

Appendix B

The Freedom of Information Act: Ten Things to Know About 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:** All public records are presumed to be open for inspection, 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. *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.”) 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. *A0-1-00.*, September 29, 2000). 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].”
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.
 - 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.
3. **Public records must exist 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.
4. **Some public records are exempt from mandatory disclosure:** There are few records that may be in the possession of the Department of Community Development that may be exempt from mandatory disclosure. Public records exempt from mandatory disclosure include:
 - A. Identity of complainant of zoning violation if given in confidence. *Virginia Code § 2.2-3705.3(10)*.
 - B. Personnel records. *Virginia Code § 2.2-3705.1(1)*.
 - C. Written advice of the locality's attorney. *Virginia Code § 2.2-3705.1(2)*.

- D. Records recorded in or compiled exclusively for use in closed meetings. *Virginia Code § 2.2-3705.1(10)*.
- E. 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)*.

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. A request for public records must identify the requested records with reasonable specificity. *Virginia Code § 2.2-3704*.
- B. A request for public records need not be made in writing. *1990 Va. Op. Atty. Gen. 9*.
- C. A request for public records 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. 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*.

6. Locality response required in 5 working days: The locality must respond to a records request within five 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 (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). One of the following four responses must be provided within 5 working days:

- A. 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. 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)*.
- C. 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 shall include contact information for the other public body. *Virginia Code § 2.2-3704(B)(3)*.

- D. It is not practically possible to provide the requested records or to determine whether they are available within the 5-day work 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 requester should be contacted to reach an agreement for a reasonable time to make the records available.
- E. Responses that all or some records will be withheld must: (1) be in writing; (2) identify with reasonable particularity the volume and subject matter of the withheld records; and (3) 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)*.

7. Situations arising from records kept in certain forms: 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(F)*.
- 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(H)*.
- C. The locality is not required to abstract or summarize information from public records, but it may do so. *Virginia Code § 2.2-3704(D)*.

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)*.

- A. For duplicating a record, the locality may not charge more than the actual cost of duplication. *Virginia Code § 2.2-3704(F)*.
- B. 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. Whether a locality may charge the cost of redacting information from records is a subject of disagreement. In *Albright v. Woodfin*, 68 Va. Cir. 115 (2005), the circuit court held that the time spent redacting the records by law enforcement personnel and their supervisors to remove protected information was not time for which the state could charge for reimbursement because redaction was not “accessing, duplicating, supplying, or searching” for the records. On the other hand, an advisory opinion of the FOIA Council concluded that “a public body may charge for staff time spent redacting portions or records as part of the actual cost of supplying the records.” *AO-02-07*.
- D. Factors to be taken into account in determining costs 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*. 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 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.

 - 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 the preservation and safekeeping of public records. *Virginia Code § 2.2-3704(A)*.