
**THE RICHMOND CITY ATTORNEY’S OFFICE GUIDE TO:
ACCESS TO PUBLIC RECORDS UNDER THE VIRGINIA
FREEDOM OF INFORMATION ACT (“VFOIA”)**

I. PURPOSE

a. The purpose of this guide is to provide practical advice to City employees in adhering to VFOIA and the City’s Administrative Regulations when responding to a request.

b. This training will:

- i.* Assist City agencies in meeting statutory freedom of information disclosure mandates;
- ii.* Increase the availability of City government information to the public;
- iii.* Increase the efficiency of City agencies in responding to freedom of information requests; and
- iv.* Establish systems to record the costs to the City in responding to freedom of information requests and to charge requesters for those costs to the extent permitted under VFOIA.

II. ROLES OF AGENCY HEAD AND DESIGNATED VFOIA REPRESENTATIVE

a. Agency Head’s Role

- i.* This policy intends to promote an increased responsiveness to freedom of information requests. Consequently, each Agency Head shall read and familiarize him/herself with VFOIA. Further, each Agency Head shall designate a VFOIA representative as provided below. Each Agency Head shall recognize that freedom of information requests are time-sensitive and shall assist his agency’s VFOIA representative in

providing a timely, appropriate response to every freedom of information request.

b. Designated VFOIA Representative

i. Each Agency Head shall designate a least one member of his staff as that agency's VFOIA representative. The Agency Head shall report the names of all VFOIA representatives or alternates to the Office of the Chief Administrative Officer upon designation. The Office of the Chief Administrative Officer shall maintain a list of VFOIA representatives and shall audit this list annually to ensure that it remains current. The VFOIA representative shall be primarily responsible for the agency's response to freedom of information requests it receives from the public and the media. The VFOIA representative shall:

1. Read and familiarize him/herself with VFOIA;
2. Familiarize him/herself with Virginia statutes applicable to the agency that may expressly forbid the release of certain records, such as some criminal or tax records;
3. Develop and update procedures for responding to freedom of information requests;
4. Train agency employees to recognize freedom of information requests and properly refer them to the agency's VFOIA representative;
5. Receive all freedom of information requests directed to the agency;
6. Act as the point of contact within the agency for freedom of information requests referred to the agency by other agencies or by the Office of the Chief Administrative Officer;

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7. Maintain appropriate records concerning each freedom of information request in accordance with Section III (F) of Administrative Regulation 3.1;
 8. Train alternate VFOIA representatives to handle time-sensitive freedom of information requests when the designated VFOIA representative is out of the office;
 9. Respond in a timely fashion to freedom of information requests in accordance with the agency's established procedures; and
 10. Consult with the appropriate member of the Office of the City Attorney, as necessary, whenever a question arises regarding freedom of information requests or procedures.

III. BACKGROUND

a. WHAT is a public record?

- i. A "public record" is any writing or recording in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.
- ii. Examples include: handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media. It also includes drafts or preliminary versions of any of the abovementioned examples.

b. WHO may request records?

- i. Citizens of the Commonwealth;
- ii. Representatives of newspapers and magazines with circulation in the Commonwealth; and

iii. Representatives of radio and television stations broadcasting in or into the Commonwealth.

c. WHAT triggers the necessity to comply with VFOIA and its provisions?

i. Must a request be made in writing?

1. No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Documentation allows both parties to point to an exact request rather than fight later over what was requested. VFOIA representatives are strongly encouraged to memorialize any oral request in a follow up correspondence to the requester.

ii. Must a request specifically mention "FOIA"?

1. No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

iii. May an agency require a requester to fill out a request form?

1. No. While the administrative regulations mandate that agencies maintain a form on which either a walk-in requester or a City employee taking a request over the telephone may record the elements of the request, the agency may not require that this form be completed by the requester before it begins work on a VFOIA request.

iv. May a public body require a requester to provide his name and legal address?

1. Yes. A public body *may* require a requester to provide his name and legal address before processing a FOIA request.
 - a. **NOTE:** VFOIA does not mandate that a public body obtain identification before processing the request.

