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HOUSE BILL NO. 209

Offered January 11, 2006

Prefiled January 3, 2006

A BILL to amend and reenact §§ 17.1-213, 42.1-77, 42.1-78, 42.1-79, 42.1-82, 42.1-85, 42.1-86, 42.1-86.1, and 42.1-87 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 42.1-76.1 and 42.1-90.1, and to repeal §§ 42.1-83 and 42.1-91 of the Code of Virginia, relating to electronic records and the Virginia Public Records Act.

Patrons—Cox, Alexander, McDougle and Wright; Senators: Bell and Houck

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-213, 42.1-77, 42.1-78, 42.1-79, 42.1-82, 42.1-85, 42.1-86, 42.1-86.1, and 42.1-87 of the Code of Virginia are amended and reenacted, and the Code of Virginia is amended by adding sections numbered 42.1-76.1 and 42.1-90.1 as follows:

§ 17.1-213. Disposition of papers in ended cases.

A. All case files for cases ended prior to January 1, 1913, shall be permanently maintained in hardcopy form, either in the locality served by the circuit court where such files originated or in The Library of Virginia in accordance with the provisions of §§ ~~42.1-83~~ and 42.1-86 and subsection C of § 42.1-87.

B. The following records for cases ending on or after January 1, 1913, may be destroyed in their entirety at the discretion of the clerk of each circuit court after having been retained for 10 years after conclusion:

- 1. Conditional sales contracts;
- 2. Concealed weapons permit applications;
- 3. Minister appointments;
- 4. Petitions for appointment of trustee;
- 5. Name changes;
- 6. Nolle prosequi cases;
- 7. Civil actions that are voluntarily dismissed, including nonsuits, cases that are dismissed as settled and agreed, cases that are dismissed with or without prejudice, cases that are discontinued or dismissed under § 8.01-335 and district court appeals dismissed under § 16.1-113 prior to 1988;
- 8. Misdemeanor and traffic cases, including those which were commenced on a felony charge but concluded as a misdemeanor;
- 9. Suits to enforce a lien;
- 10. Garnishments;
- 11. Executions except for those covered in § 8.01-484;
- 12. Miscellaneous oaths and qualifications, but only if the order or oath or qualification is spread in the appropriate order book; and
- 13. Civil cases pertaining to declarations of habitual offender status and full restoration of driving privileges.

C. All other records or cases ending on or after January 1, 1913, may be destroyed in their entirety at the discretion of the clerk of each circuit court subject to the following guidelines:

- 1. All civil case files to which subsection D does not pertain may be destroyed after 20 years from the court order date.
- 2. All criminal cases dismissed, including those not a true bill, acquittals and not guilty verdicts, may be destroyed after 10 years from the court order date.
- 3. All criminal case files involving a felony conviction may be destroyed (i) after 20 years from the sentencing date or (ii) when the sentence term ends, whichever comes later.

D. Under the provisions of subsections B and C, the entire file of any case deemed by the local clerk of court to have historical value, as defined in § 42.1-77, or genealogical or sensational significance shall be retained permanently as shall all cases in which the title to real estate is established, conveyed or condemned by an order or decree of the court. The final order for all cases in which the title to real estate is so affected shall include an appropriate notification thereof to the clerk.

E. Except as provided in subsection A, the clerk of a circuit court may cause (i) any or all ended records, papers, or documents pertaining to civil and criminal cases which have been ended for a period of three years or longer; (ii) any unexecuted search warrants and affidavits for unexecuted search warrants, provided at least three years have passed since issued; (iii) any abstracts of judgments; and (iv)

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59 original wills, to be destroyed if such records, papers, documents, or wills no longer have administrative,  
 60 fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or  
 61 documents have been microfilmed or converted to an electronic format. Such microfilm and  
 62 microphotographic processes and equipment shall meet state archival microfilm standards pursuant to  
 63 § 42.1-82, or such electronic format shall follow state electronic records guidelines, and such records,  
 64 papers, or documents so converted shall be placed in conveniently accessible files and provisions made  
 65 for examining and using same. The clerk shall further provide security negative copies of any such  
 66 microfilmed materials for storage in The Library of Virginia.

