

Policy Name	FOIA Requests and Related Charges		Policy Number	76-20.9
Section Title	Communications and Disclosure of Information	Section Number	76-20	Former Policy No.
Approval Authority	Agency Director		Effective Date	3/19/2022
Responsible Executive	Chief Operating Officer		Revised Date	7/15/2022
Responsible Office	Director's Office		Last Reviewed	7/15/2022
Responsible Reviewer	Barrett, Erin			

Purpose:

The Virginia Freedom of Information Act, Va. Code § 2.2-3700 et. seq. ("FOIA") guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials, and public employees.

Va. Code § 2.2-3704.2 requires public bodies to designate one or more FOIA officers who are responsible for serving as a point of contact for members of the public in requesting public records and to coordinate the public body's compliance with the provisions of FOIA.

Policy:

A public record is any document or record, regardless of whether it is a paper record, an electronic file, an audio or video recording or any other format, that is prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. All public records are presumed to be open, and may only be withheld if a specific statutory exemption applies. As public servants, we must track and distribute these sensitive documents in a timely manner.

A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Citizens may request that charges for supplying requested records be estimated in advance and if so requested, the public body must provide an estimate. FOIA limits charges to public body's actual cost in producing the requested records based on the hourly rate of the employee that is completing the FOIA request.

FOIA requires that each public body designate at least one FOIA officer, but more can be designated. Due to the volume, complexity, and varying subject matter of the agency's documents, DHP will designate multiple FOIA officers. The agency will designate two FOIA officers as agency-wide FOIA officers. The agency will designate one FOIA officer for each board, division, or operating department as necessary. Each board, division, or operating department shall have at least one FOIA officer and one custodian of the record as described in Policy 76-90. One individual may serve in both roles, but does not have to. Board, division, or operating department level FOIA officers will be responsible for responding to FOIA requests related to that

board, division, or operating department. Agency-wide FOIA officers will be responsible for: (i) responding to or coordinating agency-wide FOIA requests; (ii) distributing FOIA requests received at the central FOIA email account to the appropriate board, division, or operating department; (iii) assisting board, division, or operating department level FOIA officers with requests as needed; and (iv) ensuring board, division, or operating department level FOIA officer posts are appropriately filled.

FOIA requires that each FOIA officer receive FOIA training at least once every two years from the FOIA Council (through the Commonwealth of Virginia Learning Center) or through board counsel. FOIA officers must maintain documentation of receiving this training.

Authority:

Va. Code §§ 2.2-3700 *et seq.*, Va. Code § 2.2-3704.2

Procedures:

1. Receiving a FOIA request.

(a) FOIA requests may be received through any medium. The agency, however, will publish a central FOIA email address through which it will encourage requests to be sent. Any requests received at this email address will be forwarded to the appropriate FOIA officer by the agency-wide FOIA officers.

(b) A FOIA request received directly by a board, division, or administrative division FOIA officer may be handled under the procedures outlined below.

(c) A FOIA request received directly by a board, division, or administrative division FOIA officer which is asking for records of another board, division, or operating department, or the agency, shall be forwarded to the central FOIA email address for redistribution.

2. Processing a FOIA request.

(a) A response to a FOIA request must be sent within five working days of receipt of the request pursuant to Va. Code § 2.2-3704. Day one is considered the day after the request is received. The five day period does not include weekends or holidays.

(b) A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of the chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall provide the requested records to the requester or make one of the following responses in writing:

- The requested records are provided in their entirety.

- The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
- The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
- The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
- It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

(c) Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

3. Charges for requests.

(a) A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.

(b) FOIA limits charges to government's actual cost in producing the requested records based on the hourly rate of the employee that is completing the FOIA request. A charge of \$0.10 per page copied is applicable, however DHP will waive the fee for requests that will be \$50.00 or less.

(c) In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

(d) Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

4. FOIA requests for off-site records.

(a) In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made under FOIA and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity

in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester.

(b) The Library of Virginia is the custodian of record for any permanently archived records transferred to the Library of Virginia pursuant to the duties imposed by Va. Code § 42.1-76 *et seq.* ("Virginia Public Records Act"). The Library of Virginia is responsible for responding to FOIA requests for such records.

5. Out of state requests.

(a) FOIA grants rights of access to public records to citizens of Virginia and media representatives that broadcast or have circulation in or into Virginia. FOIA does not grant rights to requesters from other jurisdictions. Two out of state requesters challenged this limitation in the case of *McBurney v. Young* on the grounds that the citizenship limitation in Virginia's FOIA statutes violated the Constitution. The Eastern District of Virginia, Fourth Circuit, and the Supreme Court of the United States all denied the plaintiffs' claims, upholding the limitation on access to Virginia public records to Virginia citizens and applicable media representatives.

(b) Although not required by statute or case law to treat out of state requests the same as in-state requests, we recommend doing so because: (1) it provides for internal consistency in responding to requests, and (2) if you deny a request because the requester is not from Virginia, the requester can easily find a Virginia citizen to make the same request on his or her behalf. Since the procedural rules of FOIA are not mandatory when dealing with out of state requests, you may collect payment in advance for any amount and you may respond in a reasonable time frame rather than in five working days.

6. Exclusions.

(a) Refer to Va. Code §§ 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, and 2.2-3705.8 for specific information regarding exclusions.

(b) Questions may also be directed to the agency-wide FOIA officers or to applicable board counsel.

Related Policies:

<http://www.dhp.virginia.gov/media/dhpweb/docs/laws-regs/FOIA.pdf>

<http://foiacouncil.dls.virginia.gov/2019law.pdf>