

The Virginia Freedom of Information Act



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The Virginia Freedom of Information Act

- Guarantees (almost) all Virginians access to (almost) all government records and meetings
- One of the most “customer-friendly” access laws in the United States
- Enacted in 1968 (two years after the federal FOIA); major revisions in 1989, 1999, 2001, and 2004.



The Virginia Freedom of Information Act

- “The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”
- “The provisions of this chapter shall be liberally construed... Any exemption from public access to records or meetings shall be narrowly construed...”



What's that Word?

- **FOIA** (*FOY-yuh*)

- *Noun:* The Freedom of Information Act, a public law
- *Noun:* A request made under the Freedom of Information Act
- *Verb:* To make a request under the Freedom of Information Act



What's that Word?

- **FOIAble** (*FOY-yuh-bull*)
 - *Adj.:* Required to be released if requested under the Freedom of Information Act
- **FOIAed** (*FOY-yuhd*)
 - *pt Verb.:* Requested or received by making a request under the Freedom of Information Act



“Public Bodies” to Which FOIA Applies

- Legislative bodies (including the General Assembly, sort of)
- Authorities, boards, bureaus, commissions, agencies, and political subdivisions
- Cities, towns, and counties, and their governing bodies and constitutional officers
- School boards and state boards of visitors
- Virginia organizations supported wholly or principally by public funds



Public Bodies to Which FOIA Does NOT Apply

- Virginia Parole Board
(except certain aggregate parole data, and all records concerning Board finances)
- Petit and grand juries
- Virginia State Crime Commission
- Records required to be kept by court clerks (but circuit court records are generally open under § 17.1-208)
- Family assessment and planning teams



“Public Records” to Which FOIA Applies

- All writings and recordings
- However stored
- Regardless of physical form or characteristics
- Prepared or owned by, or in the possession of a public body or its officers, employees or agents
- In the transaction of public business



Other Provisions

- Members of public bodies must be given a copy of FOIA and become familiar with it § 2.2-3702
- Custodians of records must retain and safeguard them § 2.2-3704(A)
- Voter and election info subject first to Election Code § 2.2-3703(B)
- Inmates and civilly committed sexually violent predators have no rights under FOIA, but may have limited access rights under other laws § 2.2-3703(C)



Social Security Numbers

- The first five digits of an SSN contained in a public record are confidential and exempt from disclosure under FOIA. § 2.2-3815
- A government agency in Virginia or its agent may not collect a SSN unless authorized or required by state or federal law and essential for the performance of that agency's duties. § 2.2-3801
- These two laws are not part of FOIA itself.



Access to Records

- All public records are open by default
- Public body may request name and address of requester, but not ID or reason for request
- Request must be “reasonably specific”
- Request need not be in writing
- Request need not cite FOIA



FOIA Exclusions

- 139 types of records are excluded from FOIA:
 - 13 general (§ 2.2-3705.1)
 - 15 public safety (§ 2.2-3705.2)
 - 13 administrative investigation (§ 2.2-3705.3)
 - 8 education (§ 2.2-3705.4)
 - 18 health and social services (§ 2.2-3705.5)
 - 27 proprietary info and trade secrets (§ 2.2-3705.6)
 - 13 criminal (§ 2.2-3706)
 - 32 other specific exclusions (§ 2.2-3705.7)
- Excluded records are not required under FOIA to be withheld; they may be released or withheld at the discretion of the custodian unless another law controls



Most Common Discretionary Exclusions

- Personnel records
- Attorney-client privilege
- Active negotiations
- Trade secrets
- Security systems and plans
- Active investigations
- Scholastic records
- Health records
- Tax returns
- Bank account numbers
- Criminal investigative files
- Working papers
 - Applies only to
 - Office of Governor
 - The Lieutenant Governor
 - The Attorney General
 - Members of the General Assembly and aides on their behalf
 - Clerks of House and Senate
 - Mayors or chief executives of localities and authorities (but not both)
 - College presidents
 - Applies only to records prepared by or for the official for his or her personal or deliberative use



