

The Virginia Freedom of Information Act

Virginia Municipal League, January 6, 2022

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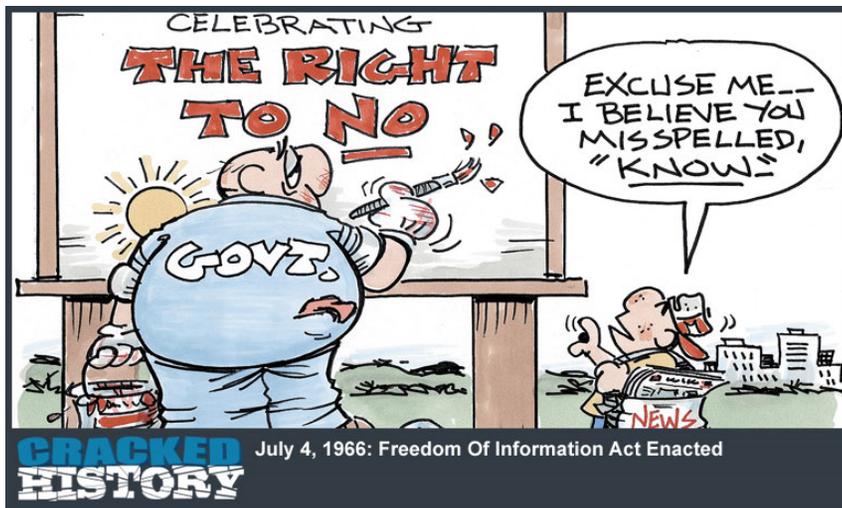
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What is a public record?

- ▶ Anything written or recorded in any way that relates to the “transaction of public business.”
- ▶ The term “transaction of public business” is not defined in Virginia law. It is a common-sense standard.



What is a FOIA request?

- ▶ Any time anyone asks a government official for a public record, that's a FOIA request. They don't have to make it in writing, or use the word "FOIA."
- ▶ *However...* the municipality can require the person to give their name and address, and you may request that a person write it down so you can make sure you have their request down accurately—but can't force them to write it down when push comes to shove.

How to make a Freedom of Information request



Find the FOIA officer's email address



Describe what you want in plain English



Hit send

Do we have to respond?

- ▶ Yes, the municipality must respond even if it has no responsive documents or all known documents are exempt from disclosure.
- ▶ A response is due within five business days. Day 1 is the day *after* you receive the request. If it is received after 5 pm, it begins the day *after that*.
- ▶ If the response is large or difficult to pull together, the municipality can take up to seven more business days simply by sending a letter to the requester saying so (a “seven-day letter”).
- ▶ If the response still can’t be completed, the municipality must try to agree with the requester for a further extension. If the requester won’t agree, then the municipality can ask the court.

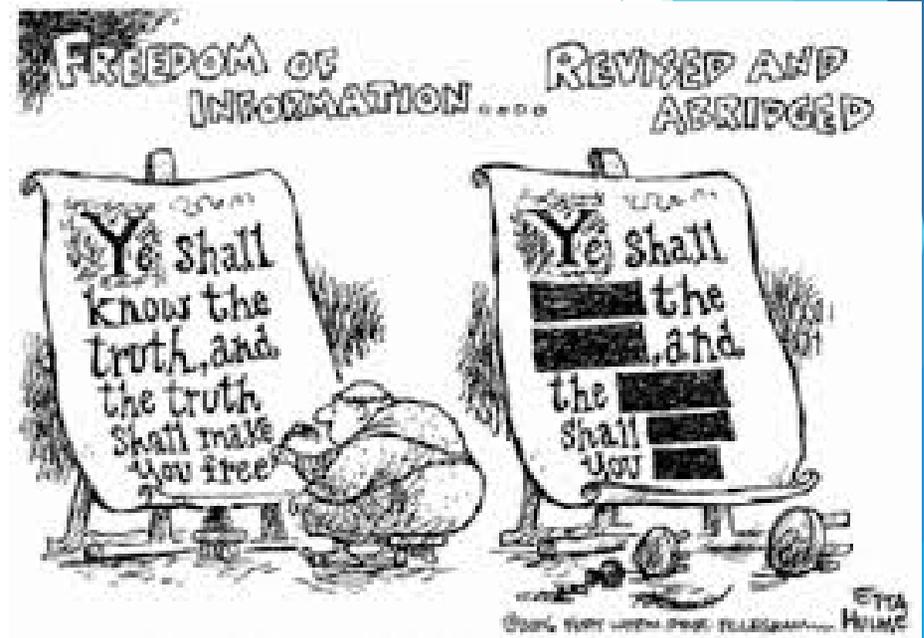
We only have enough staff to do our jobs... not do our jobs and respond to FOIA requests. What can we do?



