

23

THE FREEDOM OF INFORMATION AND GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACTS

Roger C. Wiley
Hefty Wiley & Gore, P.C.
Richmond

23-1 FREEDOM OF INFORMATION ACT

23-1.01 Public Policy

In adopting the Virginia Freedom of Information Act (the “Act” or “FOIA”), the General Assembly has declared that “the affairs of government are not intended to be conducted in an atmosphere of secrecy.” Va. Code § 2.2-3700.

The legislative policy underlying the Act is to ensure Virginia citizens ready access to records in the custody of public officials and free entry to meetings of public bodies. Openness is the established general rule. Closed meetings and denial of access to records must be based on a specifically expressed exemption, either in the Act itself or in some other applicable statute. *Id.* In general, the Act must be liberally construed in favor of openness, while exemptions allowing closed meetings or the withholding of records must be narrowly construed and properly invoked. *Id.*

23-1.01(a) Burden of Proof

The Act puts the burden on the public body in every instance to demonstrate why a meeting should be closed or a record should be withheld from disclosure. *City of Danville v. Laird*, 223 Va. 271, 288 S.E.2d 429 (1982). In court proceedings to enforce the Act, the public body must establish any claimed exemption by a preponderance of the evidence. Va. Code § 2.2-3713(E); *RF&P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908 (1994).

23-1.01(b) Duty of Officials to Be Familiar with Act

The administrator or legal counsel of each public body subject to the Act must furnish each member of the body a copy of the Act within two weeks following the member’s election, reelection, appointment or reappointment. Va. Code § 2.2-3702. The public official must read the Act and become familiar with its contents. Va. Code § 2.2-3702. See section [23-6.02](#) for consequences of violation. Local *elected* officials (including constitutional officers), executive directors and board members of industrial or economic development authorities, and members of any boards governing any authority established pursuant to the Park Authorities Act (Va. Code § 15.2-5700 et seq.) must receive training from the Freedom of Information Act Advisory Council within two months of assuming office and within every two years thereafter. Va. Code § 2.2-3704.3. The clerk of the governing body or school board must maintain public records of the training. § *Id.*

23-1.02 Scope of Act

Since its initial adoption in 1968, the Act has established uniform statewide requirements for citizen access to the official records and meetings of public bodies. Local ordinances in conflict with the Act are void. Va. Code § 2.2-3700. The General Assembly has undertaken major reviews or revisions of the Act in 1976, 1989, 1999 and most recently in 2017. 1968

Va. Acts ch. 479, 1989 Va. Acts ch. 358, 1999 Va. Acts chs. 703, 726, 2017 Va. Acts chs. 616, 778.

23-1.02(a) Standing to Assert Act

The Act guarantees access to public records to “citizens of the Commonwealth” and to representatives of news media circulating or broadcasting in Virginia. Va. Code § 2.2-3704(A). It is unclear to what extent an online publication would be considered to be “circulating or broadcasting” in Virginia. Arguably, an entity that has employees who engage in news gathering and create original content that is published on a regular basis would meet that definition. Access to public meetings is not so limited; they are simply required to be “open.” Va. Code § 2.2-3707(A).

Similarly, “any person” may request individualized notice of the meetings of a public body. Va. Code § 2.2-3707(F) (formerly (E)). The Act does not, however, afford any rights to persons incarcerated in local, state, or federal correctional facilities, whether or not located in Virginia. Va. Code § 2.2-3705. The fact that non-residents and incarcerated persons cannot compel document disclosure on their own may make little practical difference, because they can ask a Virginia citizen to make the request for them.

Virginia Code § 2.2-3705 has survived lawsuits challenging its constitutionality on both First and Fourteenth Amendment grounds. *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000); *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008). The citizen-only provision of FOIA does not violate the Privileges and Immunities Clause or the dormant Commerce Clause. The Supreme Court held that the Act does not regulate commerce in any meaningful sense, but instead provides a service that is related to state citizenship. *McBurney v. Young*, 569 U.S. 221, 133 S. Ct. 1709 (2013).

23-1.02(b) Definition of “Public Body”

Entities subject to the Act include “any legislative body [or] authority, board, bureau, commission, district or agency of the Commonwealth” or any of its political subdivisions. Local governing bodies, school boards,¹ and planning commissions are expressly included. In addition, for purposes of the public records provisions, constitutional officers are considered public bodies. Va. Code § 2.2-3701. Reversing its prior ruling, a state circuit court held that individual legislators may be sued directly for alleged violations of the FOIA procedures and time limits for responding to records requests. In its prior ruling, the court had held that an individual legislator was not a “public body” and that the procedural requirements by their terms only applied to public bodies. *Davison v. Dunnavant*, 96 Va. Cir. 48 (Henrico Cnty. 2017) (written opinion), Aug. 2, 2017 (ruling from the bench). Note, however, that Va. Code § 2.2-3705.7(2) still exempts “working papers and correspondence” of General Assembly members from mandatory disclosure; the records sought in *Davison v. Dunnavant* were not in that category.

The Act also applies to “other organizations, corporations or agencies . . . supported wholly or principally with public funds.” Va. Code § 2.2-3701. If an entity does not derive its principal support from public funds or does not have any official status or statutory functions to perform, it will generally not be considered a public body. See, e.g., Ops. Va. Att’y Gen. 2021 at 67 (outlining analysis to be applied to determine whether entity is principally supported by public funds); 2002 at 70 (civic association), 1982-83 at 719 (private hospital association not public body even though its membership includes three members of county board of supervisors), 1981-82 at 429 (homeowners’ association not public body; not supported principally by public funds), 1974-75 at 584 (council of

¹ Although a school board may adopt bylaws and regulations for its own government and for the supervision of schools, it may not adopt policies that are inconsistent with state statutes, including FOIA. 2020 Op. Va. Att’y Gen. 50. Thus, a school board policy permitting the delay or denial of access to records otherwise obtainable under FOIA if they would require “considerable work or time” to gather is likely invalid. *Id.*

presidents of state universities, lacking official status and not established by State Council of Higher Education, is not public body).

An advisory opinion of the Virginia Freedom of Information Advisory Council concludes that a private, nonprofit organization should be considered a public body for purposes of the Act if the organization receives at least two-thirds of its operating budget from public funds. Va. FOI Adv. Council AO-36-01, July 26, 2001; *see also Wigand v. Wilkes*, 65 Va. Cir. 437 (City of Norfolk 2004) (citing Advisory Council opinion; public broadcasting network not a public body because only receives 25 percent public funding). Another circuit court held that whether an entity is supported principally by public funds depends on the total contribution from public funds as measured against the number and magnitude of individual private contributions. Thus, it held that a daycare center was a public body because the county's 55 percent of the funding was the most important and primary source of funds. *The Voice v. Appalachian Reg'l Cmty. Servs.*, 89 Va. Cir. 284 (Buchanan Cnty. 2014).

Recognizing that funding levels can fluctuate, and noting that FOIA itself does not specify what time period is to be used when measuring an entity's funding levels, the Advisory Council recommended as a general rule of thumb using data for the current or most recent fiscal year in determining whether an entity is supported principally by public funds. Va. FOI Adv. Council AO-05-17, June 9, 2017.

An opinion of the Virginia Attorney General, however, indicates that the Council's analysis did not go far enough. The Council relied solely on the "support with public funds" wording. The Attorney General also focused on the "other organization" language. Citing with approval a circuit court opinion, *Students for Animals v. University of Virginia*, 12 Va. Cir. 247 (City of Richmond 1988), the Attorney General stated that an "other organization" must refer to an entity similar to those listed in Va. Code § 2.2-3701, e.g., legislative bodies, authorities, boards, bureaus, and commissions. Thus, to be a public body, the organization must have an independent status that is charged by law with the governance of, or responsibility for, some discrete public agency. It does not include subordinate, dependent groupings of individuals who are charged with carrying out a part of the mission of a parent body. 2001 Op. Va. Att'y Gen. 5.

Despite the Attorney General's opinion, the Advisory Council continues to rely primarily on the amount of public funding in determining whether an entity is a public body. Va. FOI Adv. Council AO-04-17, May 5, 2017 (tourism chamber); Va. FOI Adv. Council AO-03-04, Feb. 10, 2004 (SPCA); Va. FOI Adv. Council AO-14-03, June 9, 2003 (business and civic association); Va. FOI Adv. Council AO-09-03, Apr. 21, 2003 (volunteer fire company). The Advisory Council has advised, however, that payments made under a public contract should not be used in determining whether a private entity is principally supported by public funds. Va. FOI Adv. Council AO-01-15, Mar. 17, 2015; Va. FOI Adv. Council AO-28-04, Dec. 29, 2004. Another advisory opinion concludes that a charitable foundation which raises funds from private sources and donates them to a governmental entity to support the entity's operations is not a public body subject to the Act. Va. FOI Adv. Council AO-09-09, Oct. 23, 2009. The Council also stated that an entity created by a public body as a "public instrumentality" was itself a public body subject to FOIA. While the phrase "public instrumentality" is used in many different parts of the Code of Virginia, it is not defined by statute and does not appear in the listed terms in the definition of "public body" in Va. Code § 2.2-3701; however, the Council stated that "common usage" of the term indicated it was a public body. Va. FOI Adv. Council AO-07-12, Dec. 19, 2012.

In another advisory opinion, the Council noted that the term "public body" has a different meaning under FOIA's public meeting requirements than it has in the context of creation and ownership of public records. That opinion stated

the *public body* that is subject to the public meetings requirements of FOIA is comprised of a limited group consisting only of the *members* of a deliberative body. By contrast, the term *public body* as used in the definition of *public records* refers to records *prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business*. . . . The different usages of the term *public body* are emphasized when considering the treatment of public employees, who are not *members* for meetings purposes, but do generate and keep *public records*.

Va. FOI Adv. Council AO-05-11, Oct. 17, 2011 (emphasis in original).

23-1.02(b)(1) Committees

Committees, subcommittees, “or other entity however designated” of a public body, whether performing functions delegated by the public body or acting in a purely advisory capacity, are also subject to the Act, usually in the same manner as the public body itself. Va. Code § 2.2-3701. Study commissions and other committees or subcommittees appointed by a local governing body or school board do not, however, have to keep minutes unless their membership includes a majority of the members of the school board or governing body. Va. Code § 2.2-3707(I)(iv) (formerly (H)(iv)). The presence of citizen or “private sector” members on a committee of a public body does not make that committee exempt from the Act. Va. Code § 2.2-3701; see also section 23-2.02(b).

Whether a particular group constitutes a committee or designated entity of a public body will depend on how the group was created and the functions it has been asked to perform. See *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 835 S.E.2d 544 (2019) (private fundraising corporation not “produced or distributed by” the university for which it fundraises); see also FOI Adv. Council AO-01-15, Mar. 17, 2015; Va. FOI Adv. Council AO-09-09, Oct. 23, 2009; Va. FOI Adv. Council AO-10-07, July 19, 2007; Va. FOI Adv. Council AO-07-13, July 30, 2013. A committee that advises and answers to the city manager is not a public body. Va. FOI Adv. Council AO-04-13, May 17, 2013. An advisory committee created by an elected constitutional officer is not a committee of a public body that is subject to the Act. Va. FOI Adv. Council AO-11-07, Oct. 11, 2007. Neither is an advisory committee created by Richmond’s elected mayor, Va. FOI Adv. Council AO-08-08, Oct. 16, 2008, nor a working group coordinating an effort to consolidate two youth baseball leagues, if created by the director of a local recreation department, Va. FOI Adv. Council AO-11-09, Nov. 30, 2009. However, an advisory task force created by a public body itself to advise the body on a particular topic is subject to the Act even if it receives no specific funding from the public body. Va. FOI Adv. Council AO-01-09, May 8, 2009.

23-1.02(c) Applicability to Other Specific Entities

23-1.02(c)(1) State Agencies

The Virginia State Crime Commission and the Virginia Parole Board are expressly exempted from the Act, but the Parole Board must publish its parole guidance documents and monthly statistics on the number of inmates granted and denied parole, or whose parole is revoked. Va. Code § 2.2-3703(A)(1) and (6). Moreover, as of July 1, 2022, the votes of individual Board members are considered public records subject to FOIA. Va. Code § 2.2-3703(A)(1).

23-1.02(c)(2) FAPTs

Family assessment and planning teams created under Va. Code § 2.2-5207 are not subject to the Act. Va. Code § 2.2-3703(A)(2).

23-1.02(c)(3) Response Teams

Sexual assault and child sexual abuse response teams are exempt except with regard to specified guidelines and protocols. Va. Code §§ 2.2-3703(A)(4) and (5); 15.2-1627.4; 15.2-1627.5.

23-1.02(c)(4) Voting Records

Voter registration and election records are subject to the Act, but any provision in Title 24.2 of the Code that conflicts with the Act is controlling. Va. Code § 2.2-3703(B).

23-1.02(c)(5) Virginia Retirement System

The Virginia Supreme Court held that corporations created and wholly owned by RF&P Corporation, which in turn was wholly owned by the Virginia Retirement System, did not fall within the Act's general definition of a public body. *RF&P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908 (1994). The General Assembly later amended the statutory definition in Va. Code § 2.2-3701 to expressly include such entities, then further modified that language after VRS disposed of RF&P Corporation. 1997 Va. Acts ch. 641, 1993 Va. Acts 270, 720. For applicable exemptions, see Va. Code §§ 2.2-3705.7(A)(12) (records) and 2.2-3711(A)(39) (meetings).

23-1.02(c)(6) Constitutional Officers

In the past, the Virginia Supreme Court treated local constitutional officers as subject to the Act. See *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998) (noting sheriff is public official whose records are subject to FOIA, but ruling 911 dispatch audiotape exempt under another statute); *Associated Tax Serv., Inc. v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988) (requiring Norfolk City Treasurer to produce real estate tax information in response to FOIA request); see also Ops. Va. Att'y Gen. 1993 at 217 (applying FOIA to commissioners of revenue), 1984-85 at 313 (treasurers), 1972-73 at 192 (clerks), 1974-75 at 583 (sheriffs).

In *Connell v. Kersey*, 262 Va. 154, 547 S.E.2d 228 (2001), however, the Court held that a Commonwealth's attorney, not being a "public body" within the meaning of the Act, was not required to comply with the mandatory disclosure time limits and other requirements of Va. Code § 2.2-3704. Although the Court expressly limited the application of its ruling in *Connell* to Commonwealth's attorneys under the specific circumstances occurring in that case, it is difficult to understand how the Court, applying the same rationale, would have reached a different result in a case involving a different constitutional officer, such as a sheriff or local treasurer. The General Assembly responded to *Connell* by amending Va. Code § 2.2-3701 to provide that "for the purposes of the provisions of this [Act] applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records." For purposes of the open-meeting provisions of the Act, however, an elected constitutional officer is not a "public body." Accordingly, an advisory committee created by a constitutional officer is not subject to the Act. Va. FOI Adv. Council AO-11-07, Oct. 11, 2007.