Federal Freedom of Information Act

- Only 9 Exclusions, But Very Broad:
 - 1. National Security (classified documents)
 - 2. Internal Personnel Rules
 - 3. Statutory Prohibition
 - 4. Trade Secrets
 - 5. Internal agency memoranda
 - 6. Personal Privacy
 - 7. Law Enforcement Records that could cause harm
 - 8. Financial Institution Reports
 - 9. Locations of Wells



Limits to Virginia's Discretionary Personnel Exclusions

- Exclusions do not generally apply to
 - Employment contracts
 - Salaries of more than \$10,000
 - Job classifications
 - Allowances and reimbursements



Discretionary Criminal Records Exclusions

- Certain records related to a criminal investigation or prosecution:
 - Complaints and witness statements
 - Court orders
 - Memos, notes, and correspondence
 - Case files or reports
 - Evidence, diagrams, maps, and photos
- Identities of victims, witnesses, undercover officers, and investigative techniques (unless prohibited under § 19.2-11.2)
- Portions of noncriminal incident or other investigative reports of a personal, medical or financial nature, if they would jeopardize a person's safety or privacy



Limits to Criminal Incident Exclusions

- For felonies, law enforcement agencies must provide the following “criminal incident information” upon request, even if other related records are withheld:
 - General description of the criminal activity reported
 - Date and general location of the alleged crime
 - Identity of the investigating officer
 - Injuries suffered or property damaged or stolen
- ...Except during such time as the information is actually likely to:
 - Jeopardize an ongoing investigation or prosecution
 - Jeopardize the safety of an individual
 - Cause a suspect to flee or evade detection
 - Result in the destruction of evidence



Limits to Criminal Incident Exclusions

- The identity and status of any adult arrested and charged must be released.
§ 2.2-3706(A)(1)(c)
- Adult arrestee photographs may only be withheld while their release would jeopardize a felony investigation.
§ 2.2-3706(A)(1)(b)
- Public bodies must disclose the overall costs of undercover operations and protective details.
§ 2.2-3706(A)(2)(h)



Other FOIA Exclusions of Note

- Advice of legal counsel to public bodies and staff, and other similarly privileged records § 2.2-3705.1(2)
- Work product compiled for use in litigation § 2.2-3705.1(3)
- Confidential records from rape crisis and battered spouse programs § 2.2-3705.2(1)
- Records acquired during reviews by a fatality review team § 2.2-3705.5(9)
- Identities of executioners § 2.2-3705.7(26)
- Reports submitted to law enforcement agencies in confidence § 2.2-3706(A)(2)(b)
- All inmate records related to their imprisonment § 2.2-3706(A)(2)(d)
- Applicant and internal investigations of law enforcement staff § 2.2-3706(A)(2)(i)



Limits on Release

- Identities of individuals providing information about criminal activity under a promise of anonymity shall not be released.

§ 2.2-3706(A)(3)

- Sex offender registry entries are not subject to FOIA, except as required to be posted on the Internet

§ 2.2-3706(A)(2)(k)



911 Calls

- A recording of a 911 call is a public record and must be released unless a specific exclusion applies. § 2.2-3706(C)
- General subscriber information for a 911 system may be withheld unless the same information is made public by the telephone company, but this exclusion does not apply to the identities of telephone subscribers who placed 911 calls regarding a specific event. § 2.2-3705.2(10)



Within Five Working Days, The Public Body Must...

1. Provide the requested records, or
2. Withhold the records, citing in writing a legal prohibition or FOIA exemption, or
3. Provide in part and withhold in part, or
4. State in writing that the records could not be found or do not exist.
5. State in writing that an additional seven days is necessary to respond to request

Failure to respond to a covered request is illegal.