67 § 42.1-76.1. *Notice of Chapter.*

68 *Any person elected, reelected, appointed, or reappointed to the governing body of any agency subject*  
 69 *to this chapter shall (i) be furnished by the agency or public body's administrator or legal counsel with*  
 70 *a copy of this chapter within two weeks following election, reelection, appointment, or reappointment*  
 71 *and (ii) read and become familiar with the provisions of this chapter.*

72 § 42.1-77. Definitions.

73 As used in this chapter:

74 "Agency" means all boards, commissions, departments, divisions, institutions, authorities, or parts  
 75 thereof, of the Commonwealth or its political subdivisions and includes the offices of constitutional  
 76 officers.

77 "Archival quality" means a quality of reproduction consistent with established standards specified by  
 78 state and national agencies and organizations responsible for establishing such standards, such as the  
 79 Association for Information and Image Management, the American National Standards  
 80 Association, and the National Bureau Institute of Standards and Technology.

81 "Archival record" means a public record of continuing and enduring value useful to the citizens of  
 82 the Commonwealth and necessary to the administrative functions of public agencies in the conduct of  
 83 services and activities mandated by law that is identified on a Library of Virginia approved records  
 84 retention and disposition schedule as having sufficient informational value to be permanently maintained  
 85 by the Commonwealth. In appraisal of public records deemed archival, the terms "administrative,"  
 86 "fiscal," "historical," and "legal" value shall be defined as:

87 1. "Administrative value": Records shall be deemed of administrative value if they have continuing  
 88 utility in the operation of an agency.

89 2. "Fiscal value": Records shall be deemed of fiscal value if they are needed to document and verify  
 90 financial authorizations, obligations, and transactions.

91 3. "Historical value": Records shall be deemed of historical value if they contain unique information,  
 92 regardless of age, that provides understanding of some aspect of the government and promotes the  
 93 development of an informed and enlightened citizenry.

94 4. "Legal value": Records shall be deemed of legal value if they document actions taken in the  
 95 protection and proving of legal or civil rights and obligations of individuals and agencies.

96 "Archives" means the program administered by The Library of Virginia for the preservation of  
 97 archival records.

98 "Board" means the State Library Board.

99 "Conversion" means the act of moving electronic records to a different format, especially data from  
 100 an obsolete format to a current format.

101 "Custodian" means the public official in charge of an office having public records.

102 "Disaster plan" means the information maintained by an agency that outlines recovery techniques and  
 103 methods to be followed in case of an emergency that impacts the agency's records.

104 "Electronic record" means a public record whose creation, storage, and access require the use of an  
 105 automated system or device. Ownership of the hardware, software, or media used to create, store, or  
 106 access the electronic record has no bearing on a determination of whether such record is a public  
 107 record.

108 "Essential public record" means records that are required for recovery and reconstruction of any  
 109 agency to enable it to resume its core operations and functions and to protect the rights and interests of  
 110 persons.

111 "Librarian of Virginia" means the State Librarian of Virginia or his designated representative.

112 "Lifecycle" means the creation, use, maintenance, and disposition of a public record.

113 "Metadata" means data describing the context, content, and structure of records and their  
 114 management through time.

115 "Migration" means the act of moving electronic records from one information system or medium to  
 116 another to ensure continued access to the records while maintaining the records' authenticity, integrity,  
 117 reliability, and usability.

118 "Original record" means the first generation of the information and is the superior preferred version  
 119 of a record. Archival records should to the maximum extent possible be original records.

120 "Preservation" means the processes and operations involved in ensuring the technical and intellectual

121 survival of authentic records through time.

122 "Private record" means a record that does not relate to or affect the carrying out of the constitutional,  
123 statutory, or other official ceremonial duties of a public official, including the correspondence, diaries,  
124 journals, or notes that are not prepared for, utilized for, circulated, or communicated in the course of  
125 transacting public business.