23-1.02(c)(7) State Corporation Commission

The State Corporation Commission is not a "public body" under the Act as it derives its authority from Article IX of the Constitution of Virginia, and the Act's enforcement mechanism cannot constitutionally be applied to the Commission. *Christian v. State Corp. Comm'n*, 282 Va. 392, 718 S.E.2d 767 (2011).

23-1.02(c)(8) Courts

The extent to which the Act applies to courts remains unclear. The definition of "public body" in Va. Code § 2.2-3701 expressly includes legislative bodies, as well as a list of bodies and agencies in the executive branch, but does not mention courts, even by clear implication. Nevertheless, an early opinion of the Attorney General states with little explanation that the Act is applicable to the executive, judicial, and legislative branches of government. 1976-77 Op. Va. Att'y Gen. 309. Another opinion concludes that meetings of the Virginia Judicial Conference of Courts of Record are required to be open to the press and public. 1972-73 Op. Va. Att'y Gen. 487. Those meetings, however, are obviously not actual proceedings of a court.

Despite the doubtful applicability of FOIA to courts, there are other statutory provisions and underlying constitutional principles that ensure broad, though not absolute, public access to judicial proceedings and to court records.

The United States Supreme Court has held that the First and Fourteenth Amendments implicitly guarantee the public a qualified right of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980). Although recognizing the historical authority of trial judges to close hearings under extenuating circumstances, the Court said in a later case that “the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise, Inc. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819 (1984).

These federal cases relied strongly on the long English and colonial American history of holding actual trials of criminal defendants in public and did not specifically extend to other types of criminal proceedings. The Virginia Supreme Court, however, relying on Article I, Section 12 of the Virginia Constitution, has extended the presumption of openness to pretrial suppression hearings, even though such hearings were not typically open to the public by common law tradition. *Richmond Newspapers v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

While the Virginia Supreme Court has not specifically extended the same constitutional analysis to court proceedings in civil cases, its treatment of access to court records, discussed below, suggests that it would apply a similar presumption and require a specific finding of an overriding interest by a trial court ordering a closed hearing over news media’s or litigants’ objection in a civil case. See *Charlottesville Newspapers, Inc. v. Berry*, 215 Va. 116, 206 S.E.2d 267 (1974) (holding with little explanation that trial judge lacked authority to impose “gag” order or exclude public from hearing on motion by county board and county administrator to dismiss special grand jury previously impaneled by trial judge).

For many years public access to circuit court records has been governed by Va. Code § 17.1-208 which states in part, “any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person and the clerk shall, when requested, furnish copies thereof, subject to any reasonable fee charged by the clerk.” Tracing this statute back to an 1821 Act of Assembly, the Virginia Supreme Court has said that it is intended to “recognize the generally accepted common-law rule of openness and to declare [the General Assembly’s] power to make statutory exceptions to the rule.” *Shenandoah Publ’g House, Inc. v. Fanning*, 235 Va. 253, 368 S.E.2d 253 (1988).

Although acknowledging the authority of a judge to enter a protective order sealing documents in a specific case, the Court held in *Shenandoah Publishing* that the mere desire of a litigant to avoid emotional distress or damage to reputation was not sufficient to overcome the presumption of openness. *Id.* Instead, a trial court must find an interest in sealing the records so compelling that it overrides the presumption, and must further find that no less restrictive measure can protect that compelling interest. *Id.* In so holding, the Court expressly applied the same procedural guidelines for approval of protective orders as it adopted for closing pretrial suppression hearings in *Richmond Newspapers v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981). The holding in *Shenandoah* applies only to pleadings and evidence that actually have become part of the court record. Relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199 (1984), the Court refused to extend the presumption of openness to pre-trial discovery documents and depositions. However, the General Assembly has made it clear that FOIA’s protections are not a factor in determining whether a document is discoverable in a court proceeding. Va. Code § 2.2-3703.1; see *Harrington v. Roessler*, 89 Va. Cir. 366 (Fairfax Cnty. 2014) (criminal investigative privilege exists outside of FOIA).

A circuit court rejected the argument that the Act's disclosure exemption for records protected by the attorney-client privilege obligated the court to place such records under seal. *Tianti v. Rohrer*, 91 Va. Cir. 111 (Fairfax Cnty. 2015). Citing Va. Code § 2.2-3703.1 (FOIA exemptions do not affect discovery rules), the *Tianti* court reasoned that the Act ensures access to "government records" but not necessarily to "judicial records." Relying on *Shenandoah Publishing* and the federal cases cited in that case, the court in *Tianti* found that the compelling public interest in preservation of the attorney-client privilege overcame the presumption of openness applicable to judicial records under Va. Code § 17.1-208.

Records statutorily required to be maintained by court clerks are expressly exempted from the Act, but they remain subject to Va. Code §§ 16.1-69.54:1 and 17.1-208. Va. Code § 2.2-3703(A)(7). Special provisions apply to remote electronic access to such legally mandated court records, and since July 1, 2012, they may not contain social security numbers. Va. Code § 8.01-449(D). Clerks are authorized and directed to redact social security numbers from records created before that date. 2007 Va. Acts ch. 543, cl. 2. "Other records" held by clerks' offices are expressly made subject to FOIA disclosure requirements, but the distinction between "required by law" records and "other" records is not a clear one. The state may not, however, prevent a citizen from publishing social security numbers that are available in public records. *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010).

Requests for nonconfidential court records maintained in individual case files should be made to the respective clerks of the general or district courts. Va. Code §§ 16.1-69.54:1 and 17.1-208. A clerk may require that the request be in writing and that the requestor's name and legal address be provided. The clerk may also require advance payment for finding and copying the records, which cannot exceed the actual cost incurred. The records must be provided, or an objection made to the request, within thirty days of the request.

Requests for reports from the aggregate case information system maintained by Office of the Executive Secretary of the Supreme Court are to be made to that office. Va. Code §§ 16.1-69.54:1 and 17.1-208. The General Assembly legislatively negated the holding of the Supreme Court that under Va. Code § 17.1-242, circuit court clerks remain the custodians of all records of specific cases in their respective courts, even after the data from those cases is entered into the case information electronic database maintained in the Office of the Executive Secretary. *Daily Press, LLC, v. Office of the Exec. Sec'y of the Supreme Court*, 293 Va. 551, 800 S.E.2d 822 (2017). The Office of the Executive Secretary was required to make the nonconfidential data available in its case information system related to criminal cases publicly viewable by July 1, 2025.² Va. Code § 17.1-293.1.

Now that the General Assembly has addressed judicial record production outside of the FOIA context, a broader application of the Act to the judicial branch seems unlikely. For example, expanding FOIA's application to require the Virginia Supreme Court or other judicial panels to conduct their pre-decision deliberations in public, or to reveal their draft opinions or internal memoranda, might be viewed as violating constitutional separation of powers requirements. *Cf. Taylor v. Worrell Enters.*, 242 Va. 219, 409 S.E.2d 136 (1991) (interpreting FOIA to require Governor to disclose telephone records revealing identity of persons called would violate separation of powers principle).

23-2 MEETINGS UNDER FOIA

23-2.01 General Considerations

The right of the public to attend meetings of public bodies did not exist at common law. See *Roanoke City School Bd. v. Times-World Corp.*, 226 Va. 185, 307 S.E.2d 256 (1983). The Constitution of the United States does not guarantee citizen access to sessions of Congress or any executive branch agency. Indeed, the very public body that created the Constitution

² In response, the Office of the Executive Secretary launched an expanded public database ([Online Case Information System 2.0](#)) in June 2019.

held closed sessions and required its members to take an oath of secrecy. See Catherine Drinker Bowen, *Miracle at Philadelphia*, 22 (Little, Brown 1986 ed.) (describing secret proceedings of Constitutional Convention of 1787).

Open-meeting requirements, therefore, are exclusively a twentieth-century statutory phenomenon. Between 1950, when Alabama enacted the first such statute, and 1976, when New York became the last to do so, all fifty states adopted some form of open-meeting law. When the Virginia General Assembly first approved the Act in 1968, it created a strong presumption that meetings of public bodies must be open and allowed closed meetings for only seven general purposes. The number of permitted topics may have grown, and the procedures for holding closed meetings may have gotten more detailed, but the Act's preference for openness remains unchanged. See Va. Code § 2.2-3707(A).

23-2.02 Meetings Covered by FOIA

23-2.02(a) Definition

Any assemblage of three or more members of a public body at which public business is discussed is considered a meeting under the Act. Va. Code § 2.2-3701. If two members constitute a quorum of the public body, their gathering also falls within the Act's definition of a meeting. *Id.* Members-elect are not members of a public body. *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004); see also Va. FOI Adv. Council AO-27-22, Dec. 22, 2004 (task force of mayor-elect not a public body). The Advisory Council has also said that the Act's open meeting requirements cannot logically be applied to a single individual to whom a public body's functions have been delegated. "When considered in practical terms, treating an individual as a public body [for purposes of the open meeting requirements] leads to absurd situations and impractical results." Va. FOI Adv. Council AO-07-14, Dec. 19, 2014; Va. FOI Adv. Council AO-12-08, Dec. 2, 2008.

In *Gloss v. Wheeler*, ___ Va. ___, 887 S.E.2d 11 (2023), the Virginia Supreme Court held that a meeting of the police Citizens' Advisory Board, which was attended by a majority of the Board of Supervisors and at which public matters were discussed, constituted a public meeting as defined by VFOIA. The Court further held that "[a]s such, unless the CAB meeting falls within one of the two exceptions contained in the definition of 'meeting' found in Code § 2.2-3701, it was a meeting for the purpose of VFOIA's open meeting provisions." *Id.*

23-2.02(a)(1) Discussion of Public Business

The first of the two exceptions discussed by the Court in *Gloss v. Wheeler*, ___ Va. ___, 887 S.E.2d 11 (2023), appears in subpart (a) of the statute's definition of meeting:

"[n]either the gathering of employees of a public body" nor the "gathering or attendance of two or more members of a public body" shall be considered a "meeting" if "no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, *and* such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body[.]"

Id., citing Va. Code § 2.2-3701 (emphasis in original). In *Gloss*, the Court noted that "if the purpose of the CAB meeting was the discussion of public business³ or if the meeting were called or prearranged with the purpose of a discussion of public business of the Board, it does not fit within the exception." *Id.* (emphasis in original).

³ "[F]or a topic to constitute public business it must not just be something that conceptually could at some point come before a public body, but rather, the topic must be something that is either before the public body or is likely to come before the body in the foreseeable future." *Id.*, citing *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004).

23-2.02(a)(2) Public Forum

The second of the two exceptions discussed in *Gloss* appears in subpart (b) of the statute's definition of meeting:

"[n]either the gathering of employees of a public body" nor the "gathering or attendance of two or more members of a public body" shall be considered a "meeting" if the gathering is at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate⁴ and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting[.]

Id., citing Va. Code § 2.2-3701 (emphasis in original). In *Gloss*, the Court found that there was "more than a sufficient basis for a rational factfinder to conclude that the CAB meeting involved a discussion relating to the transaction of public business," so the meeting fell outside of the second exception. *Id.*

23-2.02(b) Committees

Two members of the public body may also constitute a meeting if they have been designated as a committee to advise the full body or perform delegated functions for it. Va. FOI Adv. Council AO-12-08, Dec. 2, 2008, and Va. FOI Adv. Council AO-20-04, Aug. 31, 2004; Ops. Va. Att'y Gen. 1990 at 8, 1987-88 at 236, 1981-82 at 437. Two members of the school board and two members of the board of supervisors may meet to discuss public matters without constituting a meeting for the purposes of FOIA if they are not designated as a committee by their respective public bodies or performing a delegated function. Va. FOI Adv. Council AO-12-04, June 16, 2004. One circuit court has held that two-member committees, even though not a quorum of the public body, must nevertheless meet in public. See *Shenandoah Publ'g House v. Shenandoah Cnty.*, 30 Va. Cir. 419 (Shenandoah Cnty. 1993).

The Advisory Council concluded that if all council members attend committee meetings and participate in those meetings, then the meetings either need to be noticed as council meetings or the council members who are not members of the committee should not participate. Va. FOI Adv. Council AO-03-14, Apr. 17, 2014.

23-2.02(c) Informal Meetings

"Work sessions," "retreats" and other informal gatherings of the public body at which public business is discussed are meetings covered by the Act just as certainly as more formal assemblies, regardless of whether a formal agenda will be followed or votes taken. Va. Code §§ 2.2-3701 and 2.2-3707; Ops. Va. Att'y Gen. 1981-82 at 442, 1977-78 at 484, 1974-75 at 579. Likewise, gatherings of a Virginia public body outside the state are meetings within the Act. 1977-78 Op. Va. Att'y Gen. 485.

23-2.02(d) Assembling Without Meeting

The gathering or attendance of two or more members of a public body at a place or function where no part of the purpose of the gathering is the discussion or transaction of public business is not a meeting covered by the Act. Va. Code § 2.2-3701 (definition of meeting); see *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004) (citizen-organized informational forum not a meeting). Compare Va. FOI Adv. Council AO-15-04, July 19, 2004 (gathering of three members of school board in private residence to meet with citizens was a public

⁴ "Even a gathering whose motivating purpose 'is to inform the electorate[,]'" Code § 2.2-3701, falls outside of the exception if its purpose expands in such a way that allows for the 'transact[ion of] public business or' for 'discussions relating to the transaction of public business[.]'" *Id.* "Once that line is crossed, the gathering is a meeting under VFOIA and all of the open meeting requirements apply." *Id.*

meeting because discussion was about issue pending before board). Applying Va. Code § 2.2-3707(G) [now 2.2-3701], an Attorney General's opinion concludes that a gathering of three members of a public body to prepare for the trial of a lawsuit would not be a meeting covered by the Act. 1984-85 Op. Va. Att'y Gen. 426. The same opinion concludes that a chance meeting of members of a public body at a social event is not covered by the Act. *Id.*

The Virginia Supreme Court has held that a conference between members of a local governing body and an assistant attorney general solely for the purpose of gathering information, at which no business actually was conducted by the governing body, was not a meeting within the meaning of the Act. *Nageotte v. Bd. of Sup'rs of King George Cnty.*, 223 Va. 259, 288 S.E.2d 423 (1982).

In another case, the Roanoke County Circuit Court held that a workshop or training program at which the board of supervisors met with a consultant to discuss "effective decision making, improvements in communicative skills and how to conduct effective meetings," was not a meeting covered by FOIA because the members did not discuss or transact any public business. *WDBJ TV v. Roanoke Cnty. Sup'rs*, 4 Va. Cir. 349 (Roanoke Cnty. 1985).