IV. RESPONDING TO A REQUEST

a. *What should be done upon receipt of a VFOIA request?*

- i. Referral - City personnel shall refer each request to their agency's VFOIA representative on the same day they receive the request because such requests are time sensitive.

b. *How long does a VFOIA representative have to respond to a request?*

- i. A VFOIA representative must respond within five (5) working days of the agency's receipt of the request in the manner specified by Va. Code Ann. § 2.2-3704(B), or unless otherwise provided by the statute. Count the day after receipt as day 1.
 1. **NOTE:** Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.

c. *What are the permissible responses to a VFOIA request?*

- i. A VFOIA representative must select one of the five (5) responses allowed by VFOIA:
 1. Provide the requested records to the requester;

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2. The requested records are being *withheld entirely* because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with VFOIA;
 - a. **NOTE:** See the “Exemptions” section below.
 3. The requested records are being provided in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with VFOIA;
 - a. **NOTE:** Generally, if a record contains exempt and non-exempt information, the public body must release the record, and delete or excise the portion of the record subject to the exemption. See the “Exemptions” section below for more information.
 4. The requested records could not be found or do not exist. However, if the agency that received the request knows that another agency or VFOIA representative has the requested records, the response shall include contact information for the other agency or VFOIA representative; or
 - a. **NOTE:** The agency is not required to create a new record if the requested record does not already exist. However, the agency may abstract or summarize information under such terms and conditions as agreed between the requester and the public body. See the “Records Retention” section below for more information.
 5. It is not practically possible to provide the requested records OR to determine whether they are available within the five-work-day period, and the VFOIA representative needs an additional

seven (7) workdays in which to provide one of the four preceding responses.

d. *When does a response need to be in writing?*

i. If any part of a VFOIA response to a request is “NO” (see e.g., responses #2 & #3 above), the response *must*:

1. Be in writing; and
2. Identify with reasonable particularity the volume and subject-matter of withheld records; and
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.

ii. If the answer is “we cannot find it” or “it doesn’t exist” (see, e.g. response #4 above), then the response *must*:

1. Be in writing; and
2. If the VFOIA representative knows that another agency/VFOIA representative has the records or may have the records, it must provide contact information for the other agency/VFOIA representative in his response.

iii. If the answer is “we need more time” and the VFOIA representative would like seven (7) additional working days to respond (e.g., response #5 above), then the response *must*:

1. Be in writing; and
2. Specify the conditions that make production of the records impossible.

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- e. *What happens after the agency has gathered all necessary documents that respond to the request?*
- i. Once the agency has amassed all of the records that respond to the request, the VFOIA representative shall review the records to:
 - 1. Make a record of what the agency is providing to the requester; and
 - 2. Identify any records the VFOIA representative believes are excluded from the law's disclosure requirements.
- f. *What happens if the VFOIA representative believes some records are exempt from disclosure?*
- i. The VFOIA representative shall consult the Office of the City Attorney, adhering to the following guidelines:
 - 1. The VFOIA representative shall not send a request to the Office of the City Attorney before gathering the records that respond to the request.
 - 2. Upon identifying records that may be exempt from disclosure, the VFOIA representative shall immediately contact the lawyer in the Office of the City Attorney that represents the VFOIA representative's office or agency.
(See Handout – City Attorney's Primary Contact List)
 - 3. The VFOIA representative shall promptly provide the lawyer with a copy of:
 - a. The request; and
 - b. The record(s) that the VFOIA representative believes may be exempt from the law's disclosure requirements.

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- i. **NOTE:** The VFOIA representative shall send the lawyer *only* those records that he actually has reason to believe may be excluded from the law's disclosure requirements.
 - c. The VFOIA representative shall allow at least two (2) working days before a response is due to the requester for a lawyer to review the request and the records that may be excluded from the law's disclosure requirements.

V. CHARGING FOR REQUESTS

a. *How much may an agency charge for producing records in response to a VFOIA request? Is an agency required to charge the requester for the City's response?*

- i. In general, an agency may make reasonable charges for its actual cost incurred in accessing, duplicating (making copies), supplying, or searching for the requested records. An agency may not charge for extraneous or surplus fees unrelated to the production of the records.

NOTE: This means that an agency cannot factor in expenses such as overhead or the cost of benefits paid to employees.

