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## SENATE BILL NO. 1371

Offered January 31, 2013

A *BILL to amend and reenact §§ 2.2-3704 and 2.2-3713 of the Code of Virginia, relating to the Virginia Freedom of Information Act; repetitive requests; remedies.*

Patron—Stuart

Unanimous consent to introduce

Referred to Committee on General Laws and Technology

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

**1. That §§ 2.2-3704 and 2.2-3713 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. 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.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is (i) for an extraordinary volume of records or requires an extraordinarily lengthy search or (ii) one of a series of requests by the same requester, and a response by the public body to any such request 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 concerning the production of the records requested.

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

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

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

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

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

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

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

96 J. In the event a public body has transferred possession of public records to any entity, including but  
97 not limited to any other public body, for storage, maintenance, or archiving, the public body initiating  
98 the transfer of such records shall remain the custodian of such records for purposes of responding to  
99 requests for public records made pursuant to this chapter and shall be responsible for retrieving and  
100 supplying such public records to the requester. In the event a public body has transferred public records  
101 for storage, maintenance, or archiving and such transferring public body is no longer in existence, any  
102 public body that is a successor to the transferring public body shall be deemed the custodian of such  
103 records. In the event no successor entity exists, the entity in possession of the public records shall be  
104 deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and  
105 supply such records to the requester. Nothing in this subsection shall be construed to apply to records  
106 transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the  
107 Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia  
108 shall be the custodian of such permanently archived records and shall be responsible for responding to  
109 requests for such records made pursuant to this chapter.

110 **§ 2.2-3713. Proceedings for enforcement of chapter.**

111 A. Any person, including the attorney for the Commonwealth acting in his official or individual  
112 capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights  
113 and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good  
114 cause. Such petition may be brought in the name of the person notwithstanding that a request for public  
115 records was made by the person's attorney in his representative capacity. Venue for the petition shall be  
116 addressed as follows:

- 117 1. In a case involving a local public body, to the general district court or circuit court of the county  
118 or city from which the public body has been elected or appointed to serve and in which such rights and  
119 privileges were so denied;
- 120 2. In a case involving a regional public body, to the general district or circuit court of the county or

city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. *In any action to enforce the provisions of this chapter, the court may decline to order production of the requested records if the evidence shows that the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body, (ii) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with § 2.2-3704.*

F. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

G. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.