Despite these precedents, members of a public body who attend a meeting or conference sponsored by someone else, or who encounter each other at a social event, should be cautious not to discuss or conduct pending public business unless they comply fully with the requirements for holding a public meeting.

Members of a public body should also be careful about continuing discussions of public business informally among themselves, even with staff or citizens present, following the conclusion of a scheduled public meeting. The author has represented one public body in a suit alleging this practice violated the Act. Although the judge in that case held there was no knowing violation, a later opinion of the FOIA Advisory Council, AO-46-01, Oct. 5, 2001, concludes such a discussion does constitute an unlawful meeting if more than two members are present.

23-2.02(e) Campaign Debates

The gathering of members of a public body at candidate forums, debates and similar campaign appearances is expressly excluded from the open-meeting requirements of the Act, even if they may be discussing their individual or collective performance in conducting public business. Va. Code § 2.2-3701 (definition of meeting).

23-2.02(f) Electronic Communication Meetings

Initially, the Virginia Supreme Court held that a telephone conference call among members of a public body was not a "meeting" to which the Act's requirements applied. *Roanoke City School Bd. v. Times-World Corp.* 226 Va. 185, 307 S.E.2d 256 (1983). The General Assembly quickly amended the Act, however, to prohibit local government public bodies from conducting meetings through "telephone, video, electronic or other communication means where the members are not physically assembled." Va. Code § 2.2-3708 (subsequently repealed and incorporated into § 2.2-3708.2).

The Act does not prohibit members of the public from participating in a public meeting by electronic means. Nothing appears to restrict the assembled public body from communicating with a staff member, attorney, or other non-member by telephone or video conference during the course of the meeting.

Over time, the legislature gradually began providing some limited authority for individual members of public bodies to participate in meetings by electronic means. The COVID-19 pandemic accelerated the need for guidelines regarding virtual meetings. Initially, the legislature created a statutory framework whereby an individual member of a local public body could attend a public meeting electronically only if several conditions were

met. The Code separates electronic meetings into two general categories: electronic meetings held during declared states of emergency, Va. Code § 2.2-3708.2, and electronic meetings held outside of states of emergency, including meetings where individual members participate virtually and all-virtual public meetings, Va. Code § 2.2-3708.3.

23-2.02(f)(1) Electronic Meetings During Declared States of Emergency

Opportunities for individual members to participate in meetings from remote locations may have had some benefit for those officials who have made use of them, but they have had limited value to public bodies themselves because they still required the presence of a physical quorum at the meeting site. That is no help when the public body needs to meet on short notice due to an emergency or other compelling reason.

During the September 11, 2001 terrorist attack on the Pentagon, Arlington County's governing body encountered difficulty responding to that emergency because conditions made it impossible for them to convene in one place. Thereafter, the General Assembly adopted amendments to the Act, then found at Va. Code § 2.2-3708.2(A)(3), permitting public bodies to hold electronic meetings during a state of emergency declared by the governor, if the catastrophic nature of the emergency makes it impracticable for a quorum of the members to assemble physically in one place, but only if the purpose of the meeting is to discuss the emergency. Notice of such emergency meetings must be given to the public at the same time as to public body members, and arrangements must be made for public access. *Id.*

When the COVID-19 pandemic arrived in early 2020, it quickly became apparent that this provision enacted to respond to an emergency situation of short duration would not be adequate to deal with a statewide public health emergency that might make in-person meetings unsafe for months. Once the Governor had declared a statewide emergency due to the pandemic, the Attorney General confirmed in an official opinion that Va. Code § 2.2-3708.2(A)(3) would apply to public bodies unable to assemble in person because of the risks caused by COVID-19, when decisions were needed immediately, and the failure to make them could result in irrevocable public harm. 2020 Op. Va. Att'y Gen. 8.

The Attorney General's opinion further confirmed, however, that the statutory authority permitted only meetings discussing the pandemic itself and how to respond to it to be held by electronic means. The Attorney General recognized that this would not solve the problem of bodies needing to address other ongoing items of regular business unrelated to the public health emergency. *Id.* Accordingly, the opinion suggested another statutory source of authority that local governing bodies might use to conduct safe meetings without physically gathering in one place: Va. Code § 15.2-1413. Previously a seldom-used relic of the Cold War era, this Code section authorizes localities to adopt an ordinance to "provide a method to assure continuity in its government, in the event of an enemy attack or other disaster." An ordinance adopted under § 15.2-1413 is valid for twelve months (extended, in 2021, from the previous limit of six months) "after any such attack or disaster" and "shall provide for . . . the resumption of normal government authority by the end of that period."⁵ *Id.* With the tacit approval of the Attorney General and the endorsement of a task force of LGA member attorneys, numerous counties, cities, and towns adopted continuity of government ordinances under this Code section, citing the COVID-19 emergency declaration, and some adopted new ordinances as the public health emergency continued and the initial ordinances expired.

However, Va. Code § 15.2-1413 offered a clear path to electronic meetings only for local governing bodies; its applicability to school boards, planning commissions, and other authorities, commissions, and boards was unclear, and by its own terms the section did not

⁵ It is unclear when a disaster, such as a pandemic, has "ended" for purposes of the statute and the twelve-month validity period.

apply to state-level public or university boards of visitors.⁶ To address this issue, the General Assembly amended Va. Code § 2.2-3708.2 to explicitly permit meetings by electronic communication even when the purpose of the meeting is the continuity of government and not solely the emergency itself. All public bodies in the state may meet by electronic means without a physical quorum assembled in one location during a declared state of emergency.

Under these provisions, a public body may meet electronically without a physically assembled quorum under the following conditions and requirements:

- the Governor has declared a state of emergency pursuant to Va. Code § 44.146.17 or the locality has declared a local state of emergency pursuant to Va. Code § 44-146.21;
- the catastrophic nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location;
- the purpose of the meeting is to provide for the continuity of operations of the public body or the discharge of its lawful purposes, duties, and responsibilities;
- the public body shall give public notice, contemporaneously with the notice provided to members of the public body, using the best available method given the nature of the emergency;
- the public body shall make arrangements for public access to the meeting through electronic communication means, including videoconferencing if already used by the public body;
- the public body shall provide the public with the opportunity to comment at those meetings of the public body when public comment is customarily received; and
- the meeting minutes must describe the nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held.

Va. Code § 2.2-3708.2.

Public bodies at all levels of government in Virginia have used the authority conferred on them by this amendment to conduct virtual meetings, attended by some or all participants via an internet or telephone connection. Citizens also have widely accepted this practice, attending public meetings online and signing up to speak over their computers or smartphones.

23-2.02(f)(2) Electronic Meetings in Situations Other Than Declared States of Emergency

Over the course of the COVID-19 pandemic, local governments and the public became more accustomed to working, learning, and meeting electronically. In 2022, the General Assembly added Va. Code § 2.2-3708.3, permitting public bodies to meet virtually, or allow their

⁶ In *Berry v. Bd. of Supervisors*, 302 Va. 114, 884 S.E.2d 515 (2023) (LGA filed [amicus brief](#)), the Virginia Supreme Court held that the Fairfax County Board of Supervisors could not adopt a new zoning ordinance during an electronic meeting conducted pursuant to § 15.2-1413, or otherwise, during a pandemic.

members to participate in meetings remotely, under certain conditions. To do so, the public body must first adopt a policy, by recorded vote at a public meeting, that shall be “applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting.” Va. Code § 2.2-3708.3(D). The policy must describe the circumstances under which an all-virtual public meeting or remote participation will be allowed and the process the body will use for approving or denying requests for remote participation. Va. Code § 2.2-3708(D)(1). The public body may also adopt a policy regarding virtual meetings or remote participation to apply to any committee, subcommittee, or other entity created by the public body. Va. Code § 2.2-3708.3. In *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 886 S.E.2d 244 (2023), the Virginia Supreme Court held that, absent the invocation of a statutory exemption, FOIA requires that members of the public be allowed to attend meetings in person in the room in which the meeting is being conducted. See also Va. FOI Adv. Council Op. AO-02-13, Mar. 20, 2013.

In the *Suffolk City School Board* case, the plaintiff was not required to sit in a separate room to see and hear the meeting because of a need for “social distancing” due the COVID 19 pandemic, or because there wasn’t enough space in the meeting room to accommodate visitors. The School Board was holding an all-day “retreat” and wanted no visitors in the meeting room, attempting to comply with FOIA by providing audio-visual access in an adjacent room. When Wahlstrom refused to leave, the Board chair declared that she was an enemy of the Board and had a police officer remove her from the meeting. *Id.*

It is not unusual for a public body to seat part of an unexpectedly large crowd in an adjacent space where the meeting is televised, making sure that anyone wanting to speak at a public hearing is allowed to do so in the actual meeting room. It remains to be seen whether the court will be more sympathetic with that practice in a case where there is no evidence suggesting that a particular citizen is being excluded because of his or her views.

23-2.02(f)(2)(i) All-Virtual Public Meetings

After the public body has adopted a policy pursuant to Va. Code § 2.2-3708.3(D), the following conditions must also be met regarding any all-virtual public meeting:

- (i) the meeting notice must state that the meeting will be all-virtual;
- (ii) public access to the all-virtual public meeting must be provided via electronic communication means, allowing the public to hear and (when possible) see all participating members of the public body;
- (iii) a phone number or other live contact information must be provided to alert the public body if the audio or video transmission of the meeting fails;
- (iv) the public body must monitor the designated means of communication during the meeting and, if the transmission fails, the body must take a recess until public access is restored;
- (v) a copy of the proposed agenda and all non-exempt materials must be made available to the public in electronic format at the same time such materials are provided to members of the public body;
- (vi) the public must be afforded the opportunity to comment through electronic means, including by way of written comments, at those public meetings when public comment is customarily received;

- (vii) no more than two members of the public body may be together in any one remote location unless that remote location is physically open to the public; and
- (viii) minutes of an all-virtual public meeting must be taken and must include the fact that the meeting was held virtually and the electronic communication means by which the meeting was held.

Va. Code § 2.2-3708.3(C). If a closed session is held during an all-virtual public meeting, transmission of the meeting to the public must resume before the public body votes to certify the closed meeting. *Id.* The public body may not convene an all-virtual public meeting more than two times per calendar year or 25 percent of the meetings held per calendar year, whichever is greater, and may not hold a virtual public meeting consecutively with another virtual public meeting.

Note that local governing bodies, school boards, planning commissions, architectural review boards, zoning appeals boards, and boards with the authority to deny, revoke, or suspend a professional or occupational license are not permitted to hold all-virtual meetings. Va. Code § 2.2-3708.3(C).

23-2.02(f)(2)(ii) Remote Participation by Public Body Members

If the public body has adopted a policy pursuant to Va. Code § 2.2-3708.3(D), individual members of the public body may participate in a public meeting remotely in any of the following situations:

1. the member has a temporary or permanent disability or other medical condition that prevents the member's physical attendance;
2. the member is caring for a family member with a medical condition;
3. the member's principal residence is more than sixty miles from the meeting location; or
4. the member is unable to attend the meeting due to a personal matter.

Va. Code 2.2-3708.3(B). In the last situation, the member must identify "with specificity" the nature of the personal matter, and the member may not participate remotely due to personal matters in more than two meetings per calendar year or 25 percent of the meetings held per calendar year, whichever is greater. Va. Code § 2.2-3708.3(B)(4).

If a member's remote participation is approved, the public body holding the meeting must record in its minutes the remote location from which the member participated; however, the location may be identified in the minutes by a general description. Va. Code § 2.2-3708.3(B). The reason for the member's remote participation must be noted in the minutes. *Id.* If the member is participating remotely due to a personal matter, the minutes must include "the specific nature of the personal matter cited by the member." *Id.* Likewise, if the member's request to participate in the meeting remotely is not approved, the reason for the disapproval must also be recorded in the minutes "with specificity." *Id.*

23-2.02(g) Email "Meetings"

The use of electronic mail by members of public bodies to communicate with each other raises special concerns. The Supreme Court of Virginia held that email communications do not constitute a meeting because they lack the "simultaneity inherent in the term 'assemblage'" of members, which is part of the definition of meetings in Va. Code § 2.2-3701. *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004) (LGA filed an amicus brief).

The Court also noted with approval the opinion of the Attorney General in which he concluded that while members' email messages are public records subject to disclosure under the Act, the exchange of such email messages among members did not constitute a meeting. 1999 Op. Va. Att'y Gen. 12. Moreover, emailing members to determine their position with respect to the transaction of public business is expressly allowed. Va. Code § 2.2-3710. The Court hinted that a different factual situation—for example, members of a public body communicating in real time through an on-line "chat room," or "instant messaging"—might be considered a meeting. Eight years after *Beck*, the Court recognized that electronic textual communication has become ubiquitous but reaffirmed the touchstone of simultaneity, upholding as "not plainly wrong" a circuit court's finding that email exchanges, while in a more compressed time frame than in *Beck*, were not simultaneous. *Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 727 S.E.2d 75 (2012) (LGA filed an amicus brief). As public bodies can act only through public votes taken at a public meeting, any action purportedly taken through email messages would be invalid. Va. Code § 2.2-3710.

23-2.02(h) Employees

Staff meetings and other gatherings of employees of a public body are not meetings covered by the Act. Va. Code § 2.2-3701 (definition of "meeting"). However, once three or more members of the public body gather to discuss public business, even if it is to discuss the business with a member of the staff, the gathering falls under the definition of a meeting and invokes the FOIA requirements. Va. FOI Adv. Council AO-46-01, Oct. 5, 2001.

23-2.02(i) Social Events

The Act expressly states it does not prohibit the gathering of two or more members of a public body at places or functions if "no part of the purpose" of the gathering is the transaction or discussion of public business, and the members' attendance was not "called or prearranged" for such purpose. Va. Code § 2.2-3701 (definition of meeting); *see also* Ops. Va. Att'y Gen. 1984-85 at 423, 1982-83 at 721, 1976-77 at 308. This provision clearly exempts purely social gatherings from the Act's open-meeting rules and procedures, but members of public bodies should still be careful about their behavior at such functions. If the members of a public body are seen to "huddle" in the corner at a social gathering, talking among themselves, others in attendance may reasonably suspect they are circumventing the Act's restrictions.

