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HOUSE BILL NO. 599

Offered January 12, 2022

Prefiled January 11, 2022

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

Patron—Roem

Committee Referral Pending

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. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records, *except that (i) for the first four individual record requests made by a requester to a public body during a period of 31 consecutive days, a public body shall not charge a requester for any costs incurred during the first two hours spent accessing or searching for the requested records and (ii) for any additional time spent accessing or searching for such records, or for any additional record requests, the public body shall not charge an hourly rate for*

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59 *accessing or searching for the records exceeding the lesser of the hourly rate of pay of the lowest-paid*
60 *individual capable of fulfilling the request or \$33 per hour. With regard to clause (ii), a public body*
61 *may petition the appropriate court for relief from the fee cap imposed by such clause upon showing by*
62 *a preponderance of the evidence that there is no qualified individual capable of fulfilling the request for*
63 *\$33 per hour or less. Any such petition shall be heard within seven days of the date when the same is*
64 *made, provided that the public body has sent and the requester has received a copy of the petition at*
65 *least three working days prior to filing. The hearing on any petition made outside of the regular terms*
66 *of the circuit court of a locality that is included in a judicial circuit with another locality or localities*
67 *shall be given precedence on the docket of such court over all cases that are not otherwise given*
68 *precedence by law. The period within which the public body shall respond under this section shall be*
69 *tolled for the amount of time that elapses between the requester's receipt of a copy of the petition and a*
70 *final disposition of the court. A public body shall not pass along to the requester or otherwise*
71 *incorporate into allowable charges any court costs or fees resulting from such petition.*

72 *Each public body shall post on its website or otherwise publish a written policy (a) explaining how*
73 *the public body assesses charges for accessing or searching for requested records and (b) noting the*
74 *current fee charged, if any, by the public body for accessing and searching for such requested records.*
75 No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the
76 general costs associated with creating or maintaining records or transacting the general business of the
77 public body. Any duplicating fee charged by a public body shall not exceed the actual cost of
78 duplication. The public body may also make a reasonable charge for the cost incurred in supplying
79 records produced from a geographic information system at the request of anyone other than the owner of
80 the land that is the subject of the request. However, such charges shall not exceed the actual cost to the
81 public body in supplying such records, except that the public body may charge, on a pro rata per acre
82 basis, for the cost of creating topographical maps developed by the public body, for such maps or
83 portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying
84 of requested records shall be estimated in advance at the request of the citizen. The period within which
85 the public body shall respond under this section shall be tolled for the amount of time that elapses
86 between notice of the cost estimate and the response of the requester. If the public body receives no
87 response from the requester within 30 days of sending the cost estimate, the request shall be deemed to
88 be withdrawn.

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

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

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

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

115 J. In the event a public body has transferred possession of public records to any entity, including but
116 not limited to any other public body, for storage, maintenance, or archiving, the public body initiating
117 the transfer of such records shall remain the custodian of such records for purposes of responding to
118 requests for public records made pursuant to this chapter and shall be responsible for retrieving and
119 supplying such public records to the requester. In the event a public body has transferred public records
120 for storage, maintenance, or archiving and such transferring public body is no longer in existence, any

121 public body that is a successor to the transferring public body shall be deemed the custodian of such
122 records. In the event no successor entity exists, the entity in possession of the public records shall be
123 deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and
124 supply such records to the requester. Nothing in this subsection shall be construed to apply to records
125 transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the
126 Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia
127 shall be the custodian of such permanently archived records and shall be responsible for responding to
128 requests for such records made pursuant to this chapter.