126 "Public official" means all persons holding any office created by the Constitution of Virginia or by  
127 any act of the General Assembly, the Governor and all other officers of the executive branch of the state  
128 government, and all other officers, heads, presidents or chairmen of boards, commissions, departments,  
129 and agencies of the state government or its political subdivisions.

130 "Public record" or "record" means recorded information that documents a transaction or activity by or  
131 with any public officer, agency or employee of an agency. Regardless of physical form or characteristic,  
132 the recorded information is a public record if it is produced, collected, received or retained in pursuance  
133 of law or in connection with the transaction of public business. The medium upon which such  
134 information is recorded has no bearing on the determination of whether the recording is a public record.

135 For purposes of this chapter, "public record" shall not include nonrecord materials, meaning ~~reference~~  
136 ~~books and exhibit~~ materials made or acquired and preserved solely for reference use or exhibition  
137 purposes, extra copies of documents preserved only for convenience or reference, and stocks of  
138 publications.

139 "Records retention and disposition schedule" means a Library of Virginia-approved timetable stating  
140 the required retention period and disposition action of a records series. *The administrative, fiscal,*  
141 *historical, and legal value of a public record shall be considered in appraising its appropriate retention*  
142 *schedule. The terms "administrative," "fiscal," "historical," and "legal" value shall be defined as:*

143 1. "Administrative value": *Records shall be deemed of administrative value if they have continuing*  
144 *utility in the operation of an agency.*

145 2. "Fiscal value": *Records shall be deemed of fiscal value if they are needed to document and verify*  
146 *financial authorizations, obligations, and transactions.*

147 3. "Historical value": *Records shall be deemed of historical value if they contain unique information,*  
148 *regardless of age, that provides understanding of some aspect of the government and promotes the*  
149 *development of an informed and enlightened citizenry.*

150 4. "Legal value": *Records shall be deemed of legal value if they document actions taken in the*  
151 *protection and proving of legal or civil rights and obligations of individuals and agencies.*

152 § 42.1-78. Confidentiality safeguarded.

153 Any records made confidential by law shall be so treated. Records which by law are required to be  
154 closed to the public shall not be deemed to be made open to the public under the provisions of this  
155 chapter. Records in the custody of The Library of Virginia which are required to be closed to the public  
156 shall be open for public access ~~400~~ 75 years after the date of creation of the record. No provision of  
157 this chapter shall be construed to authorize or require the opening of any records ordered to be sealed  
158 by a court. All records deposited in the archives that are not made confidential by law shall be open to  
159 public access.

160 § 42.1-79. Records management function vested in ~~Board; State Library Board to be official~~  
161 ~~eustodian; State Archivist~~*The Library of Virginia.*

162 A. The archival and records management function shall be vested in ~~the State~~ *The Library of Virginia*  
163 ~~Board.~~ *The State Library of Virginia Board* shall be the official custodian and trustee for the  
164 Commonwealth of all public records of whatever kind, *and regardless of physical form or*  
165 *characteristics*, that are transferred to it from any agency. As the Commonwealth's official repository of  
166 public records, The Library of Virginia shall assume *ownership and* administrative control of such  
167 records on behalf of the Commonwealth. *The Library of Virginia shall own and operate any equipment*  
168 *necessary to manage and retain control of electronic archival records in its custody, but may, at its*  
169 *discretion, contract with third-party entities to provide any or all services related to managing archival*  
170 *records on equipment owned by the contractor, by other third parties, or by The Library of Virginia.*

171 B. The Librarian of Virginia shall name a State Archivist who shall perform such functions as the  
172 Librarian of Virginia assigns.

173 C. *Whenever legislation affecting public records management and preservation is under*  
174 *consideration, The Library of Virginia shall review the proposal and advise the General Assembly on*  
175 *the effects of its proposed implementation.*

176 § 42.1-82. Duties and powers of Library Board.