23-2.02(j) Conferences

Similarly, Va. Code § 2.2-3701 (definition of meeting) seems to allow the widespread practice of members of a public body traveling together to attend conferences or conventions outside their own jurisdiction, as long as they do not discuss the actual business of the public body while together on those occasions. Some public bodies actually do plan to discuss or conduct business during out-of-town conference or conventions, and the Act does not prohibit this as long as the notice and other requirements for a public meeting are strictly observed. In several instances in recent years, however, the media and other citizens have sharply criticized local governing bodies for convening out of town in this manner, questioning the effectiveness of the notice given and noting it is generally impracticable, if not impossible, for residents of the locality actually to attend. Public bodies will want to consider carefully whether the convenience of meeting during a conference in a remote location is worth the possible adverse citizen and media reactions.

23-2.02(k) Political Parties

In general, the definition of a public meeting in the Act does not appear to include purely partisan political gatherings. A county Republican or Democratic committee, for example, is not supported wholly or principally by public funds and is therefore not a "public body" covered by the Act. Three members of the board of supervisors who are in the same political party, therefore, probably may attend their party's county committee meeting behind closed doors with impunity, at least as long as it is clearly party business that is being discussed.

If the closed partisan gathering starts discussing issues pending before the public body, however, the line between party business and public business quickly becomes obscured. The General Assembly clearly considered itself and its committees to be covered by the Act. See *ACLU v. Andrews*, 24 Va. Cir. 443 (City of Richmond 1991). Notwithstanding that, both Democrats and Republicans have routinely held closed caucus meetings at which the legislators discussed their partisan strategies with respect to particular items of legislative business, as well as other party matters. The Attorney General stated that, while legislative caucuses were not public bodies, their meetings were subject to FOIA when the caucus members discussed public business, i.e., legislative business. 2004 Op. Va. Att’y Gen. 13. In response to this opinion, the General Assembly enacted Va. Code § 2.2-3707.01, which provides that meetings of the Assembly and its committees are subject to FOIA, but meetings of its party caucuses are not. Given the now-explicit statutory exception for state-level political party caucuses, it is very unlikely local-level caucuses would be considered exempt. In light of the Attorney General’s opinion, however, meetings that take place on the local level to discuss purely partisan issues should not be considered a meeting of a public body.

23-2.03 Requirements for Notice

23-2.03(a) Postings

At least three working days before a meeting of a public body, notice of the date, time, location, and remote location, if required, of the meeting must be posted:

1. on its official public government website,⁷ if any;
2. in a prominent public location at which notices are regularly posted; and
3. at the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

Va. Code § 2.2-3707(D) (formerly (C)); see *also* Va. FOI Adv. Council AO-06-17, Aug. 1, 2017 (irrelevant what time of day meeting is held; three working days before means Friday notice must be given for Wednesday night meeting); Va. FOI Adv. Council AO-02-06, Mar. 15, 2006 (planning commission meeting attended by more than two members of town council required notice of joint meeting by both bodies). The Attorney General has opined that a vote taken at a meeting that was not properly noticed would be null and void. 2009 Op. Va. Att’y Gen. 9 (failure to give required notice invalidated school board appointment). A circuit court held that the requestor has the burden to prove that adequate notice was not timely given. *Bradford v. Bd. of Equalization*, No. CV 11005508-00 (Loudoun Cnty. Cir. Ct. Apr. 2, 2012).

23-2.03(b) Publication

Other general statutes or charter provisions may require notices of meetings for some purposes to be published in a newspaper of general circulation in the jurisdictions served by the public body. See, e.g., Va. Code §§ 15.2-2204 (zoning changes); 15.2-2506 (annual budget); 15.2-202 (proposed charter changes). The Act does not, however, contain any general requirement for such newspaper publication. Va. Code § 2.2-3707(D) (formerly (C)); 1985-86 Op. Va. Att’y Gen. 252.

23-2.03(c) Individual Notice

In addition to posting notices, the public body must give direct individual notice to anyone who has asked to be notified of the public body’s meetings. To receive such continuing notices, the person should make an annual request in writing, including his or her name,

⁷ “Official public government website” is defined as “any Internet site controlled by a public body and used, among any other purposes, to post required notices and other content pursuant to [FOIA] on behalf of the public body.” Va. Code § 2.2-3701.

address, zip code, organization (if any), and daytime telephone number. If the requester agrees, meeting notices may be sent by email. Va. Code § 2.2-3707(F) (formerly (E)). Even if the meeting is one for which newspaper publication is required, such individual requests must still be honored. See Ops. Va. Att’y Gen. 1972-73 at 494, 1971-72 at 467, 1968-69 at 261. The Advisory Council has stated that an error in the meeting time given to individuals requesting notice made notice of the meeting insufficient. A correction made less than three days before the meeting did not remedy the insufficient notice. Va. FOI Adv. Council AO-06-17, Aug. 1, 2017.

23-2.03(d) Annual Schedules

If the public body establishes an annual schedule of regular meeting dates and times, a single notice of these meeting dates to individual requesters is sufficient to comply with the requirement of § 2.2-3707(F) (formerly (E)), as long as individual requesters are also notified of any later changes in the schedule or additional special meetings. 1991 Op. Va. Att’y Gen. 5.

A local governing body must provide members of the general public with the opportunity for public comment during a regular meeting at least quarterly. Va. Code § 15.2-1416.

23-2.03(e) Adjourned Meetings

Notice for continued meetings must be given contemporaneously with the notice provided to the members of the public body conducting the meeting. Va. Code § 2.2-3707(E) (formerly (D)); see also Ops. Va. Att’y Gen. 1991 at 5, 1972-73 at 489.

Note that “continued meeting” is not defined in this subsection; however, the term is defined in the statute addressing the notice for electronic meetings held by state bodies, Va. Code § 2.2-3708.2(D)(2), as “a meeting that is continued to address an emergency or to conclude the agenda of a meeting for which proper notice was given.” Virginia Code § 15.2-1416 also references notice given pursuant to Va. Code § 2.2-3707(E) for “regular meetings” adjourned “from day to day or from time to time or from place to place, not beyond the time fixed for the next regular meeting, until the business before the governing body is completed.”

23-2.03(f) Emergencies

The Act defines an emergency as an unforeseen circumstance requiring immediate action that makes it impossible or impracticable to comply with the Act’s regular notice requirements. Va. Code § 2.2-3701. In such an event, the public body must give notice “reasonable under the circumstances” to the general public and individual requesters at the same time the members of the public body are notified of the emergency meeting. Va. Code § 2.2-3707(E) (formerly (D)); see also Ops. Va. Att’y Gen. 1975-76 at 411, 1971-72 at 467.

23-2.03(g) Agendas

The Act’s notice requirements dictate only the inclusion of the date, time, and location of the meeting. Whether the public body must also make public an agenda in advance of the meeting will depend on the type of body, other applicable general statutes, charter provisions, the public body’s own bylaws, or simply local custom and practice. Nothing in the Act itself restricts the public body’s ability to consider items during a properly convened meeting, regardless of whether those items have been identified prior to the meeting. See *Wilson v. City of Salem* and *Munley v. City of Salem*, 55 Va. Cir. 270 (City of Salem 2001) (no legal requirement, in FOIA or elsewhere, for city council to adhere to predetermined agenda).⁸

⁸ Note that Va. Code § 15.2-1418 does limit the matters considered at a special meeting to those matters that were specified in the notice to “each member of the governing body and the attorney

However, if an agenda and supporting documents are distributed to the members of the public body before the meeting, a copy of these materials (except items exempt from records disclosure under another section of the Act) must be made available for public inspection at the same time they are sent out to the membership. Va. Code § 2.2-3707(G) (formerly (F)). See Va. FOI Adv. Council AO-05-12, Oct. 26, 2012 (addressing issues regarding production of agenda packets under Va. Code § 2.2-3707(G) (formerly (F)) and the public records requirements, as well as website postings).

23-2.04 Other Requirements for Meetings

23-2.04(a) Access to Meeting Place

A circuit court has held that a meeting of a county board of equalization violated the Act by meeting in a small, inaccessible room with a sign on the door directing the public to wait outside until their case was called. *Cline v. Cnty. of Augusta*, No. 100514-00 (Augusta Cnty. Cir. Ct., Sept. 2, 2010). While acknowledging that FOIA is silent with regard to logistical matters such as the size of meeting rooms, how meeting rooms should be set up, and whether and what technologies should be available to facilitate meeting presentations and participation, the Advisory Council has stated that, as a matter of “best practices,” whenever possible the public body should move to a location that will allow more people to attend, as well as to use whatever technology is available to increase public access. The Council stated that if some people are excluded from an open meeting despite extra capacity, it would violate FOIA because the meeting was “closed” to some. Va. FOI Adv. Council AO-02-13, Mar. 20, 2013. While its advice about “best practices” is indisputable, this opinion’s latter conclusion appears to go beyond the statutory language, which says nothing about guaranteeing meeting access to every citizen, but only requires that meetings be “open.” Va. Code § 2.2-3707(A). Those familiar with the General Assembly’s own meetings can attest that committee rooms and especially smaller subcommittee rooms are often filled beyond capacity, with citizens having to wait outside in adjacent corridors.

23-2.04(b) Speakers

The Act does not require the public be allowed to speak on every subject that is discussed at every public meeting. It merely guarantees the public the right to be present. Many other statutes, of course, require “public hearings” on particular matters. In those instances, the public body may require speakers to observe reasonable time limits, and the presiding officer may declare speakers out of order if they fail to observe those time limits or stray from the subject of the public hearing.

23-2.04(c) Cameras and Recordings

The Act guarantees any person the right to photograph, record, film, or otherwise reproduce any part of a meeting that is required to be open to the public. Public bodies may adopt reasonable rules about the placement and use of cameras, recorders, and broadcasting equipment to keep them from being too disruptive. Meetings required to be open may not be conducted in a facility where such recording devices are prohibited. Va. Code § 2.2-3707(H) (formerly (G)). A circuit court held a public body may require advance notice before cameras and recording devices may be used in an open meeting. *Bradford v. Bd. of Equalization*, No. CV 11005508-00 (Loudoun Cnty. Cir. Ct. Apr. 2, 2012). Within a few years after that decision, the use of cell phone cameras to make video and audio recordings has become so commonplace that such a limitation may be impracticable. The public body itself is not required to record its meetings, but if it does so, the recording would be a record subject to FOIA. Va. FOI Adv. Council AO-04-18, May 21, 2018.

23-2.04(d) Minutes

The Act requires written minutes for every open meeting of a public body. Work sessions and other informal meetings require minutes even if no formal action occurs. Va. Code

for the Commonwealth or the county or municipal attorney, as appropriate,” unless all members are present or sign a waiver.

§ 2.2-3707(I) (formerly (H)). The only exception at the local level is for committees, subcommittees or study commissions appointed by the local governing body or school board. These do not have to keep minutes unless their membership includes a majority of the members of the governing body or school board. Committees of the General Assembly and legislative and gubernatorial study commission are also exempt from keeping minutes.

At a minimum, minutes must include (i) the date, time, and location of the meeting, (ii) the members of the public body recorded as present and absent, specifying the statutorily permissible reason that any are attending via electronic means, and (iii) a summary of the discussion on matters proposed, deliberated, or decided, and a record of any votes taken. Va. Code §§ 2.2-3707(I) (formerly (H)) and 2.2-3708.2. See Va. FOI Adv. Council AO-05-15, June 10, 2015; Va. FOI Adv. Council AO-01-06, Feb. 23, 2006 (applying and interpreting these requirements).

Minutes are not required for matters discussed in lawfully convened closed sessions, except for the convening motion and certification motion following the closed session, both of which must appear in the minutes of the open meeting, as discussed below. Va. Code § 2.2-3712(A), (D) and (I).

Local public bodies must also post minutes of their meetings on the locality's official public website within seven working days of final approval of the minutes. If a public body does not own or maintain a website, within seven days of approval it must make copies of all meeting minutes available at a prominent public location where meeting notices are regularly posted, or at the office of the public body's clerk or chief administrator. Va. Code § 2.2-3707.2.

23-2.04(e) Voting

The Act prohibits public bodies from taking a vote of any kind to authorize the transaction of any public business, except at a meeting lawfully conducted under the Act. Voting by telephone or other electronic communication is never permitted for public bodies in local government, unless pursuant to Va. Code §§ 2.2-3708.2 or 2.2-3710, or the other statutory authority dealing with electronic meetings during states of emergency detailed in section [23-2.02\(f\)](#).

Voting by secret or written ballot is also prohibited. *Id.* Because the intent of the Act is clearly to enable the public to know how individual members of the public have voted, and because other charters, statutes, and constitutional provisions require recorded roll call votes for some actions, the preferred practice is to record individual votes for all matters. Finding that voting electronically where the votes are immediately displayed on screens is not covered by FOIA, the Advisory Council stated that the use of such means does not appear to be voting by electronic communication, or a secret or written ballot. As long as the individual votes are displayed, the practice facilitates the purposes of FOIA. Va. FOI Adv. Council AO-02-17, Feb. 24, 2017. This opinion may have been influenced by the fact that both houses of the General Assembly use electronic voting systems with display boards, which display and create a permanent record of each member's vote, although the Advisory Council opinion does not mention that fact.

Although the Act permits a preliminary vote on a matter being discussed in a lawfully convened closed session, such a vote is not effective or legally binding until it is repeated in an open meeting. Va. Code § 2.2-3711; Va. FOI Adv. Council AO-01-03, Jan. 23, 2003; Va. FOI Adv. Council AO-15-02, Nov. 12, 2002. The Act also expressly allows the members of a public body to be contacted separately, in person, by telephone, or by electronic communication (provided the contact is done on a basis that does not constitute a meeting), to determine the positions on matters of public business. Va. Code § 2.2-3710. Whether such a "straw poll" is conducted by a fellow member, a news reporter, or a staff person, however, it is never binding, and reliance is always risky.

23-3 AUTHORIZED CLOSED MEETINGS

23-3.01 General Limitations

The Act allows public bodies to meet in closed sessions only if certain procedures are strictly followed and only for one of the specific, limited purposes listed in the Act. Closed sessions are not required for these stated purposes, but may be convened at the discretion of the public body. Va. Code §§ 2.2-3700 and 2.2-3711. Members of a public body may attend a closed meeting held by any committee or subcommittee of that public body or of any entity created to perform a delegated function or advise that public body. The minutes of the meeting must reflect the member's attendance. Va. Code § 2.2-3712(G).

23-3.02 Procedural Requirements for Closed Meetings

23-3.02(a) Vote to Convene

In an open public meeting, the public body must adopt a motion by a recorded affirmative vote to convene in closed session. See Va. FOI Adv. Council AO-02-04, Jan. 16, 2004. A proper motion must be made prior to each closed meeting, even if there are multiple closed meetings within the same open meeting. Va. FOI Adv. Council AO-05-18, Aug. 8, 2018.

