

Policy and Procedure 1-2

Freedom of Information Act and Responding to Requests for Records

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PURPOSE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and §§ 2.2-3704 and 2.2-3704.01 of the Code of Virginia guides users on how to make or respond to a FOIA request for public records. This outline breaks down these procedural requirements and provides practical advice for adhering to FOIA when making or responding to a request for agency records.

POLICY

The Virginia Department of Forestry is committed to openness and transparency in its operations. To that effect, agency employees shall make every reasonable effort to respond to requests for agency records in accordance with the provisions of the Virginia Freedom of Information Act and the procedures indicated in this document.

DEFINITIONS

“**Agency**” and “**VDOF**” means the Virginia Department of Forestry.

“**FOIA**” means the Virginia Freedom of Information Act (Va. Code § 2.2-3700 *et seq.*).

“**Public record**” or “**record**” means any writing and 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. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

PROCEDURES

Public Records under Freedom of Information Act (FOIA)

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. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

The definition of “public record” does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA.

Custodian of Records

The state forester, deputy state forester, chief of administration, assistant state forester, director of public information and director of human resources shall be the custodians of the records within their supervisory purview. Any custodian of records may designate others within their supervisory purview to serve as custodian of their records.

All requests for agency records shall be referred to the FOIA officer who is the Deputy State Forester. The FOIA officer shall be responsible for handling said request, including the preparation of all correspondence, additional contacts with the requester, and copying or providing access to the records being sought.

In the case of requests for records that the agency intends to deny, either partially or in their totality, the custodian of records shall notify and coordinate with the FOIA officer the preparation of the appropriate response letter.

Records Exemptions of General Applicability

- ◆ FOIA contains over 100 exemptions for records. Although many of these exemptions apply to specific agencies or to very content-specific records, there are several records exemptions of general applicability that may be used by virtually all public bodies. The records exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool. The use of any of these exemptions to not disclose information should be coordinated with the agencies FOIA officer.
 - [§2.2-3705.1\(1\)](#): Personnel Records
 - [§2.2-3705.1\(6\)](#): Vendor proprietary information
 - [§ 2.2-3705.1\(7\)](#): Computer software
 - [§ 2.2-3705.1\(8\)](#): Cost estimates of real property
 - [§ 2.2-3705.1\(10\)](#): Personal contact information
 - [§ 2.2-3705.5\(1\)](#): Health Records
 - [§ 2.2-3705.6\(3\)](#): Economic development and retention

- [§ 2.2-3705.6\(10\)](#): Virginia Public Procurement Act

Making a Request for Records

Who may request records under FOIA?

- ◆ Citizens of the Commonwealth;
- ◆ Representatives of newspapers and magazines with circulation in the Commonwealth; and
- ◆ Representatives of radio and television stations broadcasting in or into the Commonwealth.

Must a request mention “FOIA” specifically?

- ◆ 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.

Must a request be made in writing?

- ◆ No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing. Writing is recourse for both parties.
- ◆ The agency prefers that a request for records be in writing. However, FOIA does not require that the request be in writing. Therefore, if the requester declines to put the request in writing, the VDOF staff receiving the verbal request for records should document the request in writing and enter it as part of the agency's record of the request. Similarly, the request does not need to mention or refer to FOIA specifically. Thus, all requests for records should be treated as a request under FOIA and handled accordingly.

May VDOF require a requester to fill out a request form?

- ◆ No. A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request.
- ◆ VDOF does not have a FOIA Request Form.

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

- ◆ Yes. VDOF may require a requester to provide his name and legal address before processing a FOIA request. [NOTE: This is a tool a public body may use, but FOIA does not mandate that public bodies get identification first.]
- ◆ If the requester furnishes an out-of-state address and the requester is neither a representative of a newspaper or magazine with circulation in Virginia nor a representative of a radio or television station broadcasting in or into Virginia, the custodian of the requested record shall notify the FOIA officer who will then contact the requester and inquire whether the requester has a right to invoke FOIA.

RESPONDING TO A REQUEST FOR RECORDS

How long does a public body have to respond to a request?

- ◆ VDOF must respond within five working days of receipt of the request. [NOTE: Count the day after receipt as Day 1.
- ◆ **REMEMBER:** Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.