Electronic Records

- Must be provided in any requested format regularly used by the public body
- Must be posted online or e-mailed upon request if the public body is capable



Reasonable Charges

- Charges may not exceed actual cost of fulfilling that request
- Charges may not cover overhead
- Charges must be estimated in advance upon request
- Deposit may be required if estimate is over \$200
- Public body may require settlement of FOIA debt



Meetings of Public Bodies

- A meeting is any gathering of three or more members of a public body (or a quorum if the public body has only three members) § 2.2-3701
- Meetings are not covered unless they involve the discussion or transaction of public business § 2.2-3707(G)
- Meetings of the General Assembly are governed by the rules of the General Assembly, except that floor sessions, committee, and conference meetings must be open, and political party caucus meetings are not meetings § 2.2-3707.1



Meetings of Public Bodies

- All covered meetings are open by default
- Public bodies must
 - Give prominent public notice of meetings
 - Give personal notice of meetings upon request
 - Give notice, for meetings of state public bodies with at least one gubernatorial appointee, whether or not public comment will be received
 - Take minutes (and, for executive bodies, post them online)
 - Allow recordings, subject to reasonable rules
 - Not hold meetings in locations that prohibit recording



Electronic Meetings

- State and regional public bodies may only meet electronically if:
 - 3 days notice is given (other than in an emergency)
 - A quorum is physically assembled (unless the meeting is to respond to a state of emergency declared by the Governor, or unless the body is a state advisory body and audio and visual means are used)
 - The locations of all participating members are open to the public
 - The public can participate electronically if they could have in person
 - At least one non-electronic meeting per year is held
 - An annual report is made to the FOIA Council and JCOTS § 2.2-3708
- Local public bodies may not meet electronically (unless necessary to respond to a state of emergency declared by the Governor), but may always receive public participation electronically. § 2.2-3708(A),(G)
- An individual member of any public body may participate electronically due to “an emergency or personal matter,” due to a disability, or if, as a member of a regional body, he or she lives more than 60 miles from the meeting location. § 2.2-3708.1



Closed Meetings

- Meetings may be closed for one of 44 reasons, including these most common:
 - Discussion of specific employees or students
 - Discussion of acquisition of real estate
 - Discussion of unannounced business expansion
 - Discussion of actual or probable litigation
 - Discussion of active procurement

§ 2.2-3711

- The public body must vote in open session to approve the closed meeting beforehand, and vote in open session afterwards to certify that it was proper.

§ 2.2-3712



Voting

- All votes must take place in open, public, previously announced meetings
- Votes by secret or written ballot are prohibited



Plain English Explanation of Rights

- State public bodies in the executive branch must post on their web sites:
 - A plain English explanation of requestors' rights
 - Procedures to obtain public records from the body
 - FOIA responsibilities of the public body
 - Contact information for the body's FOIA ombudsman
 - General description of types of records kept by the public body
 - General description of exemptions applicable to the records
 - Any policy concerning routinely withheld records
- Great Example: www.virginia.edu/foia
- Other public bodies are welcome to do so, as well!



Virginia FOIA Council

- Advisory council in the legislative branch since 2000
- Membership includes:
 - Attorney General or designee
 - Librarian of Virginia or designee
 - Director of the Division of Legislative Services or designee
 - Four members appointed by the Speaker of the House
 - One member of the House
 - At least one current or former representative of the news media
 - Three members appointed by the Senate Committee on Rules
 - One member of the Senate
 - One officer or previous officer of local government
 - One nonlegislative citizen at-large
 - Two nonlegislative citizens, appointed by the Governor



FOIA Council Powers and Duties

- Furnish advisory opinions to any person or agency
- Conduct training seminars and educational programs
- Publish educational materials
- Assist public bodies with plain-English explanations
- Report annual activities and findings, including recommendations for changes in the law, to the General Assembly and the Governor



Practical Considerations

- Try to remain cooperative, not adversarial
- Speak, dress, and act in a respectful and non-threatening manner
- Avoid legalese
- Use the FOIA Council as a neutral third party
- Remember that you can be right, and still not get what you want



Enforcing FOIA

- Any person denied FOIA rights may petition the local general district or circuit court, which must hear the case within seven days
- The public body has the burden to support any invoked exclusions
- If a request was improperly denied, the requester may recover reasonable costs
- Officers, employees, and members of public bodies who willfully and knowingly violate FOIA must be fined \$500-\$2000 for a first violation and \$2000-\$5000 for subsequent violations



Disclaimers

- Opinions expressed in this presentation are those of the author and are not necessarily those of the author's organizations or hosts.
- This presentation is intended for informational purposes only and should not be construed as legal advice. Information is believed to be accurate but is not warranted for any specific purpose or situation.



For More Information...

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