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**HOUSE BILL NO. 1722**

Offered January 12, 2011

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*A BILL to amend and reenact §§ 2.2-3704, 2.2-3714, and 2.2-3806 of the Code of Virginia, relating to the Virginia Freedom of Information Act; designation of public records; penalties for certain violations.*

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Patron—Marshall, R.G.

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Referred to Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-3704, 2.2-3714, and 2.2-3806 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to 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. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. *At the time of creation of any public record, the custodian of such records that are subject to this chapter shall designate whether the record is subject to the mandatory disclosure provisions of this chapter or otherwise exempt from disclosure. The designation shall appear on the face of the record and shall be updated by the custodian in a timely manner in the event of any changes. Failure to designate a record as required by this section shall, upon receipt of a request for such record, waive any charge authorized under subsection G.*

BC. 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 this 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 promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. 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 this chapter. 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.

2. 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 this chapter. 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. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

3. 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.

4. 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.

CD. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester

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59 concerning the production of the records requested.

60 *DE.* Subject to the provisions of subsection *G H*, no public body shall be required to create a new  
61 record if the record does not already exist. However, a public body may abstract or summarize  
62 information under such terms and conditions as agreed between the requester and the public body.

63 *EF.* Failure to respond to a request for records shall be deemed a denial of the request and shall  
64 constitute a violation of this chapter.

65 *FG.* A public body may make reasonable charges not to exceed its actual cost incurred in accessing,  
66 duplicating, supplying, or searching for the requested records. No public body shall impose any  
67 extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating  
68 or maintaining records or transacting the general business of the public body. *Nor shall any public body*  
69 *impose a charge or fee to designate a public record as required by subsection B.* Any duplicating fee  
70 charged by a public body shall not exceed the actual cost of duplication. The public body may also  
71 make a reasonable charge for the cost incurred in supplying records produced from a geographic  
72 information system at the request of anyone other than the owner of the land that is the subject of the  
73 request. However, such charges shall not exceed the actual cost to the public body in supplying such  
74 records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating  
75 topographical maps developed by the public body, for such maps or portions thereof, which encompass  
76 a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be  
77 estimated in advance at the request of the citizen.

78 *GH.* Public records maintained by a public body in an electronic data processing system, computer  
79 database, or any other structured collection of data shall be made available to a requester at a reasonable  
80 cost, not to exceed the actual cost in accordance with subsection *F G*. When electronic or other  
81 databases are combined or contain exempt and nonexempt records, the public body may provide access  
82 to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt  
83 records as provided by this chapter.

84 Public bodies shall produce nonexempt records maintained in an electronic database in any tangible  
85 medium identified by the requester, including, where the public body has the capability, the option of  
86 posting the records on a website or delivering the records through an electronic mail address provided  
87 by the requester, if that medium is used by the public body in the regular course of business. No public  
88 body shall be required to produce records from an electronic database in a format not regularly used by  
89 the public body. However, the public body shall make reasonable efforts to provide records in any  
90 format under such terms and conditions as agreed between the requester and public body, including the  
91 payment of reasonable costs. The excision of exempt fields of information from a database or the  
92 conversion of data from one available format to another shall not be deemed the creation, preparation or  
93 compilation of a new public record.

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

100 *IJ.* Before processing a request for records, a public body may require the requester to pay any  
101 amounts owed to the public body for previous requests for records that remain unpaid 30 days or more  
102 after billing.

103 *JK.* In the event a public body has transferred possession of public records to any entity, including  
104 but not limited to any other public body, for storage, maintenance, or archiving, the public body  
105 initiating the transfer of such records shall remain the custodian of such records for purposes of  
106 responding to requests for public records made pursuant to this chapter and shall be responsible for  
107 retrieving and supplying such public records to the requester. In the event a public body has transferred  
108 public records for storage, maintenance, or archiving and such transferring public body is no longer in  
109 existence, any public body that is a successor to the transferring public body shall be deemed the  
110 custodian of such records. In the event no successor entity exists, the entity in possession of the public  
111 records shall be deemed the custodian of the records for purposes of compliance with this chapter, and  
112 shall retrieve and supply such records to the requester.

113 § 2.2-3714. Violations and penalties.

114 In a proceeding commenced against ~~members~~ *any officer, employee, or member of a public bodies*  
115 *body* under § 2.2-3713 for a violation of § 2.2-3704, 2.2-3705.1 through 2.2-3705.8, 2.2-3706, 2.2-3707,  
116 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711 or 2.2-3712, the court, if it finds that a violation was willfully  
117 and knowingly made, shall impose upon such *officer, employee, or member* in his individual capacity,  
118 whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$250  
119 nor more than \$1,000, which amount shall be paid into the State Literary Fund. For a second or  
120 subsequent violation, such civil penalty shall be not less than \$1,000 nor more than \$2,500. A *public*

*employee found to have committed a willful and knowing violation may also be subject to other disciplinary action, including suspension, demotion, or termination of public employment.*

§ 2.2-3806. Rights of data subjects.

