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# FOIA BASICS

A PRACTICAL GUIDE TO THE VIRGINIA FREEDOM OF INFORMATION ACT

# Dissecting The Act

The Act deals only with Documents and Meetings.

Divide the Act into 4 Sections:

- ▶ 2.2-3700-3703.1 are general application statutes and contain the definitions
- ▶ 2.2-3704-3706 deal with documents
- ▶ 2.2-3707-3712 deal with meetings
- ▶ 2.2-3713-3714 deal with penalties

# Liberal Construction

Government is meant to be open so if the law is unclear it should favor openness.

2.2-3700 Virginia Code

# Public Records

- ▶ Only Public Records are subject to FOIA: *"Records that are not prepared for or used in the transaction of public business are not public records."* Va Code 2.2-3701
- ▶ Public Records mean all writings and recordings in whatever format and include electronic records 2.2-3701
- ▶ Remember documents are open to inspection or copying during "regular office hours" (**You do not have to mail or transmit response**)





# Who May Make A Request?

- ▶ Citizens of Virginia – most State Agencies regularly decline requests from persons from out of state – 2.2-3704(A) (this has been upheld by the U.S. Supreme Court *McBurney v Cuccinelli*, 133 S.Ct.1709 (2013))
- ▶ Representatives of newspapers and magazines with circulation in the State
- ▶ Representatives of radio and television stations broadcasting into the State

**IT DOES NOT INCLUDE INDEPENDENT JOURNALISTS OR RESEARCHERS**



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# To Whom Must A Request Be Made?

**ANYONE!**

Despite a belief that the request must be made to the FOIA Officer, the Code says the request **MAY** be sent to the FOIA Officer.

VA. Code 2.2-3704.2.

# Tip To Auditors

Va. Code 2.2-3704.2 requests that the FOIA Officer be trained annually, but sad to say that although this is the law no training has been developed as of March 1, 2017. ([Information on FOIA Council Website](#))

# ONLY 5 Possible Responses To A Request!

- ▶ The requested records are provided.
- ▶ The requested records are being entirely withheld because the release is either prohibited by law or subject to an exclusion (**must clearly state which exclusion or law applies**).
- ▶ The requested records are provided in part and withheld in part.
- ▶ The Requested Records could not be found or do not exist.
- ▶ It is practicable to provide the documents within the required 5 day work days allotted. We need an additional 7 workdays.





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# What Happens If A Timely Answer Does Not Occur?

It is deemed a denial of the request and a violation of law!

# Common Problems

- ▶ The document does not exist. For some reason, persons are bothered by this because if someone is asking for it should it not exist? Va. Code 2.2-3704 (D.) says the public body is not required to create it.
- ▶ The exclusions are not mandatory! Release is discretionary unless there is another law which says the document is private (FERPA and HIPAA to name two).
- ▶ Agency fails to publish an explanation of FOIA rights on the Agency's Website. Va. Code 2.2-3704.1
- ▶ Charging a set price for copies IS NOT PERMITTED! Va. Code 2.2-3704(G)

# To Charge Or Not To Charge?

- ▶ The Public Body may make reasonable charges not to exceed actual costs. Va. Code 2.2-3704(F).
- ▶ It can become an accounting nightmare to seek payment when little or no information is provided. May be better not to charge.
- ▶ If it is a difficult request, a charge is often appropriate.
- ▶ You should always charge for vexatious requests.
- ▶ If the charge is over \$200, the materials are not provided until paid. Va. Code 2.2-3704(H).
- ▶ If they haven't paid old bills (over 30 days), documents may be withheld until paid.

# Common Exemptions

- ▶ Personnel Records 2.2-3705.1 (1)
- ▶ Personal Information 2.2-3705 (10)
- ▶ Competitive Negotiation 2.2-3705(12)
- ▶ Investigative Notes etc. under Fraud, Waste and Abuse Hotline 2.2-3705.3 (7).
- ▶ Scholastic Records 2.2-3705.4 (1)
- ▶ Working Papers 2.2-3705.7



# Scholastic Records

- ▶ Much wider than FERPA!
- ▶ Includes “information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution” 2.2-3701
- ▶ Therefore “directory information” which can be released per FERPA may be withheld under this exemption

# Salaries

Salaries and contracts with employees are public information.

Va. Code 2.2-3705.8



# Criminal Records 2.2-3706

- ▶ Section tells you what must be released rather than providing exemption
- ▶ Basic information on crime must be released and all other releases are discretionary

# Meetings

- ▶ Only applies to “public bodies”
- ▶ Public bodies are “any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds” 2.2-3701



# What Is Not A Public Body? (which meetings does FOIA apply?)

- ▶ Does apply to the Board of Visitors
- ▶ Does **not** apply to Faculty, Employee, Student Government, Faculty Senate and almost all other meeting in a University setting

# Meeting Requirements

- ▶ Must give notice
- ▶ Must be recorded
- ▶ Must take minutes
- ▶ Severe limitations to electronic meetings (Should always consult your attorney)
- ▶ Votes must be public
- ▶ Avoid any event where 3 or more members may discuss public business

# Closed Meetings

- ▶ Attorney should always be consulted beforehand and it is best that the attorney be present to insure discussion does not leave the topic of the closed session
- ▶ Limited to relatively narrow exemptions
- ▶ Attorney will avoid closed meetings generally unless it clearly falls in a permitted closed meeting
- ▶ No voting in closed meetings
- ▶ Must include certificate by each member

# Enforcement

- ▶ Public bears burden of showing compliance
- ▶ If a violation occurs the officer, employee or member is subject to a civil penalty (**not the agency**) if the violation was willful and knowingly made
- ▶ Cost and attorney fees in a losing case are often substantial!