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HOUSE BILL NO. 734

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on March 2, 2022)

(Patron Prior to Substitute—Delegate Bell)

A BILL to amend and reenact § 2.2-3706.1 of the Code of Virginia, relating to the Virginia Freedom of Information Act; disclosure of certain criminal records.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3706.1 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3706.1. Disclosure of law-enforcement records; criminal incident information and certain criminal investigative files; limitations.

A. For purposes of this section:

"Criminal investigative files" means any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence, relating to a criminal investigation or prosecution, other than criminal incident information subject to disclosure in accordance with subsection B.

"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.

"Ongoing" refers to a case in which the prosecution has not been finally adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.

B. 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:

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

a. 1. A general description of the criminal activity reported;

b. 2. The date and time the alleged crime was committed;

c. 3. The general location where the alleged crime was committed;

d. 4. The identity of the investigating officer or other point of contact; and

e. 5. A 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, except that any diagrams described in subdivision 14 of § 2.2-3705.2 and information therein shall be excluded from mandatory disclosure, but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law.

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

2. Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence, relating to a criminal investigation or proceeding that is not ongoing.

C. Criminal investigative files relating to an ongoing criminal investigation or proceeding are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian in his discretion except as provided in subsection E or where such disclosure is prohibited by law.

D. Criminal investigative files relating to a criminal investigation or proceeding that is not ongoing are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except as provided in subsection E; however such records shall be disclosed, by request, to (i) the victim; (ii) members of the victim's immediate family, if the victim is deceased and the immediate family member to which the records are to be disclosed is not a person of interest or a suspect in the criminal investigation or proceeding; (iii) the parent or guardian of the victim, if the victim is a minor and the parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding; (iv) an attorney representing a petitioner in a petition for a writ of habeas corpus or writ of actual innocence pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2 or any other federal or state post-conviction proceeding; and (v) for the sole purpose of inspection at the location where such records are maintained by the public body that is the custodian of the records, an attorney who provides a sworn declaration that the attorney has been retained by an individual for purposes of pursuing a civil or criminal action and has a good faith basis to believe that the records being requested are material to such action.

60 *An attorney who is in receipt of criminal investigative files or has inspected criminal investigative*
61 *files pursuant to clause (iv) or (v) shall not release such criminal investigative files or any information*
62 *contained therein except as necessary to provide adequate legal representation to a petitioner or client*
63 *whom the attorney represents in a post-conviction proceeding or civil or criminal action. An attorney*
64 *who is in receipt of criminal investigative files pursuant to clause (iv) shall return the criminal*
65 *investigative files to the public body that is the custodian of such records within 90 days of a final*
66 *determination of any writ of habeas corpus, writ of actual innocence, or other federal or state*
67 *post-conviction proceeding or, if no petition for such writ or post-conviction proceeding was filed,*
68 *within six months of the attorney's receipt of the records.*

69 *E. The provisions of ~~subsection B~~ subsections C and D shall not apply if the release of such*
70 *information:*

71 *1. Would interfere with a particular ongoing criminal investigation or proceeding in a particularly*
72 *identifiable manner;*

73 *2. Would deprive a person of a right to a fair trial or an impartial adjudication;*

74 *3. Would constitute an unwarranted invasion of personal privacy;*

75 *4. Would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by*
76 *a law-enforcement agency in the course of a criminal investigation, information furnished only by a*
77 *confidential source;*

78 *5. Would disclose law-enforcement investigative techniques and procedures, if such disclosure could*
79 *reasonably be expected to risk circumvention of the law; or*

80 *6. Would endanger the life or physical safety of any individual.*

81 *Nothing in this subsection shall be construed to authorize the withholding of those portions of such*
82 *information that are unlikely to cause any effect listed herein.*

83 *~~D.~~ F. Notwithstanding the provisions of subsections C and D, no criminal investigative file or*
84 *portion thereof shall be disclosed to any requester pursuant to this section except (i) the victim; (ii)*
85 *members of the victim's immediate family, if the victim is deceased and the immediate family member to*
86 *which the records are to be disclosed is not a person of interest or a suspect in the criminal*
87 *investigation or proceeding; (iii) the parent or guardian of the victim, if the victim is a minor and the*
88 *parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding;*
89 *or (iv) an attorney representing a petitioner in a petition for a writ of habeas corpus or writ of actual*
90 *innocence pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2 or any other federal or state*
91 *post-conviction proceeding unless the public body has made reasonable efforts to notify any individual*
92 *listed in clause (i), (ii), or (iii). Upon notification of the request, any individual listed in clause (i), (ii),*
93 *or (iii) may file in an appropriate court a petition for an injunction to prevent the disclosure of the*
94 *records or other physical evidence. The period within which the public body shall respond pursuant to*
95 *§ 2.2-3704 shall be tolled for 14 days to allow for any such person to file a petition for an injunction. If*
96 *the public body receives actual notice of the filing of a petition within the 14-day period, the time within*
97 *which the public body shall respond shall be further tolled for the period of time that elapses between*
98 *the public body's receipt of such actual notice and any resulting disposition by the court.*

99 *In making its determination, a court shall consider the following:*

100 *1. If disclosure of the public records would constitute an unwarranted invasion of personal privacy;*

101 *2. If disclosure of the public records would endanger the life or physical safety of any individual;*

102 *3. If disclosure of the public records would subject the victim, members of the victim's immediate*
103 *family, or the parent or guardian of the victim to severe mental or emotional distress;*

104 *4. Who the requester is and for what purpose the public records are requested; and*

105 *5. Any other factor or information deemed by the court to be relevant.*

106 *If the court grants an injunction, the public body shall be prohibited from disclosing the public*
107 *records.*

108 *G. No photographic, audio, video, or other record depicting a victim or allowing for a victim to be*
109 *readily identified shall be released pursuant to subsection C or D to anyone except (i) the victim; (ii)*
110 *members of the victim's immediate family, if the victim is deceased and the immediate family member to*
111 *which the records are to be disclosed is not a person of interest or a suspect in the criminal*
112 *investigation or proceeding; or (iii) the victim's parent or guardian, if the victim is a minor and the*
113 *parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding.*

114 *H. Nothing in this section shall prohibit the disclosure of current anonymized, aggregate location and*
115 *demographic data collected pursuant to § 52-30.2 or similar data documenting law-enforcement officer*
116 *encounters with members of the public.*

117 *No photographic, audio, video, or other record depicting a victim or allowing for a victim to be*
118 *readily identified, except for transcripts of recorded interviews between a victim and law enforcement,*
119 *shall be released pursuant to subdivision B 2 to anyone except (i) the victim; (ii) members of the*
120 *immediate family of the victim, if the victim is deceased; or (iii) the parent or guardian of the victim, if*
121 *the victim is a minor.*

122 ~~E.~~ *I.* In the event of a conflict between this section as it relates to requests made under this section
123 and other provisions of law, the other provisions of law, including court sealing orders, that restrict
124 disclosure of criminal investigative files, ~~as defined in subsection B,~~ shall control.