

The Freedom of Information Act: Records

This memorandum lists seven things a public body's members should know about responding to requests for public records.

1. All records in the possession of the public body 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*. Only records that are "prepared or owned by, or in the possession of a public body or its officers, employees or agents 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. *AO-1-00*.

In addition, if a public body 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 public body 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 public body. *1983-84 Va. Op. Atty. Gen. 420*.
- E. Electronic communications such as e-mails if their content otherwise makes them public records.

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 public body 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 public body.

4. Some public records are exempt from mandatory disclosure.

There are few records that may be in the possession of a public body that may be exempt from mandatory disclosure. Public records exempt from mandatory disclosure include complainants of zoning violations provided in confidence (*Virginia Code § 2.2-3705.3(8)*).

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.* Any citizen 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, may request records. *Virginia Code § 2.2-3704.*
- 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 public body. *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.* 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. Public body response required in 5 working days.

The public body 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).*

If a request for records is received, immediately contact the County’s Department of Community Development at (434)296-5832.

The Department and the County Attorney’s Office will prepare the response.

7. Retaining public records

The Virginia Records Retention Act requires that public records be retained for varying periods depending on the nature of the record.

Before destroying any public records, contact the County’s Department of Community Development at (434)296-5832.