177 A. The State Library Board shall:

178 1. Issue regulations to ~~facilitate the creation, preservation, storage, filing, reformatting, management,~~  
179 ~~and destruction of public records by all agencies.~~ Such regulations shall establish procedures for records  
180 ~~management containing recommendations for the retention, disposal or other disposition of public~~  
181 ~~records; procedures for the physical destruction or other disposition of public records proposed for~~

182 disposal; standards for the reproduction of records by photocopy or microphotography processes with the  
 183 view to the disposal of the original records. The *concerning* procedures for the disposal, physical  
 184 destruction or other disposition of public records containing social security numbers. *The procedures*  
 185 shall include all reasonable steps to destroy such documents by (i) shredding, (ii) erasing, or (iii)  
 186 otherwise modifying the social security numbers in those records to make them unreadable or  
 187 undecipherable by any means. Such standards shall relate to the quality of film used, preparation of the  
 188 records for filming, proper identification of the records so that any individual document or series of  
 189 documents can be located on the film with reasonable facility, and that the copies contain all significant  
 190 record detail, to the end that the photographic or microphotographic copies shall be of archival quality.

191 2. Issue regulations specifying permissible qualities of paper, ink, and other materials to be used by  
 192 agencies for public record purposes. The Board shall determine the specifications for and shall select  
 193 and make available to all agencies lists of approved papers, photographic materials, ink, or other writing  
 194 materials for archival public records, and only those approved may be purchased for use in the making  
 195 of such records. These regulations and specifications shall also apply to clerks of courts of record.

196 3. Provide assistance to agencies in determining what records no longer have administrative, legal,  
 197 fiscal, or historical archival value and should be destroyed or disposed of in another manner. Each  
 198 public official having in his custody public records shall assist the Board in the preparation of an  
 199 inventory of all public records in his custody and in preparing a suggested schedule for retention and  
 200 disposition of such records. No land or personal property book shall be destroyed without being first  
 201 offered to The Library of Virginia for preservation.

202 All records created prior to the Constitution of 1902 that are declared archival may be transferred to  
 203 the archives.

204 *Issue regulations and guidelines designed to facilitate the creation, preservation, storage, filing,*  
 205 *reformatting, management, and destruction of public records by agencies. Such regulations shall*  
 206 *mandate procedures for records management and include recommendations for the creation, retention,*  
 207 *disposal, or other disposition of public records.*

208 *B. The State Library Board may establish advisory committees composed of persons with expertise in*  
 209 *the matters under consideration to assist the Library Board in developing regulations and guidelines.*

210 § 42.1-85. *Duties of Librarian of VirginiaRecords Management Program; agencies to cooperate;*  
 211 *agencies to designate records officer.*

212 A. The ~~Librarian~~ *Library* of Virginia shall administer a records management program for the  
 213 application of efficient and economical ~~management~~ *methods to the creation, utilization, maintenance,*  
 214 ~~retention, preservation, and disposal for managing the lifecycle~~ *of public records consistent with rules,*  
 215 ~~regulations, or standards and guidelines~~ *promulgated by the State Library Board, including operations*  
 216 *operation of a records center or centers. It shall be the duty of the* ~~The Librarian~~ *Library of Virginia to*  
 217 *shall establish procedures and techniques for the effective management of public records, to make*  
 218 *continuing surveys of paper work operations* ~~records and records keeping practices~~, and to recommend  
 219 improvements in current records management practices, including the use of space, equipment, *software,*  
 220 and supplies employed in creating, maintaining, and servicing records.