23-3.02(b) Contents of Motion

The convening motion, which must be recorded in detail in the minutes of the public meeting, must identify the subject matter of the closed session, state its purpose as authorized by Va. Code § 2.2-3711 or other provision of law, and cite the specific exemption in the Act or other provision of law under which the closed meeting is permitted. A motion that merely makes a general reference to the Act or to the exemptions or the subject matter is not adequate to comply with the Act. See Va. Code § 2.2-3712(A); *Cole v. Smyth Cnty. Bd. of Sup'rs*, 298 Va. 625, 842 S.E.2d 389 (2020) (merely reciting statutory language of "actual or probable litigation" not sufficient description of subject matter); *Ripol v. Westmoreland Cnty. Indus. Dev. Authority*, 82 Va. Cir. 69 (Westmoreland Cnty. 2010) (motion to discuss "prospective business or industry" too general); Va. FOI Adv. Council AO-03-17, Mar. 17, 2017 (purpose but not subject stated); Va. FOI Adv. Council AO-02-16, Aug. 12, 2016 (subject description insufficient); Va. FOI Adv. Council AO-24-04, Dec. 2, 2004 (issues stated in motion too vague); cf. Va. FOI Adv. Council AO-03-13, May 8, 2013 (minutes stating that subject of closed meeting to discuss real property was "Unsolicited Confidential Proposal" was not too vague). While the closed session motion may identify more than one subject, purpose and exemption, the better practice, for the sake of clarity, is to adopt a separate motion for each closed meeting topic. Va. FOI Adv. Council AO-02-10, Mar. 17, 2010.

23-3.02(c) Limitation to Identified Subjects

Discussion during the closed session must be limited only to the exempt subjects identified in the convening motion. If the discussion leads to another topic that is eligible for a closed meeting but has not been identified in the previous motion, the public body must return to public session and adopt a new motion properly identifying the added topic. Va. Code § 2.2-3712(C); *Cole v. Smyth Cnty. Bd. of Sup'rs*, 298 Va. 625, 842 S.E.2d 389 (2020) (exemptions should be narrowly construed, thus Board violated FOIA by discussing, at closed meetings, matters falling outside professed legal matters exemption, even if the matters discussed and legal matters were somewhat intertwined).

23-3.02(d) Presence of Non-Members

The public body may allow non-members into their closed session, if their presence will aid in consideration of the closed-session topic, or the public body otherwise considers their presence necessary. Va. Code §§ 2.2-3710, 2.2-3712(H); 1979-80 Op. Va. Att'y Gen. 385.

23-3.02(e) Public Vote

No decision reached or vote taken is legally effective until confirmed by a vote in an open public meeting. Va. Code §§ 2.2-3710, 2.2-3712(H). Virginia Code § 2.2-3711(B) says that nothing adopted or agreed to in a closed meeting is effective unless the public body,

following the closed meeting, reconvenes in open meeting and takes a vote of the membership on action whose substance is “reasonably identified in the open meeting.” In *Moody v. City of Portsmouth*, 93 Va. Cir. 455 (City of Portsmouth 2016), the court ruled that city council members violated this provision when they signed a letter in closed session fining one of the council members for misconduct, but failed to vote on the fine in open session. An Attorney General’s opinion concludes that a school board’s motion purporting to add a former school superintendent into the school board’s supplemental retirement system violated this provision because the person was not identified by name or position in the open meeting. 2014 Op. Va. Att’y Gen. 150.

23-3.02(f) Minutes

Minutes are not required for the closed meeting. Va. Code § 2.2-3712(I).

23-3.03 Certification Following Closed Meeting**23-3.03(a) Motions**

Immediately following the closed meeting, the public body must reconvene in an open meeting and take a roll call vote to certify that, to the best of each member’s knowledge, the only subjects just discussed or considered in the preceding closed meeting were those: (i) lawfully exempted from the Act’s open-meeting requirements and (ii) properly identified in the motion that convened the closed meeting. Va. Code § 2.2-3712(D). In an unpublished opinion, *Suffolk City School Board v. Story*, Rec. No. 201334 (Jan. 20, 2022), the Virginia Supreme Court held that nothing in Va. Code § 2.2-3712(D) requires that the certification of a closed meeting be read aloud during a public meeting. Accordingly, a “short-form” certification, where only the title of the certification was read aloud in the public meeting, did not violate FOIA.

23-3.03(b) Recorded Vote

The certification vote must be recorded in the minutes of the open meeting. Any member who believes that the closed meeting did not conform to the certification statements must state his reasons for that conclusion, before voting against the certification. That statement must also be recorded in the minutes. Va. Code § 2.2-3712(D). FOIA does not provide a remedy to cure a defective certification. Va. FOI Adv. Council AO-02-16, Aug. 12, 2016.

23-3.03(c) Negative Votes

Negative votes on certification of the closed meeting do not affect the validity or confidentiality of matters that have been lawfully discussed in the closed session; however, the recorded vote and statements of members voting against certification may be evidence in any proceeding brought to enforce the Act. Va. Code § 2.2-3712(E).

23-3.04 Authorized Purposes**23-3.04(a) Generally**

The Act lists numerous purposes for which public bodies may hold closed meetings. Many of those, however, are relevant only to particular state agencies or other entities not found at the local level. Only those that could be relevant to a public body in local government will be mentioned in this chapter.

In addition to the exemptions listed in the Act itself, other specific statutes may make certain subjects exempt from the Act’s open-meeting requirements.

Consistent with the stated policy of the Act, any exemption, whether found in the Act itself or elsewhere, must be narrowly construed. No meeting may lawfully be closed to the public unless the statutory exemption is explicit and specific. Va. Code § 2.2-3700.

23-3.04(b) Personnel Matters**23-3.04(b)(1) Subjects**

Virginia Code § 2.2-3711(A)(1) contains the closed-meeting exemption for what are loosely called “personnel matters.” Permitted subjects for the closed meeting include the discussion or interviewing of candidates for employment or appointment. Public bodies may also discuss the assignment, promotion, demotion, performance, salary, discipline, or resignation of specific employees. In *Media General Operations, Inc. v. City Council of Richmond*, 64 Va. Cir. 406 (City of Richmond 2004), the court held that the council improperly closed a meeting for the stated purpose of discussing the performance of the city manager in relation to rising crime in the city, finding that the actual discussion on crime (based on deposition testimony) was more wide-ranging than just the city manager’s performance.

23-3.04(b)(2) Specific Individuals

The word “specific” in the personnel matters exemption limits its application to matters involving a particular employee. Discussions of general salary increases or personnel policies applicable to groups of employees are not eligible for closed meetings. Ops. Va. Att’y Gen. 1979-80 at 378, 1974-75 at 570. Virginia Code § 2.2-3711(A)(1) explicitly states that this subdivision should not be construed to authorize a closed meeting for a local governing body or elected school board to discuss collective compensation for the public body. See also Va. FOI Adv. Council AO-06-15, Aug. 5, 2015 (construing prior law).

23-3.04(b)(3) Controversial Issues

Two opinions of the Attorney General and a circuit court opinion about the personnel matters exemption have created controversy and disagreement among local government attorneys.

In one of these opinions, the Attorney General concluded that a public body may not use the exemption to hold a closed discussion about which of its members it will select to be its presiding officer (i.e., mayor or board chairman). 1999 Op. Va. Att’y Gen. 15. The plain language of Va. Code § 2.2-3711(A)(1) permits closed meeting discussion of “appointment . . . of specific public officers . . . of any public body.” Since a member of a local governing body or school board chosen as mayor or chairman is effectively being selected for appointment to an additional office, the reason for the Attorney General’s opinion is difficult to understand. Use of the “personnel” exemption to discuss the choice of a presiding officer has been a widespread and long-standing practice in local government. Most local public bodies are unlikely to alter that practice based on an opinion of the Attorney General, but there is now a judicial opinion that agrees with the Attorney General.

Although the Attorney General’s opinion was not cited, a circuit court held that the personnel exemption may not be used to close a meeting to select a mayor and vice-mayor. The court reasoned that as Va. Code § 15.2-1422 requires governing bodies to “elect one of its number as presiding officer,” and Va. Code § 2.2-2711(A)(1) refers only to the “appointment” of “specific public officers,” the exemption does not apply as there is a “material distinction” between an election and an appointment. *Denton v. City Council for Hopewell*, 91 Va. Cir. 429 (City of Hopewell 2015).

In a second controversial opinion, the Attorney General concluded that the only employees a public body may discuss in closed session under Va. Code § 2.2-3711(A)(1) are those directly selected, employed, and supervised by the public body itself. 1998 Op. Va. Att’y Gen. 9, aff’d 2000 Op. Va. Att’y Gen. 19. In most cities and towns, and many counties, that conclusion would limit the subjects of the exemption to the manager or chief administrator, the clerk of the public body and perhaps its attorney. That opinion, too, ignores more than twenty years of actual practice by public bodies at both local and state levels, using the exemption to discuss any employee of the locality or agency, whether appointed by the public body or by a subordinate administrator.

One commentary on the latter opinion notes that the definition of public records in Va. Code § 2.2-3701, which encompasses “all [records] in the possession of a public body *or its employees*,” (emphasis added) has always been interpreted to mean all employees of the agency or locality, regardless of who appoints them. Use of conflicting definitions for the same term in two sections of the same statute seems highly debatable. See M. Packer and M. Flynn, “Access to Government Information: Failure to Understand Recent Amendments to Virginia’s FOIA Could Be Expensive,” *Journal of Local Government Law* (Va. State Bar), Vol. X, No. 4, June 2000, at 10. This Attorney General’s opinion, too, seems destined to be ignored by most local public bodies in the absence of a more definitive resolution of the issue. See also 2000 Op. Va. Att’y Gen. 24; Va. FOI Adv. Council AO-17-03, July 7, 2003 (school board may not meet in closed meeting to discuss performance or censure of individual members of board).

23-3.04(c) Student Matters**23-3.04(c)(1) Scholastic Records**

Virginia Code § 2.2-3711(A)(2) allows closed sessions to discuss the admission of students to public schools and state institutions of higher education, disciplinary matters involving such students, or any other matters that would involve the disclosure of information contained in a scholastic record.

23-3.04(c)(2) Attendance by Subject or Parents

The student who is the subject of a closed meeting, or the student’s parents if the student is a minor, must be allowed into the closed meeting if they have made a written request to the presiding officer of the public body to be so included.

23-3.04(d) Real Property**23-3.04(d)(1) Limits**

Under Va. Code § 2.2-3711(A)(3), public bodies may hold closed meetings to discuss the acquisition of real property for public purposes, or the sale of publicly owned real property, but only if open discussion would adversely affect the public body’s negotiating strategy or bargaining position.

23-3.04(d)(2) Condition or Use

Before the 1999 revisions to the Act, this exemption also allowed closed discussion of the “condition or use” of public property, and did not expressly require that there be an identifiable adverse impact from public discussion of the proposed transaction. The 1999 changes considerably narrowed the scope of this exemption.

23-3.04(d)(3) Ownership

A 1978 opinion of the Attorney General concludes that a town council could meet in closed session to discuss the Virginia Department of Transportation’s acquisition of land within the town for a bridge, even when the town was not directly involved in the acquisition process. 1978-79 Op. Va. Att’y Gen. 315. In view of the 1999 revisions of § 2.2-3711(A)(3), such a closed meeting might now be questioned, unless the town council could demonstrate that public discussion would adversely affect VDOT’s negotiations to purchase the property.

23-3.04(e) Personal Privacy

Closed meetings may also be held for the protection of privacy of individuals in matters not related to public business. Va. Code § 2.2-3711(A)(4); 1969-70 Op. Va. Att’y Gen. 316. For example, a member of a public body might request a closed meeting to inform the other members of the illness of a spouse or other relative.

23-3.04(f) Economic Development**23-3.04(f)(1) No Prior Announcement**

Under Va. Code § 2.2-3711(A)(5), public bodies may meet in closed session to discuss a prospective business or industry, or the expansion of an existing one, but only as long as there has been no previous public announcement that the business or industry is interested

in expanding or locating in the community. See *Ripol v. Westmoreland Cnty. Indus. Dev. Auth.*, 82 Va. Cir. 69 (Westmoreland Cnty. 2010) (previous announcement must be either to or by the public body); 1974-75 Op. Va. Att’y Gen. 573; Va. FOI Adv. Council AO-45-01, Oct. 2, 2001. Va. Code § 2.2-3711(A)(39) also provides that meetings of local or regional industrial or economic development authorities or organizations may be closed to discuss records excluded from mandatory FOIA disclosure under subdivision 3 of Va. Code § 2.2-3705.6.

23-3.04(f)(2) Prospects for Bond Funding

Industrial development authorities and other public bodies empowered to issue industrial revenue bonds are not required to reveal the identity of businesses with which they are in discussions, as long as there has been no public announcement by the business. However, the business must be identified as a matter of public record at least thirty days before the public body authorizes the issuance of any bonds. Va. Code § 2.2-3711(E)(ii).

23-3.04(g) Legal Matters

23-3.04(g)(1) Litigation

The mere presence of an attorney is not sufficient to justify a closed meeting under the exemption in Va. Code § 2.2-3711(A)(7). However, public bodies may meet in closed session with legal counsel or staff members to discuss “actual or probable litigation.” The Act defines “probable litigation” as a lawsuit that has been specifically threatened or that the public body or its attorney reasonably believes will be brought by or against a known party.

The Virginia Supreme Court held that a city council could not rely on the “potential litigation” exemption to discuss an intergovernmental cost-sharing proposal from neighboring counties, when representatives of those counties, the potential adverse parties to the supposedly threatened litigation, were present in the closed meeting. *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 288 S.E.2d 415 (1982).

23-3.04(g)(2) Advice

In addition to actual or probable litigation, closed sessions may be held to receive advice of legal counsel on other “specific legal matters requiring the provision of legal advice,” although the mere presence of, or consultation with, the attorney does not justify closing the meeting. Va. Code § 2.2-3711(A)(8). Past opinions of the Attorney General emphasize that there must be a specific situation or contemplated action creating a present need for the confidential advice. See, e.g., 1982-83 Op. Va. Att’y Gen. 716. A general discussion of “legal matters to consider in rezoning cases” is insufficiently specific to qualify for a closed meeting. 1980-81 Op. Va. Att’y Gen. 389. The legal matters must also be one within the scope of the public body’s authority. Thus, another Attorney General’s opinion concludes that a school board could not meet in closed session to discuss a proposed annexation because that is not a legal matter within the school board’s jurisdiction. 1986-87 Op. Va. Att’y Gen. 31; see also Va. FOI Council AO-01-07, Jan. 8, 2007 (general discussion of water and sewer policies was not specific legal matter requiring advice of counsel).