A. Any agency maintaining personal information shall:

1. Inform an individual who is asked to supply personal information about himself whether he is legally required, or may refuse, to supply the information requested, and also of any specific consequences that are known to the agency of providing or not providing the information.

2. Give notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing the information. However documented permission for dissemination in the hands of the other agency or organization shall satisfy the requirement of this subdivision. The notice may be given on applications or other data collection forms prepared by data subjects.

3. Upon request and proper identification of any data subject, or of his authorized agent, grant the data subject or agent the right to inspect, in a form comprehensible to him:

a. All personal information about that data subject except as provided in subdivision 1 of § 2.2-3705.1, subdivision 1 of § 2.2-3705.4, and subdivision 1 of § 2.2-3705.5.

b. The nature of the sources of the information.

c. The names of recipients, other than those with regular access authority, of personal information about the data subject including the identity of all persons and organizations involved and their relationship to the system when not having regular access authority, except that if the recipient has obtained the information as part of an ongoing criminal investigation such that disclosure of the investigation would jeopardize law-enforcement action, then no disclosure of such access shall be made to the data subject.

4. Comply with the following minimum conditions of disclosure to data subjects:

a. An agency shall make disclosures to data subjects required under this chapter, during normal business hours, in accordance with the procedures set forth in subsections ~~B~~ and ~~C~~ and ~~D~~ of § 2.2-3704 for responding to requests under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or within a time period as may be mutually agreed upon by the agency and the data subject.

b. The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, or (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable charges for document search and duplication in accordance with subsection ~~F~~ ~~G~~ of § 2.2-3704.

c. The data subject shall be permitted to be accompanied by a person of his choosing, who shall furnish reasonable identification. An agency may require the data subject to furnish a written statement granting the agency permission to discuss the individual's file in such person's presence.

5. If the data subject gives notice that he wishes to challenge, correct, or explain information about him in the information system, the following minimum procedures shall be followed:

a. The agency maintaining the information system shall investigate, and record the current status of that personal information.

b. If, after such investigation, the information is found to be incomplete, inaccurate, not pertinent, not timely, or not necessary to be retained, it shall be promptly corrected or purged.

c. If the investigation does not resolve the dispute, the data subject may file a statement of not more than 200 words setting forth his position.

d. Whenever a statement of dispute is filed, the agency maintaining the information system shall supply any previous recipient with a copy of the statement and, in any subsequent dissemination or use of the information in question, clearly note that it is disputed and supply the statement of the data subject along with the information.

e. The agency maintaining the information system shall clearly and conspicuously disclose to the data subject his rights to make such a request.

f. Following any correction or purging of personal information the agency shall furnish to past recipients notification that the item has been purged or corrected whose receipt shall be acknowledged.

B. Nothing in this chapter shall be construed to require an agency to disseminate any recommendation or letter of reference from or to a third party that is a part of the personnel file of any data subject nor to disseminate any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by any public body.

As used in this subsection, "test or examination" includes ~~(i)~~ (a) any scoring key for any such test or

182 examination and ~~(ii)~~ (b) any other document that would jeopardize the security of the test or  
183 examination. Nothing contained in this subsection shall prohibit the release of test scores or results as  
184 provided by law, or to limit access to individual records as provided by law; however, the subject of the  
185 employment tests shall be entitled to review and inspect all documents relative to his performance on  
186 those employment tests.

187 When, in the reasonable opinion of the public body, any such test or examination no longer has any  
188 potential for future use, and the security of future tests or examinations will not be jeopardized, the test  
189 or examination shall be made available to the public. Minimum competency tests administered to public  
190 school children shall be made available to the public contemporaneously with statewide release of the  
191 scores of those taking such tests, but in no event shall such tests be made available to the public later  
192 than six months after the administration of such tests.

193 C. Neither any provision of this chapter nor any provision of the Freedom of Information Act  
194 (§ 2.2-3700 et seq.) shall be construed to deny public access to records of the position, job classification,  
195 official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to  
196 any public officer, official or employee at any level of state, local or regional government in the  
197 Commonwealth. The provisions of this subsection shall not apply to records of the official salaries or  
198 rates of pay of public employees whose annual rate of pay is \$10,000 or less.

199 D. Nothing in this section or in this chapter shall be construed to require an agency to disseminate  
200 information derived from tax returns in violation of §§ 2.2-3705.7 and 58.1-3.

201 **2. That the provisions of § 2.2-3704 of this act shall apply to public records created on or after**  
202 **July 1, 2011.**