221 B. ~~It shall be the duty of any~~ *Any* agency with public records ~~to shall~~ cooperate with ~~the Librarian~~ *The*  
 222 *Library of Virginia in conducting surveys. and to Each agency shall establish and maintain an active,*  
 223 *continuing program for the economical and efficient management of the records of such agency. The*  
 224 *agency shall be responsible for ensuring that its public records are preserved, maintained, and*  
 225 *accessible throughout their lifecycle, including converting and migrating electronic records as often as*  
 226 *necessary so that information is not lost due to hardware, software, or media obsolescence or*  
 227 *deterioration. Any public official who converts or migrates an electronic record shall ensure that it is an*  
 228 *accurate copy of the original record. The converted or migrated record shall have the force of the*  
 229 *original.*

230 C. Each state agency and political subdivision of this Commonwealth shall designate as many as  
 231 appropriate, but at least one, records officer to serve as a liaison to The Library of Virginia for the  
 232 purposes of implementing and overseeing a records management program, and coordinating legal  
 233 disposition, including destruction, of obsolete records. Designation of state agency records officers shall  
 234 be by the respective agency head. Designation of a records officer for political subdivisions shall be by  
 235 the governing body or chief administrative official of the political subdivision. *Each entity responsible for*  
 236 *designating a records officer shall provide The Library of Virginia with the name and contact*  
 237 *information of the designated records officer, and shall ensure that such information is updated in a*  
 238 *timely manner in the event of any changes.*

239 D. *The Library of Virginia shall develop and make available training and education opportunities*  
 240 *concerning the requirements of and compliance with this chapter for records officers in the*  
 241 *Commonwealth.*

242 § 42.1-86. *Program to select and preserve important records; availability to public* ~~Essential public~~  
 243 *records; security recovery copies; disaster plans.*

244 A. In cooperation with the head of each agency, ~~the Librarian~~*The Library* of Virginia shall establish  
 245 and maintain a program for the selection and preservation of *essential* public records considered  
 246 ~~essential to the operation of government and for the protection of the rights and interests of persons.~~ He  
 247 *The program* shall provide for preserving, classifying, arranging, and indexing *essential public records*  
 248 so that such records are made available to the public. ~~and The program shall make security~~ *provide for*  
 249 *making recovery* copies or designate as ~~security~~ *recovery* copies existing copies of such essential public  
 250 records.

251 B. ~~Security~~ *Recovery* copies shall be of archival quality ~~meet quality standards established by The~~  
 252 *Library of Virginia* and shall be made by ~~photographic, photostatic, microfilm, microcard, miniature~~  
 253 ~~photographic, or other~~ *a process which that* accurately reproduces *the record* and forms a durable  
 254 medium. ~~A recovery copy may also be made by creating a paper or electronic copy of an original~~  
 255 *electronic record.* ~~Security~~ *Recovery* copies shall have the same force and effect for all purposes as the  
 256 original record and shall be as admissible in evidence as the original record whether the original record  
 257 is in existence or not. ~~Security~~ *Recovery* copies shall be preserved in the place and manner prescribed  
 258 by the State Library Board and the Governor. ~~Public records deemed unnecessary for the transaction of~~  
 259 ~~the business of any agency, yet deemed to be of archival value, may be transferred with the consent of~~  
 260 ~~the Librarian of Virginia to the custody of The Library of Virginia.~~

261 C. *The Library of Virginia shall develop a plan to ensure preservation of public records in the event*  
 262 *of disaster or emergency as defined in § 44-146.16. This plan shall be coordinated with the Department*  
 263 *of Emergency Management and copies shall be distributed to all agency heads. The plan shall be*  
 264 *reviewed and updated at least once every five years. The personnel of the Library shall be responsible*  
 265 *for coordinating emergency recovery operations when public records are affected. Each agency shall*  
 266 *ensure that a plan for the protection and recovery of public records is included in its comprehensive*  
 267 *disaster plan.*

268 § 42.1-86.1. Disposition of public records.

269 A. No agency shall sell or give away public records. No agency shall destroy or discard a public  
 270 record unless (i) the record appears on a records retention and disposition schedule approved pursuant to  
 271 § 42.1-82 and the record's retention period has expired; (ii) a certificate of records destruction, as  
 272 designated by the Librarian of Virginia, has been properly completed and approved by the agency's  
 273 designated records officer; and (iii) there is no litigation, audit, investigation, request for records  
 274 pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), or renegotiation of the  
 275 relevant records retention and disposition schedule pending at the expiration of the retention period for  
 276 the applicable records series. After a record is destroyed or discarded, the agency shall forward the  
 277 original certificate of records destruction to The Library of Virginia.

