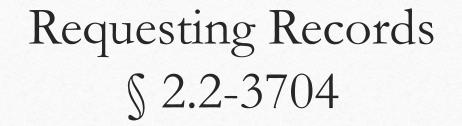
# Access to Public Records

Virginia Freedom of Information Act

Virginia Freedom of Information Advisory Council http://foiacouncil.dls.virginia.gov/ foiacouncil@dls.virginia.gov (804) 698-1810

#### Introduction to Records & FOIA

- All public records are presumed open unless specifically exempt.
- Definition of "public record" (§ 2.2-3701)
  - all writings and recordings that consist of letters, words or numbers, or their equivalent . . . however stored, and 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.



- Who can make a request?
  - Citizens of the Commonwealth (McBurney v. Young, (U.S. 2013))
  - Representatives of newspapers & magazines with circulation in the Commonwealth
  - Representatives of radio & television stations broadcasting in or into the Commonwealth
- How to make a request
  - Identify records with reasonable specificity
  - Name & legal address may be required

#### Responding to Requests § 2.2-3704

- Five working days to respond
  - First day to respond is the day after the request is receive
  - "Working days" do not count weekends, legal holidays, or days when the public body is closed
- Five permissible responses to a request
- Creation of new records not required, but may abstract or summarize by agreement
- Make reasonable efforts to agree on the production of records

## Five Permissible Responses

- 1. Provide the requested records
- 2. Requested records are being entirely withheld
- 3. Requested records are being provided in part and withheld in part
- 4. Requested records could not be found or do not exist
- 5. Additional time needed to search for/produce records (up to seven additional working days)

### How to Respond to a Request

- If any part of the answer is "no," the response must:
  - Be in writing
  - Identify with reasonable particularity the subject matter of the withheld records; AND
  - Cite the specific section(s) of the Code of Virginia that authorizes the records to be withheld
- **<u>NOTE</u>**: if being entirely withheld, response must identify with reasonable particularity the volume of the withheld records

## How to Respond to a Request

- If the records cannot be found or do not exist, the response must:
  - Be in writing, AND
  - If the public body knows that another public body has the records, it must provide contact information for the other public body.
- If the public body needs more time, the response must:
  - Be in writing, AND
  - Specify the conditions that make production of the records within the five-working-day period impossible.
  - If 5 + 7 working days is not enough, negotiate with requester; if cannot reach agreement, can petition court for additional time

## Charging for Records

- A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.
- Cannot charge more than the actual cost to the public body
- Cannot charge for certain scholastic records if requested by parent or guardian (of minor student) or student (if 18 years or older)
- Public body shall make all reasonable efforts to supply the requested records at the lowest possible cost
- May charge for exclusion review (ATI v. UVA, Va. Supreme Ct., 2014)

#### Charging for Records (continued)

- Before searching for records, must notify requester of public body's right to charge and requester's right to a cost estimate
- If requester asks for an estimate, public body must provide it
  - Time period is tolled from time estimate is sent until requester responds
  - If no response within 30 days, request deemed withdrawn
- Public body may request a deposit for charges in excess of \$200
  - Time period is tolled until deposit is paid
- If a bill goes unpaid 30 days or more, do not have to respond to new requests until the outstanding balance is paid

9

#### Electronic Records

- Requester may choose any format the public body uses in the regular course of business
- Converting format or redacting exempt fields is not considered creating a new record
- Use and retention of e-mail
  - Virginia Public Records Act, §§ 42.1-76, et seq.
    - Definition of "public record"
    - Retention schedules set by the Library of Virginia
  - Tips for using and managing email

## Exemptions of General Application

- Personnel records § 2.2-3705.1 (1)
- Attorney-client privilege § 2.2-3705.1 (2)
- Legal memoranda and other work product § 2.2-3705.1 (3)
- Contract negotiations § 2.2-3705.1 (12)
- Procurement exemptions § 2.2-3705.6 (10) and (11)
- Account & routing numbers § 2.2-3705.1 (13)
- Economic development and retention § 2.2-3705.6 (3)