23-3.04(g)(3) Contracts

The Attorney General concludes that changes to contracts are not always “legal matters” that public bodies can discuss in closed session merely because they will be included in a legal document. 1981-82 Op. Va. Att’y Gen. 432 (change in consultant’s compensation not legal matter exempt from open-meeting requirement). Another opinion, however, concludes that the negotiating strategy and proposed substantive terms of a water contract between two cities is a proper subject for discussion by the city councils with their attorneys and staff in separate closed sessions, because open discussion by either governing body would clearly place it at a disadvantage in the negotiations. 1992 Op. Va. Att’y Gen. 1. Adopting the rationale of the 1992 Attorney General’s opinion, an exception added to the Act in 2003 provides that meetings may be closed to discuss the award of a public contract involving

the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body. Va. Code § 2.2-3711(A)(29). The adoption of this provision negated Va. FOI Adv. Council AO-04-02, which advised that no contract exemption existed. See Va. FOI Adv. Council AO-02-04, Jan. 16, 2004. The Virginia Supreme Court has held, however, that this exemption did not permit a county governing body, which had previously entered into a three-party contract with the county school board and an architect for design of a high school, to meet in closed session with the architect (but without the school board) to discuss changes in the scope of the architect's work that the school board had not yet agreed to. *White Dog Publ'g v. Culpeper Cnty. Bd. of Sup'rs*, 272 Va. 377, 634 S.E.2d 334 (2006). Use of this exemption was appropriate, however, to discuss the ranking of proposals submitted under the Virginia Public Procurement Act. Va. FOI Adv. Council AO-04-08.

23-3.04(h) Antiterrorist Planning and Security

Meetings may be closed for briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to terrorist activity or cybersecurity threats, or a related threat to public safety. Va. Code § 2.2-3711(A)(19). Reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure may also be discussed during a closed meeting. *Id.*

23-3.04(i) Other Purposes

The Act contains the following additional subjects eligible for closed session discussion that may occasionally be useful at the local level of government:

1. Investments. Investment of public funds that involves competition or bargaining, if premature public discussion would have an adverse financial impact. Va. Code § 2.2-3711(A)(6).
2. Awards. Special awards or honors. Va. Code § 2.2-3711(A)(11).
3. Testing. Tests or examinations used to evaluate (i) student performance; (ii) qualifications or aptitude for employment, retention or promotion, or (iii) licensing or certification. Va. Code § 2.2-3711(A)(12).
4. Siting Agreements. Discussions (presumably by a local governing body or perhaps a planning commission) of negotiations about, or the terms of, a hazardous waste siting agreement. Va. Code § 2.2-3711(A)(14).
5. Telecommunications. Discussion or consideration of confidential proprietary records and trade secrets developed or held by a local public body providing telecommunications services or cable television services or by a wireless service authority. Va. Code § 2.2-3711(A)(32) and (33).
6. Voting Security. Discussions by local electoral boards to consider voting security matters. Va. Code § 2.2-3711(A)(34).
7. PPTA & PPEA Matters. Discussion or consideration of relevant exempt records by the responsible public entity, an affected local jurisdiction, or an independent review panel appointed to advise the public entity, as those terms are defined in the Public-Private Transportation Act and the Private Education Facilities and Infrastructure Act. Va. Code § 2.2-3711(A)(28).
8. Retirement Plans. Discussion of retirement plan records exempt under Va. Code § 2.2-3705.7(24). Va. Code § 2.2-3711(38).

9. Resource Management Plans. Discussion of records related to resource management plans that are not otherwise required to be disclosed. Va. Code §§ 2.2-3711(45); 10.1-104.7.
10. Sexual Assault and Child Abuse. Discussion of (i) individual sexual assault cases by a sexual assault team established pursuant to Va. Code § 15.2-1627.4 or (ii) individual child abuse or neglect cases or sex offenses involving a child by a child abuse team established pursuant to Va. Code § 15.2-1627.5.

23-3.04(j) Topics Determined Not Eligible

Various opinions of the Attorney General advise that specific topics are not eligible for discussion in closed session. These non-exempt subjects include:

1. Form of Government. A proposed change in the form of government of a locality. 1974-75 Op. Va. Att’y Gen. 570.
2. Budget. The proposed annual budget of the public body. 1974-75 Op. Va. Att’y Gen. 582.
3. Personnel Policies. General personnel matters not involving a specific individual. 1979-80 Op. Va. Att’y Gen. 378.
4. Tax Assessments. Discussion by a board of equalization of allegedly inequitable assessments. 1983-84 Op. Va. Att’y Gen. 442.
5. Water Rates. A proposed deferred payment plan for sewer service. 1982-83 Op. Va. Att’y Gen. 717.
6. Administrative Structure. Reorganization of the administrative structure of a school system. 1982-83 Op. Va. Att’y Gen. 713. *But see id.* at 714 (closed session permitted to discuss filling one deputy school superintendent position and eliminating another).

23-3.04(k) Special Exclusion for Matters Relating to Commission on Local Government

Except for public hearings or other meetings specifically required by statute, the Act does not apply at all to meetings of the Commission on Local Government, or to meetings of local governing bodies or their members to discuss any issues that would be subject to that Commission’s review (e.g., annexation, city reversion to town status). Va. Code § 15.2-2907(D). Note that this is not merely an exemption allowing closed meetings for those discussions, but an exclusion of such meetings from FOIA requirements altogether.

23-4 PUBLIC RECORDS UNDER FOIA

23-4.01 General Requirement for Openness

All public records must be open to inspection and copying during normal business hours of the public official who is custodian of the records. The requestor may choose whether to obtain copies or inspect the documents. Va. Code § 2.2-3704. Localities with a population greater than 250 and any school board must post a link to the following information on the homepage of their official public government websites:

1. a plain English explanation of the procedures for requesting records and the rights of the requester and responsibilities of the public body;
2. contact information for the public body’s designated FOIA officer (see section [23-4.01\(b\)](#));

3. types of public records maintained;
4. exemptions that may be applied;
5. any policy concerning the type of public records routinely withheld;
6. a statement regarding the potential charges for producing records and saying that the requester may request an estimate of the costs;
7. a written policy explaining how charges for accessing or searching for records are assessed, including the current fee charged; and
8. a link to the FOIA Advisory Council's online public comment form (except for school boards).

Va. Code § 2.2-3704.1.

23-4.01(a) Custodian

Custodian is not defined. The Virginia Supreme Court has stated that in the ordinary situation, a custodian for FOIA purposes is the public body in possession of a record. The Court also noted that there might be more than one custodian. If state law specifies the entity that is the custodian of records, however, that designation controls. *Daily Press, LLC v. Office of the Exec. Sec'y of the Supreme Court*, 293 Va. 551, 800 S.E.2d 822 (2017). The Advisory Council has concluded that the custodian is the public official in charge of preparing, owning, or possessing public records. Va. FOI Adv. Council AO-02-14, Jan. 29, 2014. The Council also noted that it is an internal decision by a locality whether to have elected officials act as custodians of their own email or to have its chief administrative officer (or some other employee or designee) handle such requests. *Id.*

Even though an employee of a public body serves in an official capacity for a third party, that service does not automatically subject documents held by that third party to FOIA liability. *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 835 S.E.2d 544 (2019).

23-4.01(b) FOIA Officer

All local public bodies, including school boards and constitutional officers, must designate a FOIA officer who is the point of contact for records requests and the coordinator for FOIA compliance. Va. Code §§ 2.2-3704.1; 2.2-3704.2. Contact information for the FOIA officer must be publicized, and for any locality with a population greater than 250, a link to this information must be posted on the locality's website homepage. *Id.*; Va. Code § 2.2-3704.1. FOIA officers must be trained once every two years by the local government's attorney or the FOIA Advisory Council, Va. Code § 2.2-3704.2(E), and the Council must post on its website a listing of the FOIA officer contact information for all public bodies. Va. Code § 2.2-3704.2(G).

23-4.01(c) To Whom the Right Applies

This right to inspect and copy records is guaranteed to all citizens of the Commonwealth, and to representatives of news media circulating or broadcasting in Virginia. *Id.* While a public body may choose to allow non-Virginians to inspect and copy records, a non-resident may lack standing to compel records disclosure in court. See *McBurney v. Young*, 569 U.S. 221, 133 S. Ct. 1709 (2013) (citizen-only provision of FOIA does not violate the Privileges and Immunities Clause or the dormant Commerce Clause). In *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), the Fourth Circuit recognized that there is no general First Amendment right to access a government record, but nonetheless found that a Maryland statute limiting access to the state's voter registration list to Maryland registered voters implicated First Amendment concerns. The *Fusaro* court reasoned that the voter registration list was closely tied to political speech, and restrictions on access were based on content-

and speaker-based conditions. Nonetheless, because the statute at issue did not severely burden speech, strict scrutiny did not apply and a balance of interests tests should be used.

The Act expressly does not afford any rights to persons incarcerated in federal, state, or local correctional facilities, either in Virginia or elsewhere; such persons may, however, exercise their constitutional rights including, but not limited to, calling for exculpatory evidence in a criminal prosecution. Va. Code § 2.2-3703. Denial of this right has been held to violate neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment. *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000); *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008). Nothing in the Act prevents another Virginia citizen from requesting records on behalf of an inmate.

23-4.01(d) Public Records Defined

The Act's definition of public records includes all written or recorded items consisting of words, letters, or numbers, or their equivalent, regardless of the method or physical form in or which they are created, set down, or stored, when such items are prepared, owned, or possessed by a public body or its officers, agents, or employees in the transaction of public business. Va. Code § 2.2-3701. The list of various special types of records previously included in this definition was deleted by the 1999 revision. The current definition is clearly intended to be all encompassing. See Va. FOI Adv. Council AO-06-11, Oct. 17, 2011 (photographs, while not a writing or recording consisting of letters, words, or numbers, or their equivalent, are public records).

When a private party holds records relating to public business as a contractor or agent for a public body, such records may be subject to disclosure. See Va. FOI Adv. Council AO-03-04, Feb. 10, 2004 (SPCA acts as an agent of local government for animal control and its records related to animal control and use of public funds are public records); AO-37-01, Aug. 6, 2001 (tourism records maintained by chamber of commerce under delegation from local governing body are public records subject to FOIA).

Except for records archived at the Library of Virginia pursuant to the Virginia Public Records Act (Va. Code § 42.1-76 et seq.), if public records have been sent to another public or private entity for storage, maintenance, or archiving, the transferring public body remains the custodian of the records. Va. Code § 2.2-3704(J); see *Daily Press, LLC, v. Office of the Exec. Sec'y of the Supreme Court*, 293 Va. 551, 800 S.E.2d 822 (2017). Current records should be kept at the buildings in which they are ordinarily used. Va. Code § 42.1-87(A); 2013 Op. Va. Att'y Gen. 191.

An advisory opinion concludes that adopted and published state statutes and regulations are not records that public bodies are obligated to furnish on request, although a public body may choose to do so. Va. FOI Adv. Council AO-05-06, May 25, 2006.

23-4.01(e) Distinguishing Between Public and Private Records

Only records created in the transaction of public business are subject to disclosure under the Act. An opinion of the FOI Advisory Council acknowledges that messages or correspondence of a public official that address only private matters do not have to be disclosed. Va. FOI Adv. Council AO-1-00, Sept. 29, 2000. A general district court in Loudoun County disagreed with that opinion and held that all communications with a public official are presumed to be public records. *Mann v. Waters*, No. V07-7576, (Loudoun Co. Gen. Dist. Ct., Nov. 20, 2007). A later circuit court opinion from the same jurisdiction, however, agreed with the Advisory Council that a county supervisor's messages or other correspondence addressing only private matters do not have to be disclosed, but further held that the response to a records request that includes both public and private records must identify the specific private records being withheld. *Burton v. Mann*, 74 Va. Cir. 471 (Loudoun Cnty. 2008); see also Va. FOI Adv. Council AO-02-14, Jan. 29, 2014 (mere residence on county backup database does not make a document a public record).

23-4.02 Requesting Records**23-4.02(a) Request**

To make a valid request for records under the Act, the citizen only needs to identify them "with reasonable specificity." The request does not need to mention the Act; its time limits and other requirements apply regardless of whether the requester mentions it. Va. Code § 2.2-3704. The requester may be required to provide his name and legal address. Va. Code § 2.2-3704(A).

23-4.02(b) Existing Records Only

The Act only guarantees access to existing records. Va. Code § 2.2-3704(D); *see also* 1991 Op. Va. Att'y Gen. 7; Advisory Council AO 00-11, Dec. 12, 2000 (Department of Corrections was not obligated to combine information from two databases to answer newspaper reporter's question).

23-4.02(c) Written or Oral Requests

The Act does not expressly state whether the public body may require requests for records be made in writing. One opinion of the Attorney General concludes the Act does not prohibit a policy of responding only when the request is made in person or in writing. 1982-83 Op. Va. Att'y Gen. 727. *But see* Va. FOI Adv. Council AO-18-04, Aug. 31, 2004 (public body may ask, but not require, that the FOIA request be made in writing). Demanding a full written application and positive identification of the requester for every request, however simple and straightforward, seems unduly burdensome and contrary to the general policy of the Act. A better practice is to require a written request only when that is necessary to clarify what records are being requested. There is no disclosure exemption in the Act for records containing the names of persons who have made requests for records under the Act. Va. FOI Adv. Council AO-42-01, Sept. 4, 2001.

23-4.02(d) Public Body's Response

The custodian of the records must provide the records or make one of the following responses in writing within five working days:

1. The requested records are withheld. This response must identify with reasonable particularity the volume and subject matter of the withheld records and cite, for each category of records, the specific provision of the Act or other statute that authorizes withholding them.
2. Part of the requested records are being made available and part will be withheld. This response also must identify the subject of the withheld portions and cite the specific section of the Act or other statute that exempts from disclosure each part being withheld.
3. It is not practically possible to complete the response within the initial five working days. The custodian must explain the specific circumstances making a full response impossible. When this is done within the initial five workdays, the public body gains an additional seven workdays or, in the case of a request for a criminal investigative file pursuant to Va. Code § 2.2-3706.1, sixty additional workdays, to complete processing of the request.
4. The requested records could not be found or do not exist. However, if the public body that receives the request knows that another public body has the requested records, the response shall include contact information for the other public body.

Va. Code § 2.2-3704(B).

Before conducting a search for the requested records, the public body must notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the records, and ask the requester whether he or she would like a cost estimate. Va. Code § 2.2-3704(F). Under prior law, the public body was required to provide an estimate only if the requester asked for it. The period of time in which the public body must respond to the FOIA request is tolled for the amount of time between notice of the cost estimate and the response of the requester. Va. Code § 2.2-3704(F).