- ii. City Administrative Regulation 3.1 requires City employees responding to a VFOIA request to charge the requester to recoup the City's costs. See A.R. 3.1, III, E.

b. *Can the agency be required to estimate the costs of supplying the requested records in advance? If so, what is to be included in that estimate?*

- i. Yes. A citizen may request that the agency estimate the cost of responding to his request in advance. Further, City Administrative Regulation 3.1 requires City

employees responding to a VFOIA request to provide an estimate pursuant to the following guidelines:

1. Records Available on Internet or at Library—Upon receiving a request, the VFOIA representative shall determine if the information is already available to the public on the Internet or at a public library. If so, the VFOIA representative shall contact the requester by the fastest means possible and inform him that the information is available free of charge on the Internet or at a public library.
 - a. **NOTE:** Should the requester decide to seek the records on the Internet or at a public library, the VFOIA representative shall send a letter to the requester confirming the requester’s decision.

2. Records NOT Available on Internet or at Library – If the requested records are not publicly available on the Internet or at a public library, the VFOIA representative shall estimate the cost of complying with the request, including the following factors:
 - a. The actual cost of time spent by City employees in searching for, gathering, or redacting records in response to a request. The VFOIA representative shall use the lowest-paid employee capable of performing these tasks. For each employee, this cost shall be calculated as the hourly rate of the employee (not including benefits or other overhead costs for that employee) multiplied by the number of hours that employee spends performing tasks in response to that VFOIA request.
 - i. **NOTE:** Generally, a requester cannot be charged for an employee’s time spent sitting with or supervising the

requester's inspection of the records for security reasons.

b. The actual cost of duplication.

c. The actual cost of mailing or delivering.

i. **NOTE:** This cost shall be the amount expended by the City in mailing or otherwise delivering the records to the requester but shall not apply where the requester comes and picks up the records.

c. *How is the estimate to be communicated to the requester?*

i. The VFOIA representative shall communicate the estimate to the requester by the fastest means possible according to the following:

1. The Estimate Cost Is Less Than or Equal to \$200

—If the estimated cost of fulfilling the request is less than or equal to \$200, the VFOIA representative shall inform the requester that payment is due upon delivery of the response to the request.

2. The Estimated Cost Is Greater Than \$200—If the estimated cost of fulfilling the request is greater than \$200, the VFOIA representative shall inform the requester in writing that, as authorized by § 2.2-3704(F) of the Code of Virginia:

a. The City will not continue to process the request until it has received a deposit in the amount of the estimate from the requester;

b. The City will credit the deposit toward the final cost of supplying the requested records; and

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- c. That the statutory period within which the City must respond (five (5) working days) to a request will be tolled until the deposit is paid.
 - d. *How are the costs of complying with a request to be billed to the requester?*
 - i. Upon the completion of the work and duplicating necessary to fulfill a request, the VFOIA representative shall prepare an invoice of the costs. The invoice shall include all of the applicable factors listed in A.R.3.1 IV(b)(i)(2) above and shall be in a form approved by the Chief Administrative Officer or his designee. The VFOIA representative shall see that the invoice is presented to the requester along with the records responding to his request.
 - e. *How are the charges for processing the VFOIA request to be collected from the requester?*
 - i. If the requester has made a deposit, such deposit shall be credited against the invoiced cost. If the deposit is insufficient to cover the invoiced cost, the VFOIA representative shall invoice the requester for the additional costs. If any portion of the deposit remains after credited against the invoiced cost, the VFOIA representative shall return such portion to the requester with the response request.
 - ii. If the requester appears in person either to inspect the requested records or to pick up copies thereof, the VFOIA representative shall collect the charge for the request before providing the requester with access to or copies of the records.
 - iii. If the requester requests delivery by mail or electronic mail, the invoice provided with the City's response to the request shall state that the requester has ten (10) calendar

days to pay the City the invoiced amount and that the City reserves the right to impose an interest charge of nine percent (9%) per annum and to pursue its standard collection procedures for delinquent accounts after thirty (30) calendar days.

iv. Pursuant to § 2.2-3704(I) of the Code of Virginia, before processing a request for records, the City may require the requestor to pay any amounts owed for previous requests for records that remain unpaid thirty (30) days or more after billing.

f. *What can the agency do if the requester does not pay for records provided under VFOIA?*

i. Before responding to a new request for records, the agency may require the requester to pay any amounts owed to the agency for previous requests for records that remain unpaid for thirty (30) days or more after billing.

g. *Do the same requirements apply to a request for electronic records?*

i. Yes. However, like all other records, the agency may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. Also like all other records, when electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information.