What are the permissible responses to a request?

As of July 1, 2007, VDOF must make one of the five responses allowed by FOIA:

1. Provide the requested records to the requester;

2. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with FOIA;
3. The requested records are being provided in part and are being withheld 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 FOIA;
4. 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; or
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 public body needs an additional seven work days in which to provide one of the four preceding responses.

When does a response need to be in writing?

- ◆ If any part of the answer is “NO” (i.e., response 2 OR 3 above), the response must:
 - Be in writing;
 - Identify with reasonable particularity the subject matter of withheld records; and
 - Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.
- ◆ If the records are being entirely withheld (i.e., response 2) then the response must also identify with reasonable particularity the volume of the withheld records.
- ◆ If the answer is “we cannot find it” or “it does not exist” (i.e., response 4 above), the response must
 - Be in writing; and
 - If VDOF knows that another public body has the records, it must provide contact information for the other public body.
- ◆ If the answer is “we need more time” and VDOF would like seven additional working days to respond (i.e., response 5 above), the response must:
 - Be in writing; and
 - Specify the conditions that make production of the records within the five-work-day period impossible.

How does VDOF respond if a record contains exempt and nonexempt information?

- ◆ Generally, if a record contains exempt and nonexempt information, VDOF must release the record and delete or excise only the exempt portion of the record.

Must VDOF create a record in response to a FOIA request?

- ◆ Generally, no if the requested record does not already exist. However, VDOF may abstract or summarize information under such terms and conditions as agreed between the requester and VDOF.

How much may VDOF charge for producing records?

- ◆ VDOF may make reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. VDOF may not charge extraneous or surplus fees unrelated to the production of the records. [NOTE: This means that VDOF cannot factor in expenses such as overhead or the cost of benefits paid to employees.] Charges for copies must not exceed the actual cost of duplication.
- ◆ A citizen may request that VDOF estimate the cost of supplying the requested records in advance. The five-working-day period to respond is paused for the amount of time that elapses between notice of the cost estimate and the response of the requester. If VDOF receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn.

- ◆ If VDOF elects to assess charges and the charges are less than or equal to \$200, the custodian shall send the records to the requester and cause the issuance of an invoice to the requester at the time VDOF provides the records to the requester. The VDOF shall explain the charges in the response letter. All payments should include a copy of invoice/letter and check should be payable to the Treasurer of Virginia and mailed to: Virginia Department of Forestry, 900 Natural Resources Drive, Suite 800, Charlottesville, VA 22903

Can VDOF require advance payment?

- ◆ When VDOF determines in advance that the charges for supplying the requested records are likely to exceed \$200, they may require the requester to pay a deposit before proceeding with the request. This deposit may not exceed the amount of the advance determination, and VDOF must credit it toward the final cost of supplying the records. If VDOF asks for the advance deposit, the five-working-day period to respond to the request is paused until the deposit is paid.

What can VDOF do if a requester does not pay for records provided under FOIA?

- ◆ Before responding to a new request for records, VDOF may require the requester to pay any amounts owed for previous requests for records that remain unpaid 30 days or more after billing.

Do these same requirements apply to a request for electronic records?

- ◆ Yes. Like all other records, regardless of format, VDOF may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. And like other records, when electronic records or databases contain both exempt and nonexempt records,
- ◆ VDOF must supply the nonexempt information and excise or delete the exempt information. The excision of exempt fields from a database or the conversion of data from one available format to another is not considered the creation of a new record under FOIA.
- ◆ VDOF must provide electronic records in any medium identified by the requester if that medium is used by VDOF in the regular course of business. If VDOF has the capability, this includes the option of posting the records on a website or delivering the records to an email address.
- ◆ VDOF is not required to produce records in a format not regularly used. However, VDOF must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and VDOF, including the payment of reasonable costs.

AUTHORITY

This policy and procedure is issued by the Virginia State Forester.

INTERPRETATION

The chief of administration and deputy state forester is responsible for the interpretation of this policy and procedure.

APPROVAL

I certify that this policy and procedure is approved and ready for publication.

John Colligan

Chief of Administration Name (Print)

Chief of Administration Signature

Ed Zimmer

Deputy State Forester Name (Print)

Deputy State Forester Signature