- The municipality may charge the actual cost (or a reasonable approximation) of fulfilling the request.
- If the person requests an estimate, municipality must give it up-front.
- If the estimated cost is over \$200, the municipality may request a deposit prior to processing.
- The municipality may charge for time spent searching and copying. This includes cost of materials and salaries of people who did the work. You cannot charge overhead or benefits.
- If someone hasn't paid for a previous FOIA request for at least 30 days, the municipality may refuse future FOIA requests until paid, or send the matter to collections.

What about really sensitive documents?

- ▶ FOIA is liberally construed *in favor of disclosure*. To withhold a document, the municipality must be able to put its finger on a clear exclusion.
- ▶ If part of a document is subject to an exclusion but some not, the municipality should redact it and provide the portion that is subject to disclosure.



Issues for Law Enforcement

- ▶ Brand new rules in 2021 (new Va. Code § 2.2-3706.1)
- ▶ 60 days (rather than 5 business days) to respond to requests for criminal investigative files.
- ▶ “Criminal incident information” contained in “any report,” which must include, but is not limited to:
 - ▶ General description of criminal activity;
 - ▶ Date and time of alleged crime;
 - ▶ General location of alleged crime;
 - ▶ Identity of investigating officer or point of contact;
 - ▶ Description of injuries suffered or property damaged or stolen; and
 - ▶ Any diagrams related to the alleged crime or location.
- ▶ The entirety of criminal investigative files for investigations that are not ongoing.
- ▶ Exceptions:
 - ▶ If disclosure would interfere with a particular ongoing investigation;
 - ▶ Would deprive a person of a fair trial;
 - ▶ Would constitute an unwarranted invasion of personal privacy;
 - ▶ Would disclose (i) a confidential source or (ii) information furnished only to a confidential source
 - ▶ Would disclose law-enforcement techniques that would risk circumvention of the law; or
 - ▶ Would endanger the life or physical safety of any individual.
- ▶ Information about a victim may not be released except (i) to the victim; (ii) members of the immediate family of the victim, if deceased; or (iii) the parent or guardian, if the victim is a minor.



Common Record Exclusions Used by Cities and Towns

- ▶ Personnel records, except to the person himself.
- ▶ Work product, memoranda, or advice of legal counsel.
- ▶ Proprietary information or trade secrets provided by an economic development prospect under an NDA.
- ▶ Confidential information related to a public contract or PPEA.
- ▶ Executive working papers.
- ▶ Memoranda prepared only for use in closed session.
- ▶ Confidential information related to a public franchise award.

The Role of the FOIA Officer

So a citizen asks for a public document... now what?

- ▶ The employee who received the request sends it to the designated FOIA Officer.
- ▶ FOIA Officer makes sure he or she understands the request, contacts the requester if necessary, and calendars the five-business-day response time.
- ▶ FOIA Officer contacts relevant staff to pull documents together and estimate cost and time.
- ▶ If an extra seven days or a deposit is needed, FOIA Officer contacts requester and asks for the seven days or the deposit.
- ▶ Acts as liaison with City/Town Attorney for complex issues of interpretation.
- ▶ Determines if any exclusions are applicable.
- ▶ Redacts any documents.
- ▶ Responds to the requester.

Website

- ▶ Identities of FOIA Officers
 - ▶ Also register with FOIA Council
- ▶ Statement of rights of FOIA requesters
- ▶ Dates, places, and times of public meetings

Public Meetings

- ▶ Any time three or more members of a public body (or a quorum, if less) discuss public business simultaneously, it's a meeting.
- ▶ Must give appropriate notice. Just to hold a meeting requires three days' notice. Notice for *any meeting* used to be just in county administrator's office. Now, must be:
 - ▶ On the municipal website;
 - ▶ In a "prominent location"—usually front of courthouse.
 - ▶ In the chief administrator's office.
- ▶ Notice of emergency, special, *and continued* meetings must be given to the press *simultaneously* with the members of the public body. This might mean that as a practical matter, "continued" meetings no longer make sense.
- ▶ Agendas and agenda packages must be made available to the public simultaneously with providing them to the Council.
- ▶ Must take minutes, or in some cases may make an audio tape instead.
- ▶ Must be in an ADA-accessible space. The public and media need to be allowed in, and may tape or photograph the events.

