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SENATE BILL NO. 876

Offered January 18, 2018

A BILL to amend and reenact §§ 2.2-3701, 2.2-3704, and 2.2-3704.01 of the Code of Virginia, relating to the Virginia Freedom of Information Act; transfer of public records; definition of "custodian."

Patron—Mason

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3701, 2.2-3704, and 2.2-3704.01 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Custodian" means the official in charge of a public body or other entity that has created, prepared, or revised a public record or that maintains or possesses a public record. There can be more than one custodian of any public record, and each custodian is responsible for the production of the record upon request.

"Electronic communication" means any audio or combined audio and visual communication method.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, 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.

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59 "Regional public body" means a unit of government organized as provided by law within defined  
60 boundaries, as determined by the General Assembly, which unit includes two or more localities.

61 "Scholastic records" means those records containing information directly related to a student or an  
62 applicant for admission and maintained by a public body that is an educational agency or institution or  
63 by a person acting for such agency or institution.

64 **§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and**  
65 **responding to request; charges; transfer of records for storage, etc.**

66 A. Except as otherwise specifically provided by law, all public records shall be open to citizens of  
67 the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth,  
68 and representatives of radio and television stations broadcasting in or into the Commonwealth during the  
69 regular office hours of the custodian of such records. Access to such records shall be provided by the  
70 custodian in accordance with this chapter by inspection or by providing copies of the requested records,  
71 at the option of the requester. The custodian may require the requester to provide his name and legal  
72 address. The custodian of such records shall take all necessary precautions for their preservation and  
73 safekeeping.

74 B. A request for public records shall identify the requested records with reasonable specificity. The  
75 request need not make reference to this chapter in order to invoke the provisions of this chapter or to  
76 impose the time limits for response by a public body. Any public body that is subject to this chapter  
77 and that is the custodian of the requested records shall promptly, but in all cases within five working  
78 days of receiving a request, provide the requested records to the requester or make one of the following  
79 responses in writing:

80 1. The requested records are being entirely withheld. Such response shall identify with reasonable  
81 particularity the volume and subject matter of withheld records, and cite, as to each category of withheld  
82 records, the specific Code section that authorizes the withholding of the records.

83 2. The requested records are being provided in part and are being withheld in part. Such response  
84 shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each  
85 category of withheld records, the specific Code section that authorizes the withholding of the records.

86 3. The requested records could not be found or do not exist. However, if the public body that  
87 received the request knows that another public body has the requested records, the response shall include  
88 contact information for the other public body.

89 4. It is not practically possible to provide the requested records or to determine whether they are  
90 available within the five-work-day period. Such response shall specify the conditions that make a  
91 response impossible. If the response is made within five working days, the public body shall have an  
92 additional seven work days in which to provide one of the four preceding responses.

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

99 D. Subject to the provisions of subsection G, no public body shall be required to create a new record  
100 if the record does not already exist. However, a public body may abstract or summarize information  
101 under such terms and conditions as agreed between the requester and the public body.

102 E. Failure to respond to a request for records shall be deemed a denial of the request and shall  
103 constitute a violation of this chapter.

104 F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing,  
105 duplicating, supplying, or searching for the requested records. No public body shall impose any  
106 extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating  
107 or maintaining records or transacting the general business of the public body. Any duplicating fee  
108 charged by a public body shall not exceed the actual cost of duplication. The public body may also  
109 make a reasonable charge for the cost incurred in supplying records produced from a geographic  
110 information system at the request of anyone other than the owner of the land that is the subject of the  
111 request. However, such charges shall not exceed the actual cost to the public body in supplying such  
112 records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating  
113 topographical maps developed by the public body, for such maps or portions thereof, which encompass  
114 a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be  
115 estimated in advance at the request of the citizen.

116 G. Public records maintained by a public body in an electronic data processing system, computer  
117 database, or any other structured collection of data shall be made available to a requester at a reasonable  
118 cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases  
119 are combined or contain exempt and nonexempt records, the public body may provide access to the  
120 exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as

121 provided by this chapter.

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

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

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

141 J. In the event *that* a public body has transferred possession of *the entirety of any public records*  
142 *record* to any entity, including but not limited to any other public body, for storage, maintenance, or  
143 archiving, the public body initiating the transfer of such records shall remain the custodian of such  
144 records for purposes of responding to requests for public records made pursuant to this chapter and shall  
145 be responsible for retrieving and supplying such public records to the requester. *For the purpose of this*  
146 *subsection, the transfer of a portion of information contained in one public body's public record to*  
147 *another public body shall not be considered the transfer of an entire public record.*

148 In the event *that* a public body has transferred public records for storage, maintenance, or archiving  
149 and such transferring public body is no longer in existence, any public body that is a successor to the  
150 transferring public body shall be deemed the custodian of such records. In the event *that* no successor  
151 entity exists, the entity in possession of the public records shall be deemed the custodian of the records  
152 for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester.

153 Nothing in this subsection shall be construed to apply to records transferred to the Library of  
154 Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act  
155 (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such  
156 permanently archived records and shall be responsible for responding to requests for such records made  
157 pursuant to this chapter.

158 **§ 2.2-3704.01. Records containing both excluded and nonexcluded information; duty to redact.**

159 No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public  
160 body to withhold a public record in its entirety on the grounds that *(i)* some portion of the public record  
161 is excluded from disclosure by this chapter or by any other provision of law *or (ii) information*  
162 *contained in such public record was provided by another public body.* A public record may be withheld  
163 from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or  
164 other provision of law applies to the entire content of the public record. Otherwise, only those portions  
165 of the public record containing information subject to an exclusion under this chapter or other provision  
166 of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.