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HOUSE BILL NO. 734

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on March 12, 2022)

(Patron Prior to Substitute—Delegate Bell)

A BILL to amend and reenact § 2.2-3706.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 8.01-622.2, 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 and that the Code of Virginia is amended by adding a section numbered 8.01-622.2 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" "Family representative" means the decedent's personal representative or, if no personal representative as set forth in § 64.2-100 has qualified, the decedent's next of kin in order of intestate succession as set forth in § 64.2-200.

"Immediate family members" means the decedent's family representative, spouse, child, sibling, parent, grandparent, or grandchild. "Immediate family members" include a stepparent, stepchild, stepsibling, and adoptive relationships.

"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) the victim's immediate family members, 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

60 *habeas corpus or writ of actual innocence pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2*
61 *or any other federal or state post-conviction proceeding or pardon; and (v) for the sole purpose of*
62 *inspection at the location where such records are maintained by the public body that is the custodian of*
63 *the records, (a) an attorney or his agent when such attorney is considering representing a petitioner in*
64 *a post-conviction proceeding or pardon, (b) an attorney who provides a sworn declaration that the*
65 *attorney has been retained by an individual for purposes of pursuing a civil or criminal action and has*
66 *a good faith basis to believe that the records being requested are material to such action, or (c) a*
67 *person who is proceeding pro se in a petition for a writ of habeas corpus or writ of actual innocence*
68 *pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) of Title 19.2 or any other federal or state*
69 *post-conviction proceeding or pardon, who provides a sworn affidavit that the records being requested*
70 *are material to such action. An attorney or his agent who is in receipt of criminal investigative files or*
71 *has inspected criminal investigative files pursuant to clause (iv) or (v) shall not release such criminal*
72 *investigative files or any information contained therein except as necessary to provide adequate legal*
73 *advice or representation to a person whom the attorney either represents or is considering representing*
74 *in a post-conviction proceeding or pardon or represents in a civil or criminal action.*

75 *An attorney who is in receipt of criminal investigative files pursuant to clause (iv) shall return the*
76 *criminal investigative files to the public body that is the custodian of such records within 90 days of a*
77 *final determination of any writ of habeas corpus, writ of actual innocence, or other federal or state*
78 *post-conviction proceeding or pardon or, if no petition for such writ or post-conviction proceeding or*
79 *pardon was filed, within six months of the attorney's receipt of the records.*

80 *No disclosure for the purpose of inspection pursuant to clause (v) (c) of this section shall be made*
81 *unless an appropriate circuit court has reviewed the affidavit provided and determined the records*
82 *requested are material to the action being pursued. The court shall order the person not to disclose or*
83 *otherwise release any information contained in a criminal investigative file except as necessary for the*
84 *pending action and may include other conditions as appropriate.*

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

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

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

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

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

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

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

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

99 *Ð. F. Notwithstanding the provisions of subsection C or D, no criminal investigative file or portion*
100 *thereof, except disclosure of records under clause (iv) of subdivision D or clause (v) (a) of subdivision*
101 *D, shall be disclosed to any requester pursuant to this section, unless the public body has made*
102 *reasonable efforts to notify (i) the victim; (ii) the victim's immediate family members, if the victim is*
103 *deceased and the immediate family member to be notified is not a person of interest or a suspect in the*
104 *criminal investigation or proceeding; or (iii) the victim's parent or guardian, if the victim is a minor*
105 *and the parent or guardian to be notified is not a person of interest or a suspect in the criminal*
106 *investigation or proceeding.*

107 *Upon receipt of notice that a public body has received a request for criminal investigative files*
108 *pursuant to this section, an individual listed in clause (i), (ii), or (iii) shall have 14 days to file in an*
109 *appropriate court a petition for an injunction to prevent the disclosure of the records as set forth in*
110 *§ 8.01-622.2. The public body shall not respond to the request until at least 14 days has passed from*
111 *the time notice was received by an individual listed in clause (i), (ii), or (iii). The period within which*
112 *the public body shall respond to the underlying request pursuant to § 2.2-3704 shall be tolled pending*
113 *the notification process and any subsequent disposition by the court.*

114 *G. No photographic, audio, video, or other record depicting a victim or allowing for a victim to be*
115 *readily identified shall be released pursuant to subsection C or D to anyone except (i) the victim; (ii)*
116 *the victim's family representative, if the victim is deceased and the family representative to which the*
117 *records are to be disclosed is not a person of interest or a suspect in the criminal investigation or*
118 *proceeding; or (iii) the victim's parent or guardian, if the victim is a minor and the parent or guardian*
119 *is not a person of interest or a suspect in the criminal investigation or proceeding.*

120 *H. Nothing in this section shall prohibit the disclosure of current anonymized, aggregate location and*
121 *demographic data collected pursuant to § 52-30.2 or similar data documenting law-enforcement officer*

encounters with members of the public.

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

E. 1. In the event of a conflict between this section as it relates to requests made under this section and other provisions of law, the other provisions of law, including court sealing orders, that restrict disclosure of criminal investigative files, as defined in subsection B, shall control.

§ 8.01-622.2. Injunction against disclosure of criminal investigative file materials under the Virginia Freedom of Information Act.

Except with respect to the disclosure of records under clause (iv) of subdivision D or clause (v) (a) of subdivision D of § 2.2-3706.1, an injunction may be awarded to prevent the disclosure of records related to criminal investigative files requested under § 2.2-3706.1 of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

In making its determination, a court shall consider the following and shall enter its findings on the record:

1. Whether disclosure of the public records would constitute an unreasonable invasion of personal privacy;

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

3. Whether disclosure of the public records would subject (i) the victim; (ii) the victim's immediate family members as set forth in § 2.2-3706.1, if the victim is deceased and the immediate family member is not a person of interest or a suspect in the criminal investigation or proceeding; or (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, to severe mental or emotional distress; and

4. Any other factor or information deemed by the court to be relevant.