Electronic Meetings

- ▶ New legislation in 2021.
- ▶ In general, individual members may call in under the following circumstances:
 - ▶ The public body has a policy specifically permitting it;
 - ▶ A quorum of the Council is physically present;
 - ▶ The physically present quorum votes to allow the person to call in;
 - ▶ The person is either medically incapable of attending, is attending to the serious medical condition of a family member; or is on personal business out of town (may only do this twice a year or 25% of meetings a year, whichever is greater); *and*
 - ▶ The person is connected to the meeting such that he or she can be heard and can hear all who are present.
- ▶ In an emergency, may call a 100% electronic meeting if:
 - ▶ There is a declared state of emergency, and the meeting is necessary for the public body to discharge its lawful duties and responsibilities;
 - ▶ It is advertised as an electronic meeting;
 - ▶ It is broadcast to the public by electronic means (e.g., Facebook, Youtube);
 - ▶ The public has opportunities to comment during the meeting.

Special Notice for Special Meetings

- ▶ Some types of actions require much more than three days' notice, and require a public hearing:
 - ▶ Sell real estate, one week advertisement in newspaper.
 - ▶ Take land use action (rezoning, comp plan amendment, special exception permit), two weeks in newspaper and sometimes also mailing to neighbors.
 - ▶ Adopt tax rate and budget—one week advertisement in newspaper, hold public hearing, wait seven days to adopt.
 - ▶ Special periods for many other things.
- ▶ What if it isn't done right? The action never legally happened. Go back to square one.



Who Can Speak?

- ▶ A public meeting is a “limited public forum.” That means that the public gets to speak, but only at designated times and places and subject to rules.
- ▶ Citizens’ comment and public hearings are controlled by rules and are largely in the discretion of the Chair/Mayor. A body may set time limits and the Chair/Mayor may require peoples’ comments to be germane and not to resort to personal ad hominem attacks, but otherwise, people are allowed to say what they want.

**NOTICE
OF
PUBLIC
HEARING**

Closed Sessions

- Closed sessions should be the exception, not the rule. You have to identify specifically what you're going in for.
- The motion must identify (1) the reason for the closed session, (2) the subject matter, and (3) the statutory exemption. Example: "I move to go into closed session to discuss acquisition or disposition of real estate in Monroe, where discussion in open session would adversely affect the bargaining position or negotiating strategy of the City/Town, pursuant to Va. Code section 2.2-3711 subsection (A)(3)."
- Some common reasons:
 - **Personnel:** To discuss *specific* personnel, where names will be named.
 - **Legal Counsel:** Consult with legal counsel about a *specific* legal matter or about litigation.
 - **Economic Development:** Discuss a previously unannounced economic development prospect.
 - **Contracts:** Discuss a public contract or PPEA proposal when discussion in open session would compromise your strategy.
 - **Acquisition or Sale of Real Estate:** Only when discussion in public would compromise your negotiations.



Certifying a Closed Meeting

- ▶ Every closed meeting must be certified. This means that every member must certify that to the best of that person's knowledge:
 - ▶ Only public business matters lawfully exempted from open meetings requirements under FOIA and
 - ▶ Only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered.
- ▶ Vote is by a roll call.

Enforcement

- ▶ Enforcement of FOIA is by citizen lawsuit. May be brought in General District Court or Circuit Court.
- ▶ Typically, the only relief available to a petitioner is injunction or mandamus.
- ▶ Petitioner usually gets his or her attorney's fees, if successful.
- ▶ If the violation was willful and knowing, then the person may have a personal civil penalty of between \$500 and \$2,000 for a first offense, and between \$2,000 and \$5,000 for subsequent offenses.
- ▶ A person who destroys documents to avoid responding to a FOIA will have to pay a personal civil penalty of \$100 per page. A public body will be fined an additional \$1,000 for willful and knowing violations of closed meeting rules.



Ongoing Training & Guidance

- ▶ FOIA Officers must have annual training either from their legal counsel or the FOIA Advisory Council.
- ▶ FOIA Advisory Council will respond to questions from citizens and public officials, but will generally not respond to questions that are in, or are close to, litigation.
- ▶ The City/Town Attorney will advise all municipal departments and elected officials, including constitutional officers, upon request.
- ▶ FOIA Officers must be registered with the FOIA Advisory Council.
- ▶ All elected officials must take these courses upon being newly elected and every other year thereafter.

2022 Session Proposals

- ▶ **HB2000 (Roem, D-Manassas):**
 - ▶ No charge for the first two hours of the first four requests in any 31-day period.
 - ▶ For any hours you do charge for, may charge no more than \$33 an hour.
 - ▶ Must have a published written policy explaining the process of determining charges.
 - ▶ Expected to result in significant increase in compliance costs for localities and taxpayers.
- ▶ **HB2196 (Mullin, D-Newport News):**
 - ▶ Release of any disciplinary records of any law-enforcement officer.
 - ▶ Expected to result in recruitment issues and litigation problems.

Questions?

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