278 B. *No agency shall destroy any public record created before 1912 without first offering it to The*  
 279 *Library of Virginia.*

280 § 42.1-87. ~~Where records kept; duties of agencies; repair, etc., of record books; agency heads not~~  
 281 ~~divested of certain authority~~*Archival public records.*

282 A. Custodians of archival public records shall keep them in fire-resistant, environmentally controlled,  
 283 physically secure rooms designed to ensure proper preservation and in such arrangement as to be easily  
 284 accessible. Current public records should be kept in the buildings in which they are ordinarily used. It  
 285 shall be the duty of each agency *to consult with The Library of Virginia to determine the best manner in*  
 286 *which to store long-term or archival electronic records. In entering into a contract with a third-party*  
 287 *storage provider for the storage of public records, an agency shall require the third-party to cooperate*  
 288 *with The Library of Virginia in complying with rules and regulations promulgated by the Board.*

289 B. *Public records deemed unnecessary for the transaction of the business of any state agency, yet*  
 290 *deemed to be of archival value, may be transferred with the consent of the Librarian of Virginia to the*  
 291 *custody of the Library of Virginia.*

292 C. *Public records deemed unnecessary for the transaction of the business of any county, city, or*  
 293 *town, yet deemed to be of archival value, shall be stored either in The Library of Virginia or in the*  
 294 *locality, at the decision of the local officials responsible for maintaining public records. Archival public*  
 295 *records shall be returned to the locality upon the written request of the local officials responsible for*  
 296 *maintaining local public records. Microfilm shall be stored in The Library of Virginia but the use*  
 297 *thereof shall be subject to the control of the local officials responsible for maintaining local public*  
 298 *records.*

299 Each agency shall establish and maintain an active and continuing program for the economic and  
 300 efficient management of public records.

301 D. Record books deemed archival should be copied or repaired, renovated or rebound if worn,  
 302 mutilated, damaged or difficult to read. Whenever the public records of any public official are in need  
 303 of repair, restoration or rebinding, a judge of the court of record or the head of such agency or political  
 304 subdivision of the Commonwealth may authorize that the records in need of repair be removed from the

305 building or office in which such records are ordinarily kept, for the length of time necessary to repair,  
306 restore or rebind them, provided such restoration and rebinding preserves the records without loss or  
307 damage to them. Before any restoration or repair work is initiated, a treatment proposal from the  
308 contractor shall be submitted and reviewed in consultation with The Library of Virginia. Any public  
309 official who causes a record book to be copied shall attest it and shall certify an oath that it is an  
310 accurate copy of the original book. The copy shall then have the force of the original.

311 *E.* Nothing in this chapter shall be construed to divest agency heads of the authority to determine the  
312 nature and form of the records required in the administration of their several departments or to compel  
313 the removal of records deemed necessary by them in the performance of their statutory duty. ~~Whenever~~  
314 ~~legislation affecting public records management and preservation is under consideration, The Library of~~  
315 ~~Virginia shall review the proposal and advise the General Assembly on the effects of its proposed~~  
316 ~~implementation.~~

317 *§ 42.1-90.1. Auditing*

318 *The Librarian may, in his discretion, conduct an audit of the records management practices of any*  
319 *agency. Any agency subject to the audit shall cooperate and provide the Library with any records or*  
320 *assistance that it requests. The Librarian shall compile a written summary of the findings of the audit*  
321 *and any actions necessary to bring the agency into compliance with this chapter. The summary shall be*  
322 *a public record, and shall be made available to the agency subject to the audit, the Governor, and the*  
323 *chairmen of the House and Senate Committees on General Laws and the House Appropriations and*  
324 *Senate Finance Committees of the General Assembly.*

325 **2. That §§ 42.1-83 and 42.1-91 of the Code of Virginia are repealed.**