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SENATE BILL NO. 324

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology)

(Patron Prior to Substitute—Senator Roem)

Senate Amendments in [] - February 2, 2024

A *BILL to amend and reenact § 2.2-3704 of the Code of Virginia, relating to Virginia Freedom of Information Act; charges for production of public records; report.*

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3704 of the Code of Virginia is 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 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 during the regular office hours of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. 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. 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. 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.

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 or, in the case of a request for criminal investigative files pursuant to § 2.2-3706.1, 60 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 for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body 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.

F. *I.* Except with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and such requests for scholastic records by a parent or legal guardian of a minor student or by a student who is 18 years of age or older, a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost, *except that (i) for the first hour of the first request made by a requester to a public body during a calendar year, a public body shall not charge a requester for any costs incurred during the first hour spent accessing [, duplicating, supplying,] or searching for the requested records and (ii) for*

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60 any additional time spent accessing [, duplicating, supplying,] or searching for such records, or for
61 any additional record requests, the public body shall not charge an hourly rate for accessing [,
62 duplicating, supplying,] or searching for the records exceeding the lesser of the hourly rate of pay of
63 the lowest-paid individual capable of fulfilling the request or \$40 per hour.

64 2. With regard to clause (ii) of subdivision 1, a public body may petition the appropriate court for
65 relief from the fee cap imposed by such clause upon showing by a preponderance of the evidence that
66 there is no qualified individual capable of fulfilling the request for \$40 per hour or less. Any such
67 petition shall be heard within seven days of the date when the same is made, provided that the public
68 body has sent and the requester has received a copy of the petition at least three working days prior to
69 filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality
70 that is included in a judicial circuit with another locality or localities shall be given precedence on the
71 docket of such court over all cases that are not otherwise given precedence by law. The period within
72 which the public body shall respond under this section shall be tolled for the amount of time that
73 elapses between the requester's receipt of a copy of the petition and a final disposition of the court. A
74 public body shall not pass along to the requester or otherwise incorporate into allowable charges any
75 court costs or fees resulting from such petition.

76 3. The Office of the Attorney General and any local public body, including local school boards, are
77 exempt from the fee cap imposed by clause (ii) of subdivision 1 and from the provisions of subdivision
78 2.

79 4. A public body shall document all requests for electronic public records that take longer than 30
80 minutes to fulfill and shall include the number of hours spent accessing or searching for the requested
81 records.

82 5. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup
83 the general costs associated with creating or maintaining records or transacting the general business of
84 the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of
85 duplication. The public body may also make a reasonable charge for the cost incurred in supplying
86 records produced from a geographic information system at the request of anyone other than the owner of
87 the land that is the subject of the request. However, such charges shall not exceed the actual cost to the
88 public body in supplying such records, except that the public body may charge, on a pro rata per acre
89 basis, for the cost of creating topographical maps developed by the public body, for such maps or
90 portions thereof, which encompass a contiguous area greater than 50 acres. Prior to conducting a search
91 for records, the public body shall notify the requester in writing that the public body may make
92 reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or
93 searching for requested records and inquire of the requester whether he would like to request a cost
94 estimate in advance of the supplying of the requested records. The public body shall provide the
95 requester with a cost estimate if requested. The period within which the public body shall respond under
96 this section shall be tolled for the amount of time that elapses between notice of the cost estimate and
97 the response of the requester. If the public body receives no response from the requester within 30 days
98 of sending the cost estimate, the request shall be deemed to be withdrawn. Any costs incurred by the
99 public body in estimating the cost of supplying the requested records shall be applied toward the overall
100 charges to be paid by the requester for the supplying of such requested records. Any local public body
101 that charges for the production of records pursuant to this section may provide an electronic method of
102 payment through which all payments for the production of such records to such locality may be made.
103 For purposes of this subsection, "electronic method of payment" means any kind of noncash payment
104 that does not involve a paper check and includes credit cards, debit cards, direct deposit, direct debit,
105 electronic checks, and payment through the use of telephonic or similar communications.

106 G. Public records maintained by a public body in an electronic data processing system, computer
107 database, or any other structured collection of data shall be made available to a requester at a reasonable
108 cost, not to exceed the actual cost and the costs permitted to be charged by a public body in accordance
109 with the provisions of subsection F. When electronic or other databases are combined or contain exempt
110 and nonexempt records, the public body may provide access to the exempt records if not otherwise
111 prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

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

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

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

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

2. That the provisions of [this act shall expire on July 1, 2025 the first enactment of this act shall not become effective unless reenacted by the 2025 Session of the General Assembly] .

3. That the Virginia Freedom of Information Advisory Council (the FOIA Council) shall study whether the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) allowing public bodies to charge requesters for the production of public records should be permanently amended to make access to public records easier for requesters. In conducting its study, the FOIA Council shall convene a work group consisting of citizens of the Commonwealth, representatives of state and local government entities, broadcast, print, and electronic media sources, open government organizations, and other interested parties, to examine the current FOIA provisions on charges and make recommendations on ways to amend such provisions to make the assessment of charges by public bodies for the production of public records more uniform, more transparent, easier to understand, and less costly. Technical assistance shall be provided to the FOIA Council by the Division of Legislative Services. All agencies of the Commonwealth shall provide assistance to the FOIA Council for this study, upon request. The work group shall complete its meetings by November 30, 2024, and present its findings and recommendations for consideration by the FOIA Council at its meeting in December 2024. The chairman of the FOIA Council shall submit to the Division of Legislative Automated Systems an executive summary of the work group's findings and recommendations with any additional comments by the FOIA Council no later than the first day of the 2025 Regular Session of the General Assembly. The executive summary shall state whether the FOIA Council intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.