1. **NOTE:** The excision of exempt information is *not* considered the creation of a new document under VFOIA.

ii. An agency must provide electronic records in any medium identified by the requester if that medium is used by the agency in the regular course of business. If the agency has the capability, this includes the option of

posting the records on a website or delivering the records to an email address. While an agency must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and the agency, the agency is not required to produce records in a format not regularly used by the agency.

h. Special Circumstances & Exceptions

- i. Intergovernmental Waiver of Costs*—The costs associated with responding to VFOIA requests from governmental entities shall be waived whenever such an entity extends the City reciprocity regarding cost waiver. Costs associated with VFOIA requests from all other governmental entities may be waived at the discretion of the agency head. In all cases where costs are waived, an invoice shall be prepared for the purpose of record keeping.
- ii. Charging Under Special Circumstances*—When a requester requests the reproduction of topographical maps or the production of records from the City’s Geographic Information System, the VFOIA representative, in responding to the request, shall follow the special guidelines set forth in §2.2-3704(F) of the Code of Virginia in charging for these types of requests.

VI. GENERAL RECORDS EXEMPTIONS

a. Personnel Records, § 2.2-3705.1(1):

- i. Provides an exemption for personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof.*

b. Attorney-client Privilege, §2.2-3705.1(2):

- i. Provides an exemption for written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

c. Attorney Work Product, § 2.2-3705.1(3):

- i. Provides an exemption for legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning matter that is properly the subject of a closed meeting under § 2.2-3711.

d. Tests and Examinations, § 2.2-3705.1(4):

- i. Provides an exemption for an test or examination used, administered or prepared by any public body for purposes of evaluation of:
 - 1. Any student or any student's performance;
 - 2. Any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion; or
 - 3. Qualifications for any license or certificate issued by a public body.

e. Closed Meetings, § 2.2-3705.1(5):

- i. Provides an exemption for records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711.

f. Vendor Proprietary Information, § 2.2-3705.1(6):

- i.* Provides an exemption for vendor proprietary information software that may be in the official records of a public body. For purposes of this subdivision, “vendor proprietary software” means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

g. Computer Software, § 2.2-3705.1(7):

- i.* Provides an exemption for computer software developed by or for a state agency, state-supported institution of higher education or a political subdivision of the Commonwealth.

h. Cost Estimates of Real Property, § 2.2-3705.1(8):

- i.* Provides an exemption for appraisals and cost estimates of real property subject to a proposed purchase, sale or lease prior to the completion of such purchase, sale or lease.

i. Certain Personal Information, § 2.2-3705.1(10):

- i.* Provides an exemption for personal information, as defined in § 2.2-3801, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the public body not disclose such information.

j. Contracts, § 2.2-3705.1(12):

- i.* Provides an exemption for records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public

body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract.

k. Certain Engineering and Construction Plans, § 2.2-3705.2(2):

- i. Provides an exemption for those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall only be exempt until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.
- ii. Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

l. Security Systems, § 2.2-3705.2(3):

- i. Provides an exemption for documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

m. Plans to Respond to Terrorist Activity, § 2.2-3705.2(4):

- i. Provides an exemption for plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or

environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

n. Security or Facilities, § 2.2-3705.2(6):

- i. Provides an exemption for engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

o. Students, § 2.2-3705.4(1):

- i. Provides an exemption for scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or to the parent or legal guardian of the student. However, no student shall have access to:
 - 1. Financial records of a parent or guardian; or
 - 2. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, which are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

p. Health, § 2.2-3705.5(1):

- i.* Provides an exemption for health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

q. Prequalification to Bid, § 2.2-3705.6(10):

- i.* Provides an exemption for confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

r. Working Papers of the Mayor, § 2.2-3705.7(2):

- i.* Provides an exemption for documents and correspondence prepared by or for the Mayor for his personal or deliberative use.

s. Library Records, § 2.2-3705.7(3):

- i.* Provides an exemption for library records that can be used to identify both the name of a library patron and the material the patron borrowed.

t. Human Resources Investigation, § 2.2-3705.3(3):

- i.* Provides and exemption for investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, the law does not prohibit the disclosure of information taken from inactive

reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

u. Auditor's Reports in Draft Form, , § 2.2-3705.3(7):

- i.* Provides and exemption for investigative notes, correspondence and information furnished in confidence provided to or produced by or for the City Auditor. However, records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by § 2.2-3705.3, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.