Weekends, legal holidays, and other days offices are closed (e.g., for inclement weather) are not counted as working days when computing the time limit for a response to a records request. Va. FOI Adv. Council AO-06-14, Sept. 26, 2014; Va. FOI Adv. Council AO-02-08, Mar. 7, 2008. If the request is for an extraordinary volume of records or requires an extraordinary lengthy search, and the additional seven days are insufficient, the public body or custodian of the records should attempt to negotiate an agreement with the requester for more time. If that is not successful, the public body may petition the appropriate court for additional time. Va. Code § 2.2-3704(C).

FOIA does not specify the extent to which a public body must search for records in response to a request. As the circumstances of a search may vary depending on any number of factors, such as the nature and scope of the request, the volume of records being requested, the age of the records, the media upon which the records are recorded, and the manner in which they are kept, there can be no bright-line rule setting forth exact requirements for every search. Considering the policy of FOIA, the legal duties it imposes, and the presumption that public officials will obey the law in carrying out their duties, it must also be presumed that while the methods and extent of searches vary, any search for records made under FOIA is carried out in good faith. Va. Adv. Council AO-04-10, Nov. 19, 2010. While the volume requested may justify extra response time and charges, volume alone does not justify denying a request. Va. FOI Adv. Council AO-02-14, Jan. 29, 2014.

23-4.02(e) Charging for Records Furnished

23-4.02(e)(1) Reasonable Charges

The public body may make reasonable charges for its actual costs of finding, duplicating, or supplying records requested and “shall make all reasonable efforts to supply the requested records at the lowest possible cost.” Va. Code § 2.2-3704(F). This includes a reasonable cost for an exclusion review and redacting. *Am. Tradition Inst. v. Rector of the Univ. of Va.*, 287 Va. 330, 756 S.E.2d 435 (2014). The charge must not exceed the actual, direct costs for these activities. Expressly prohibited by Va. Code § 2.2-3704(F) are any “extraneous, intermediary or surplus fees or expenses to recoup the general costs . . . [of] creating or maintaining records or transacting the general business of the public body.” If a requester specifies that he wants to inspect the records, he may not be charged for copying. Va. FOI Adv. Council AO-04-04, Mar. 19, 2004. Copying charges must also not exceed the actual cost of copying. *Id.*; see 1983-84 Op. Va. Att’y Gen. 436; Va. FOI Adv. Council AO-08-03, Apr. 3, 2003; Va. FOI Adv. Council AO-14-02, Nov. 12, 2002; and Va. FOI Adv. Council AO-05-14, June 12, 2014 (discussing elements of a “reasonable” charge). Any local public body that charges for the production of records pursuant to this section may provide an electronic method of payment through which all payments for the production of such records to such locality may be made. Va. Code § 2.2-3704(F).

The FOIA Advisory Council has stated that the cost of fringe benefits for staff who respond to the request is an extraneous cost. Va. FOI Adv. Council AO-05-02, May 24, 2002. Despite the Council opinion to the contrary, the author believes a persuasive argument can be made for the addition of a percentage of fringe benefits to the hourly pay rate for the searching and copying employee when compared to the actual cost of that activity. When producing public records under FOIA, a county supervisor, or any other public official, may charge at most whatever rate corresponds to his actual rate of pay as a public official, not

the rate earned in private employment. Va. FOI Adv. Council AO-03-12, Apr. 24, 2012. Another advisory opinion concludes that a public body should not charge for simply copying and emailing to a requester links to records posted on the public body's website. Va. FOI Adv. Council AO-08-09, Aug. 3, 2009. Similarly, the Council has stated that as a general rule, the number of pages should have no effect on the cost of an electronic document sent as an attachment to an electronic mail message, since the number of pages does not affect the actual cost or time involved in copying or supplying a purely electronic record. Va. FOI Adv. Council AO-05-13, May 30, 2013.

The FOIA Advisory Council has stated that while a public body may create a responsive document in its discretion, it cannot charge a requester without prior consent, nor can it charge for the cost of computing the cost of responding. Va. FOI Adv. Council AO-49-01, Dec. 17, 2001. But note the subsequent statutory change, permitting the costs of creating the estimate to be included in the overall charges. Va. Code § 2.2-3704(F) ("Any costs incurred by the public body in estimating the cost of supplying the requested records shall be applied toward the overall charges to be paid by the requester for the supplying of such requested records."). Because the creation of salary records is an exception to the general rule that responsive records do not have to be created, see section [23-4.04\(a\)\(1\)\(iii\)](#), the Council has also said that a public body may not charge for the creation of salary records (although it noted that usually such information is in existing records). Va. FOI Adv. Council AO-04-04, Mar. 19, 2004.

23-4.02(e)(2) Estimate

Before conducting a search for the records, the public body must ask the requester in writing whether he would like a cost estimate. Va. Code § 2.2-3704(F). Any costs incurred by the public body in estimating the cost of supplying the records may be applied toward the overall charges to be paid by the requester for the supplying of the records.⁹ *Id.* Such information must be included in the FOIA notice posted on the locality's official website. Va. Code § 2.2-3704.1(A)(6). The period of time in which the public body must respond to the FOIA request is tolled for the amount of time between notice of the cost estimate and the response of the requester. Va. Code § 2.2-3704(F). If the public body receives no response from the requester within thirty days of sending the cost estimate, the request will be deemed withdrawn. *Id.*

23-4.02(e)(3) Requiring Prepayment

When the public body estimates that the bill for complying with the request will exceed \$200, it may require the citizen to pay a deposit up to the amount of the estimate before it proceeds with the request. Va. Code § 2.2-3704(H). The public body may not ask for prepayment after compiling the records. Va. FOI Adv. Council AO-04-04, Mar. 19, 2004. Once the public body notifies the requester of the estimate and asks for the advance payment, the time period for responding to the request is tolled until the requester pays. Va. Code § 2.2-3704(H); see also 1979-80 Op. Va. Att'y Gen. 386 (requiring advance payment is discretionary); *Fairfax Cnty. Sch. Bd. v. Judicial Watch Inc.*, 91 Va. Cir. 443 (Fairfax Cnty. 2016) (statute means government may require actual payment before processing the FOIA request; thus, time for compliance does not begin to run when requester agrees to pay).

Additionally, 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 thirty days or more after billing. Va. Code § 2.2-3704(I).

⁹ Implicitly, then, if the requester decides, after being provided with the estimate, to cancel the request for the records, the public body must absorb the cost of providing the estimate.

23-4.02(e)(4) Topographic Maps

Specific language in Va. Code § 2.2-3704(F) addresses charges for topographic maps and other records produced by a locality's geographic information system. The locality may charge anyone other than the owner of the land that is the subject of the request a reasonable charge for supplying such records. The charge may not exceed the locality's actual cost of supplying the record except that, for topographical map's encompassing an area greater than fifty acres, the charge may be based on the actual cost of creating (i.e., not merely cost of copying) such maps, allocated on a per acre basis. *Id.*

23-4.02(f) Not Required to Create New Records

The Act requires disclosure only of existing records. It does not generally require a public body to create new records or to abstract or summarize information from existing ones, although the public body may agree at its discretion to create such a summary. Va. Code § 2.2-3704(D); see *Daily Press, LLC, v. Office of the Exec. Sec'y of the Supreme Court*, 293 Va. 551, 800 S.E.2d 822 (2017) (use of data replication software is not creation of a new record); 1991 Op. Va. Att'y Gen. 9.

Likewise, public bodies and records custodians are not required by the Act to respond to questions, explain the contents of records or furnish "information" in other ways than by providing requested existing records. See Ops. Va. Att'y Gen. 1979-80 at 384 (although inmate is entitled to see his medical records, custodian is not required to explain medical terms), 1975-76 at 409 (no requirement to supply information not contained in official record), 1974-75 at 573 (not required to provide "information" on prospective business client).

23-4.02(g) Redaction

The issue of redaction arises in multiple circumstances. There are public records that are required to be released but from which certain information may redacted, e.g., personal information in 911 calls. Similarly, a public body may exercise its discretion to release an exempt document, but it may be otherwise required by law to redact certain information, e.g., personally identifying information in scholastic records. Finally, there is the record that contains exempt and non-exempt information. When does the public body have the obligation to redact a record so that non-exempt information is provided?

The General Assembly negated the holding of *Department of Corrections v. Surovell*, 290 Va. 255, 776 S.E.2d 579 (2015), in which the Court held that when the General Assembly intends to require redaction and production of portions of records, the exemption itself must refer to portions of the record. In response, the General Assembly set out a general rule of redaction which provides non-exempt portions of all records are subject to disclosure. Thus, an entire record may be withheld only if all information it contains falls within a FOIA exemption or is otherwise prohibited by law to be disclosed. Va. Code § 2.2-3704.01.

23-4.02(h) Requests for Computer Records; Emails**23-4.02(h)(1) Electronic Data**

Because the Act's definition of public records includes all records of a public body regardless of the manner in which they are created or kept, computer data and other electronic records must be made available to requesters on the same basis, within the same time limits, and at a similarly defined "reasonable" cost as paper records. See Va. Code §§ 2.2-3701 and 2.2-3704(G). The fact that a computer file or database contains information both exempt and not exempt from disclosure makes no difference. The public body must disclose the non-exempt parts, even if it elects to claim an exemption for the exempt parts. Va. Code § 2.2-3704(G). The Act states specifically that the removal of exempt fields from a database is not considered the creation of a new public record. Va. Code § 2.2-3704(H); see 2002 Op. Va. Att'y Gen. 9; Va. FOI Adv. Council AO-21-03, July 21, 2003 (addressing obligation to provide copies of digital databases of court and land records).

23-4.02(h)(2) Email Messages

Even based on the pre-1999 definition of official records, the Attorney General concludes that email messages about public business sent and received by public officials are records covered by the Act, subject to the same exemptions and requirements as their paper correspondence would be. 1999 Op. Va. Att’y Gen. 12. Whether an email is a public record depends on its content, not on whether it is received at or sent from the official email address or private email address of a public official. Va. FOI Adv. Council AO-02-14, Jan. 29, 2014; Va. FOI Adv. Council AO-04-10, Nov. 19, 2010; and AO-07-04, Apr. 7, 2004.

This conclusion has given rise to further questions about members’ obligations to retain such email messages. The FOIA does not contain requirements for the retention of any public records. That issue is addressed by the Virginia Public Records Act, Va. Code § 42.1-76 et seq., and by administrative regulations and [retention schedules](#) promulgated by the Library of Virginia pursuant to the latter statute. See also [Virginia Public Records Management Manual \(Oct. 2014\)](#). The Public Records Act, regulations, and schedules require public bodies to retain email messages for the same time periods as comparable printed public records. The Public Records Act makes a distinction between retaining public and private records, not printed and electronic records. Va. Code § 42.1-82. Indeed, the Act provides that even if a public record is otherwise required to be retained in a tangible medium, it may be retained in an electronic medium in accordance with the access and retention schedules of the Act. Va. Code § 42.1-86.01. The Act also *requires* the destruction of public records in accordance with the retention and disposition schedule. Va. Code § 42.1-86.1.

23-4.02(h)(3) Furnishing in Different Medium

A further addition made in the 1999 revision obligates public bodies to furnish records maintained electronically in any medium identified by the requester, as long as that medium is used by the public body in the ordinary course of business. Va. Code § 2.2-3704(G). Thus, if the requester asks to receive the record on a diskette or compact disk instead of a paper copy, the public body must ordinarily comply. See 2004 Op. Va. Att’y Gen. 88 (court clerk need not produce electronic data on compact disk if office does not regularly use such medium in the course of business, but must make reasonable accommodation if requester provides the means and covers the cost of reformatting the data into the medium the requester desires). If the public body has email capability and the requester asks to receive the file as an email attachment, that too must be done. Converting an electronic record from one medium to another (e.g., printing a paper copy or transferring it to diskette) is not considered to be the creation of a new record. As with other types of copying, the public body may make a reasonable charge for these services, not to exceed its actual costs. *Id.*

23-4.02(i) Purpose of Request Not Relevant

In a case in which a city treasurer attempted to withhold non-exempt real property assessment records because the requester intended to use them for commercial purposes, the Virginia Supreme Court held that the motive or intent of person making a request for records under the Act is not relevant to the requester’s entitlement to those records. *Associated Tax Serv., Inc. v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988). In *Kaeberle v. Virginia Department of Transportation*, 84 Va. Cir. 543 (Hanover Cnty. 2012), a circuit court held it was irrelevant that a requestor, because of the nature of his employment, could use information in a public record to obtain confidential personnel information.

There is little justification for a public body’s requiring a citizen who requests records to state the intended use or reason for the request. Except when necessary to determine the specific records the requester is seeking, inquiring about the requester’s motive is inappropriate. However, the requester may be asked to provide a name and legal address. Va. Code § 2.2-3704(A).

23-4.02(j) Control of Records During Inspections

The Act expressly provides that custodians of public records “shall take all necessary precautions for their preservation and safekeeping.” Va. Code § 2.2-3704(A). Accordingly, opinions of the Attorney General conclude that records custodians may adopt reasonable rules for the safety and preservation of records being made available for inspection, as well as measures to protect the efficient operation of the custodian’s office while such inspections are taking place. Ops. Va. Att’y Gen. 1989 at 12, 1986-87 at 283.

One such opinion indicates, however, that unless the custodian has some basis for believing that the requester will remove or destroy records, the requester may not be charged for the time spent by an employee whose sole function is to watch the requester as the records are inspected. 1989 Op. Va. Att’y Gen. 12.

23-4.03 Exempt and Non-Exempt Records Generally

The 2004 General Assembly reorganized more than seventy categories of exempt records into seven subject-specific exemption sections. Va. Code §§ 2.2-3705.1 through 2.2-3705.7. Exemptions for criminal and other law enforcement records, which are now codified separately in Va. Code §§ 2.2-3706 and 2.2-3706.1, are discussed in section [23-4.05](#).

23-4.03(a) Use of Exemptions Discretionary

Nothing in the Act itself requires that particular public records be kept confidential. The custodians of public records may exercise their discretion to claim the exemptions in § 2.2-3705 or disclose requested records in those exempt categories, unless some other state or federal law restricts or prohibits disclosure of the record. *See, e.g.*, Va. Code §§ 58.1-3 (prohibiting disclosure of certain taxpayer records); 22.1-287 et seq. (restricting disclosure of scholastic records); 16.1-300 et seq. (restricting access to juvenile court records). By the clause “except where such disclosure is prohibited by law,” Va. Code §§ 2.2-3705.1 through 2.2-3705.7 make it clear these other statutes are controlling. There is no balancing test between the exercise of such discretion and the public interest in the records. Va. FOI Adv. Council AO-01-14, Jan. 29, 2014.

