

20201145D

HOUSE BILL NO. 5090

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Delegate Hurst
on September 9, 2020)

(Patron Prior to Substitute—Delegate Hurst)

A BILL to amend and reenact § 2.2-3706 of the Code of Virginia, relating to the Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3706 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3706. Disclosure of law-enforcement and criminal records; limitations.

A. Records required to be released. All public bodies engaged in criminal law-enforcement activities shall provide the following records and information when requested in accordance with the provisions of this chapter, except that the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted pursuant to § 19.2-11.2:

1. Criminal incident information relating to felony offenses contained in any report, notes, electronic communication, or other document, including filings through the incident-based reporting system, which shall include:

- a. A general description of the criminal activity reported;
- b. The date and time the alleged crime was committed;
- c. The general location where the alleged crime was committed;
- d. The identity of the investigating officer or other point of contact;
- e. A general description of any injuries suffered or property damaged or stolen; and
- f. Any diagrams related to the alleged crime or the location where the alleged crime was committed.

A verbal response as agreed to by the requester and the public body is sufficient to satisfy the requirements of subdivision 1.

Where However, when a court of record determines upon the petition of a law-enforcement agency or attorney for the Commonwealth by a preponderance of the evidence that the release of criminal incident information, however, is likely to jeopardize an ongoing investigation or prosecution or the safety of an individual, cause a suspect to flee or evade detection, disclose any information prohibited from release in subsection C, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information. Nothing in subdivision 1 shall be construed to authorize the withholding of those portions of such information that are not likely to cause the above-referenced damage. An investigation shall not be considered "ongoing" for purposes of this subsection if three or more years have elapsed from when the prosecution was finally adjudicated or the date the alleged crime was committed if no prosecution was made. Venue for this petition shall be in the locality in which the crime is being investigated;

2. Adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation;

3. Information, including race, ethnicity, and gender, relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest; and

4. Records of completed unattended death investigations to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. For the purposes of this subdivision, "unattended death" means a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated, and "immediate family" means the decedent's personal representative or, if no personal representative has qualified, the decedent's next of kin in order of intestate succession as set forth in § 64.2-200; and

5. Criminal investigative files relating to a case in which (i) criminal charges have been finally adjudicated or (ii) more than three years have elapsed from the date the alleged crime was committed if no prosecution was made. With respect to clause (ii), if the public body engaged in criminal law-enforcement activities investigating the alleged crime determines that the release of a criminal investigative file will jeopardize the possibility of future prosecution in a cold case, it may petition the circuit court wherein the public body is located to enjoin the release of the file.

For purposes of this subdivision:

"Cold case" means an investigation into a criminal case that has remained unsolved for at least three years after the crime occurred or evidence of a crime was first identified, whichever occurred last.

"Criminal investigative files" means any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system,

60 *diagrams, maps, photographs, correspondence, reports, witness statements, or evidence.*

61 *Nothing in this subdivision shall prohibit the disclosure of current anonymized, aggregate location*
62 *and demographic data collected pursuant to § 52-30.2 or similar data documenting law-enforcement*
63 *officer encounters with members of the public.*

64 *For the purposes of subdivisions 1 and 5, no photographic, audio, video, or other record depicting a*
65 *victim or allowing for a victim to be readily identified shall be released to anyone except (i) the victim;*
66 *(ii) his immediate family, as defined in subdivision 4, if the victim is deceased; or (iii) the parent or*
67 *guardian of the victim, if the victim is a minor.*

68 B. Discretionary releases. The following records are excluded from the mandatory disclosure
69 provisions of this chapter; but may be disclosed by the custodian, in his discretion, except where such
70 disclosure is prohibited by law:

71 1. ~~Criminal~~ Any criminal incident information or investigative files, defined as any documents and
72 information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs,
73 correspondence, reports, witness statements, and evidence relating to a criminal investigation or
74 prosecution, other than criminal incident information subject to release not required to be disclosed in
75 accordance with ~~subdivision~~ subdivisions A 1 and 5;

76 2. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators
77 authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police departments of public
78 institutions of higher education established pursuant to Article 3 (§ 23.1-809 et seq.) of Chapter 8 of
79 Title 23.1;

80 3. Records of local law-enforcement agencies relating to neighborhood watch programs that include
81 the names, addresses, and operating schedules of individual participants in the program that are provided
82 to such agencies under a promise of anonymity;

83 4. All records of persons imprisoned in penal institutions in the Commonwealth provided such
84 records relate to the imprisonment;

85 5. Records of law-enforcement agencies, to the extent that such records contain specific tactical
86 plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or
87 the general public;

88 6. All records of adult persons under (i) investigation or supervision by a local pretrial services
89 agency in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation,
90 probation supervision, or monitoring by a local community-based probation services agency in
91 accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or
92 supervision by state probation and parole services in accordance with Article 2 (§ 53.1-141 et seq.) of
93 Chapter 4 of Title 53.1;

94 7. Records of a law-enforcement agency to the extent that they disclose the telephone numbers for
95 cellular telephones, pagers, or comparable portable communication devices provided to its personnel for
96 use in the performance of their official duties;

97 8. Those portions of any records containing information related to undercover operations or
98 protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations
99 or protective details. Nothing in this subdivision shall operate to allow the withholding of information
100 concerning the overall costs or expenses associated with undercover operations or protective details;

101 9. Records of (i) background investigations of applicants for law-enforcement agency employment,
102 (ii) administrative investigations relating to allegations of wrongdoing by employees of a
103 law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement
104 agencies that are made confidential by law;

105 10. The identity of any victim, witness, or undercover officer, or investigative techniques or
106 procedures. However, the identity of any victim or witness shall be withheld if disclosure is prohibited
107 or restricted under § 19.2-11.2; and

108 11. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department
109 of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, including information obtained
110 from state, local, and regional officials, except to the extent that information is required to be posted on
111 the Internet pursuant to § 9.1-913.

112 C. Prohibited releases. The identity of any individual providing information about a crime or criminal
113 activity under a promise of anonymity shall not be disclosed.

114 D. Noncriminal records. Public bodies (i) engaged in emergency medical services, (ii) engaged in fire
115 protection services, (iii) engaged in criminal law-enforcement activities, or (iv) engaged in processing
116 calls for service or other communications to an emergency 911 system or any other equivalent reporting
117 system may withhold those portions of noncriminal incident or other noncriminal investigative reports or
118 materials that contain identifying information of a personal, medical, or financial nature where the
119 release of such information would jeopardize the safety or privacy of any person. Access to personnel
120 records of persons employed by a law-enforcement agency shall be governed by the provisions of
121 subdivision B 9 of this section and subdivision 1 of § 2.2-3705.1, as applicable.

122 E. Records of any call for service or other communication to an emergency 911 system or
123 communicated with any other equivalent reporting system shall be subject to the provisions of this
124 chapter.

125 F. Conflict resolution. In the event of conflict between this section as it relates to requests made
126 under this section and other provisions of law, this section shall control.