolled for the amount of time that elapses between the notice of the advance determination to the requester and the response of the requester. *Virginia Code § 2.2-3704(H).*

10. Duties of the designated custodian of records.

The designated custodian of records must:

- A. Be familiar with the requirements for complying with the Freedom of Information Act.
- B. Respond to all requests for public records. The following is a response schedule based on a schedule used by the Albemarle County Schools Division:
 - *Day request is received:* Recipient forwards copy of request to the custodian. Custodian determines sources of public records and makes a preliminary determination as to the scope of the request, whether a time extension to respond may be required, whether the request needs to be clarified by the requestor, whether the request will require an advance deposit, and whether negotiating a narrowing of the scope of the request will be required.
 - *Working day 1:* Custodian, working with department staff and the locality's attorney, determines whether to provide full response, whether to inform requestor that time extension will be required, whether the request needs to be clarified, whether an advance deposit may be required, and whether to negotiate narrowing the scope of the request.
 - *Working day 2:* Custodian gathers records, estimates cost of production and copying, if requested, and contacts the requestor to negotiate narrowing the scope of the request, if necessary.
 - *Working day 3:* Custodian provides any records that may be subject to mandatory or discretionary withholding under FOIA or other laws to the locality's attorney to determine whether exemption from disclosure applies.
 - *Working day 4:* Custodian reviews the records for compliance with request and compliance with FOIA, consults with the locality's attorney if necessary, and prepares written response to requestor.
 - *Working day 5:* Custodian sends a written response to the requestor (see sections 6 and 9 above).
- C. Consult the locality's attorney to determine whether an exemption from mandatory disclosure applies, if there is any doubt.
- D. Take all necessary precautions for preserving and safekeeping public records. *Virginia Code § 2.2-3704(A).*