23-4.03(b) Copyrighted Materials

An opinion of the Attorney General concludes that the Act does not require a public body to provide copies of copyrighted materials (when the copyright is held by someone other than the public body) under circumstances that would violate the federal Copyright Act. The opinion notes, however, that the public body may have received the copyrighted material under circumstances that created an implied consent to its further distribution, or that furnishing it to others for some purposes might fall under the “fair use” doctrine in the Copyright Act. 1998 Op. Va. Att’y Gen. 5.

23-4.04 Particular Categories of Exempt and Non-exempt Information¹⁰**23-4.04(a) Exclusions of General Application to Public Bodies**

Virginia Code § 2.2-3705.1 consolidates exemptions of general application that may be used by both state and local public bodies, including, but not limited to, personnel information, written legal advice, work product and other information compiled for use in litigation or in an active administrative investigation, and contract negotiation records.

¹⁰ To help clarify its general rule regarding redacting material that is exempt from disclosure, the FOIA statute now refers to exempt information in a public record rather than an exempt public record. Court cases before that revision, of course, refer to exempt records. This chapter generally refers to exempt information, but has retained the use of “record” when discussing the holding of a court that used that term. The reader can consider the terms interchangeable.

23-4.04(a)(1) Personnel and Salary Information**23-4.04(a)(1)(i) General Scope**

Personnel information contained in a public record about identifiable individuals is exempt from required disclosure to third parties. Va. Code § 2.2-3705.1(1). Information qualifying for this exemption includes, among other matters, names, applications, and qualifications of job applicants or persons seeking appointment to a public body. Ops. Va. Att’y Gen. 1991 at 9, 1981-82 at 433; Va. FOI Adv. Council AO-23-04, Nov. 2, 2004. The exemption probably applies to more than just information contained in a personnel file in a supervisor’s or human resource manager’s office. A circuit court has defined “personnel record” as all information gathered about an employee’s employment in a permanent form. *McChrystal v. Fairfax Cnty. Bd. of Sup’rs*, 67 Va. Cir. 171 (Fairfax Cnty. 2005). Another court defined personnel records as records of or pertaining to a specific, identifiable employee and touching directly upon that individual’s “performance, discipline, attendance, income, social security number, tax-related matters, personal background, circumstances and education, and other information bearing upon the individual’s employment relationship” and for which either the employee or employer may have a reasonable expectation of confidentiality. *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450 (City of Norfolk 2010); see also *Butler/Elliott v. Hoch* letter opinion by Judge Durrer dated March 6, 2014 (Madison Cnty.) for a written opinion by a general district court judge that extensively discusses the jurisprudence of the personnel record exemption.

In *Hawkins v. Town of South Hill*, 107 Va. Cir. 212 (Mecklenburg Cnty. 2021), the court adopted a definition of “personnel information” broader than that adopted in the *Virginian-Pilot* case in Norfolk and narrower than the definition used in the *McChrystal* case in Fairfax: “All information necessarily compiled and held by an employer, concerning an identifiable employee, which information directly relates to the commencement, continuation or termination of the employment relationship.” *Id.* Accordingly, it found that a letter from several town employees requesting a meeting with town administrators regarding their “concerns” about the “workplace environment” did not contain any exempt personnel information. The letter did not contain specific complaints about any particular employee, nor any job titles, social security numbers, addresses, tax information, employee evaluations, or “anything else that could be deemed to be personal in nature.” However, the court ordered redacted those portions of an email containing specific complaints about the performance of the Town Manager. The Supreme Court of Virginia, however, noting that the circuit court had used an outdated statutory description of personnel “records” rather than the current description of personnel “information,” remanded the case for further consideration of some of the items the circuit court had ruled need not be disclosed. *Id.*, *affirmed in part and remanded*, 301 Va. 416, 878 S.E.2d 408 (2022).¹¹

23-4.04(a)(1)(ii) Right to See One’s Own Records

The FOIA Advisory Council said that the personnel exemption should cover any record held by a public body that relates to an identifiable employee concerning the nature of the employment, job capacity or performance, or is otherwise related to the scope of employment. Va. FOI Adv. Council AO-04-03, Feb. 14, 2003. A report evaluating an employee’s performance is exempt. 1974-75 Op. Va. Att’y Gen. 580. But, a report of teacher evaluation ratings by a public school that does not identify individual employees does not qualify for exemption. 1983-84 Op. Va. Att’y Gen. 449. Pension records of individual current and retired employees are likewise exempt. 1978-79 Op. Va. Att’y Gen. 316. Employee timesheets are exempt. Va. FOI Adv. Council AO-07-02, July 23, 2002. One court has held

¹¹ On remand, the circuit court held that all of the previously withheld documents were subject to production, save those portions that qualified as “personnel information,” which must be redacted. *Hawkins v. Town of South Hill*, No. CL 20000144-00 (Mecklenburg Cnty. Cir. Ct., May 26, 2023). Material to be redacted included the names of certain government employees to whom the document in question did not pertain, certain references to private activity that was outside the scope of the public employment in question, and references to certain medical or emotional diagnoses. *Id.*

that the home and business addresses of the members of a university board of visitors are not personnel records exempt from disclosure under Va. Code § 2.2-3705.1(1). *Dixon v. Va. Commonwealth Univ.*, CL 2010-11537 (Fairfax Cnty. Cir. Ct., Sept. 9, 2010). Nevertheless, most local governments treat the home addresses and personal phone numbers of their employees as exempt personnel information. The Virginia Supreme Court has held that the personnel records exemption applies to employee records of law enforcement agencies, notwithstanding the requirements of Va. Code § 2.2-3706. *Harmon v. Ewing*, 285 Va. 335, 745 S.E.2d 415 (2013) (per curiam). But see Va. Code § 2.2-3706(D), adopted after *Harmon*, stating that access to law enforcement personnel records is governed by the provisions of both Va. Code §§ 2.2-3706(B)(9) and 2.2-3705.1(1), “as applicable.”

Nevertheless, access to personnel information may not be denied to the person who is the subject of the record. Va. Code § 2.2-3705.1(1). Employees of state and local agencies or public bodies may inspect and copy their own personnel information. See Ops. Va. Att’y Gen.: 1976-77 at 210, 1974-75 at 585; Va. FOI Adv. Council AO-04-16 (Dec. 16, 2016) (teacher cannot obtain records directly related to an identifiable student even if teacher is also the subject of those records unless the information identifying the student is redacted). Another opinion concludes that a job applicant is entitled to see a report of a background investigation on the applicant in a city’s personnel files. 1973-74 Op. Va. Att’y Gen. 456. But see Va. Code § 2.2-3706(B)(9) (exempting background investigations of applicants for law enforcement jobs). Virginia Code § 2.2-3706(D) says that access to personnel records of persons employed by a law-enforcement agency is governed by the provisions of §§ 2.2-3706(B)(9) and 2.2-3705.1, “as applicable.” In *McChrystal v. Fairfax Cnty. Bd. of Sup’rs*, 67 Va. Cir. 171 (Fairfax Cnty. 2005), the circuit court construed the right of an employee to see his own personnel record in light of the exemption in Va. Code § 2.2-3705.3(3) for employment discrimination investigations, see section [23-4.04\(c\)\(1\)](#), and held that an employee subject to an employment discrimination investigation was entitled under FOIA to all information in the final report but not the investigatory materials giving rise to it. Under Va. Code § 2.2-3806 of the GDCDPA, however, the employee was entitled to the investigatory material as well. See section [23-7.04](#).

The *McChrystal* court did not address letters of reference, but Va. Code § 2.2-3806(B), part of the Government Data Collection and Dissemination Practices Act, contains a specific provision to protect the confidentiality of written recommendations or references from third parties held by public bodies, concerning job applicants, students or applicant for licenses or certificates. An opinion of the Attorney General concludes that Va. Code § 2.2-3806(B) authorizes withholding letters of recommendation from a state agency employee who is the subject of those letters. 1976-77 Op. Va. Att’y Gen. 210. A later opinion of the FOI Advisory Council disagrees with that conclusion, arguing that the right of public employees to see their own personnel records, expressed in Va. Code § 2.2-3705.1(1), overrides Va. Code § 2.2-3806(B). Va. FOI Adv. Council AO-03-05, Mar. 30, 2005. The same Advisory Council opinion reaches a different conclusion, however, about letters of recommendation concerning employees or students of educational institutions or agencies, because of a more specific disclosure exemption in Va. Code § 2.2-3705.4(A)(2). That statute also encompasses, in addition to letters of reference for employees of such institutions, letters of recommendation regarding applicants for school or university admission or for the awarding of academic honors. Letters of reference for public school or university employees are not fundamentally different from such letters in the personnel files of other public employees, so there seems to be no logical basis for granting the subjects access to the latter while denying access to the former. Perhaps the Attorney General’s opinion remains the correct answer.

23-4.04(a)(1)(iii) Contracts and Salary Information

Despite the general exemption for personnel information, the Act expressly requires disclosure of employment contracts and records of the name, position, job classification,

salary or rate of pay, and expense allowances or reimbursements of any officer or employee of a public body. Salaries of employees earning under \$10,000 annually are excepted from this requirement. Va. Code § 2.2-3705.1(1). Attorneys General have consistently ruled that this provision is mandatory, even if the requester intends to publish the information, and that even annual salaries under \$10,000 may be disclosed if the public body elects to do so. Ops. Va. Att’y Gen. 1987-88 at 33, 1982-83 at 708, 1980-81 at 394, 1978-79 at 310 and 311, 1969-70 at 317; Va. FOI Adv. Council AO-01-02, Jan. 16, 2002. If an individual earns two salaries from a public body, each should be considered separately for purposes of the exception for salaries under \$10,000. 1982-83 Op. Va. Att’y Gen. 731. Despite the general limitation that a public body need not create a responsive record that does not exist, it must create a salary record when that information is requested for a specific date or range of dates, e.g., employee salaries as of July 1, 2003. Va. FOI Adv. Council AO-11-03, Apr. 30, 2003; Va. FOI Adv. Council AO-01-21, Jan. 21, 2021.

23-4.04(a)(1)(iv) Waiver by Employee

Although use of the exemption for personnel information other than employment contracts, salaries, and expense records is generally optional with the public body, individual employees have the ability to stop the public body from asserting the exemption for their records. Any person over eighteen who is the subject of personnel information may waive the protection of Va. Code § 2.2-3705.1(1). When a public body receives such a waiver, in writing, from an individual, the public body may no longer claim the exemption. Va. Code § 2.2-3705.1(1).

23-4.04(a)(2) Social Security Numbers

The Protection of Social Security Numbers Act says that except for limited and specified circumstances, the first five digits of a social security number contained in a public record shall be confidential and exempt from disclosure under FOIA. Va. Code § 2.2-3815. That statute does not apply to records maintained by clerks of court, which are governed by other statutes with regard to social security numbers. If a petitioner in a proceeding for an injunction or mandamus to enforce this provision substantially prevails on the merits, he shall be entitled to costs and attorney’s fees. Va. Code § 2.2-3816.

23-4.04(a)(3) “Legal” Exemptions

23-4.04(a)(3)(i) Attorney-Client Privilege and Written Advice

Written advice of legal counsel to public bodies is exempt from mandatory disclosure, as are other records protected by attorney-client privilege. Va. Code § 2.2-3705.1(2); *Hill v. Cnty. of Spotsylvania*, CL No. 07-1093 (Spotsylvania Cnty. Cir. Ct. Feb 26, 2008).

Billing records may fall within the attorney-client and work-product exceptions to disclosure under FOIA if they reveal (i) confidential information, including the motive of the client in seeking representation; (ii) litigation strategy, including records indicating the specific nature of the services provided, such as researching particular areas of law; and (iii) analytical work product or legal advice. A blanket redaction of all itemized descriptions of services is too broad, however; each entry must be evaluated to determine if it meets the above requirements. *Bergano v. City of Va. Beach*, 296 Va. 403, 821 S.E.2d 319 (2018); see also 1987-88 Op. Va. Att’y Gen. 30 (entries protected by attorney-client privilege on a town attorney’s itemized bill to the town may be redacted before disclosure of the bill; cited with approval in *Bergano*); section 23-4.02(g).

23-4.04(a)(3)(ii) Litigation or Administrative Investigation

Legal memoranda and other work product are also exempt, if they are compiled specifically for use in litigation or in an active administrative investigation that is a proper subject for a closed meeting under the Act. Va. Code § 2.2-3705.1(3); *Bergano v. City of Va. Beach*, 296 Va. 403, 821 S.E.2d 319 (2018). In *Shenandoah Publishing House Inc. v. City of Winchester*, 52 Va. Cir. 111 (City of Winchester 2000), the court held that a document prepared for the city attorney to determine whether a matter should be investigated was work product even though no investigation took place. In *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*,

81 Va. Cir. 450 (City of Norfolk 2010), the circuit court held that “work product” does not need to be created or compiled by attorneys or those acting under their direction. The court found that records related to an investigation of testing irregularities at a public school were the “work product” of an active administrative investigation even though it also found that they were not prepared in anticipation of litigation. However, the court further found that once the administrative investigation was complete, the records were subject to disclosure even though some litigation was a likely result of the investigation. The Advisory Council takes the position that even if records were compiled specifically for use in an active administrative investigation of employee misconduct, the portion of the records pertaining to an identifiable employee must be released to that employee upon request pursuant to the right of an employee under Va. Code § 2.2-3705.1(1) to see his own personnel records. Va. FOI Adv. Council AO-04-16 (Dec. 16, 2016); Va. FOI Adv. Council AO-02-03, Jan. 23, 2003.

23-4.04(a)(3)(iii) Closed Meetings

Records recorded in or compiled exclusively for discussion in a lawful closed meeting are exempt from disclosure, but a record that is otherwise subject to disclosure does not become exempt merely because it is reviewed or discussed in a closed meeting. Va. Code § 2.2-3705.1(5). Note that the FOIA Advisory Council has stated that FOIA does not address the “widespread” practice of requiring participants in a closed meeting to return any documents distributed or recorded during a closed meeting. Va. FOI Adv. Council AO-03-10, June 11, 2010.

23-4.04(a)(3)(iv) Settlement Agreements

An opinion of the Attorney General concludes that a settlement agreement is not a writing protected by attorney-client privilege, but is exempt as a document compiled specifically for use in litigation. 1987-88 Op. Va. Att’y Gen. 35.

The Virginia Supreme Court, however, held that although a settlement agreement may be exempt as a document compiled for use in litigation, accounting records reflecting the issuance of a check by the Division of Risk Management in payment of the settlement do not qualify for the same exemption. *LeMond v. McElroy*, 239 Va. 515, 391 S.E.2d 309 (1990). Construing *LeMond*, the Advisory Council stated that a contract settling an employment dispute was exempt, but accounting records reflecting any payment were not. The Council stated: “The implied policy is clear: the public gets to see how its tax dollars are spent” Va. FOI Adv. Council AO-06-13, June 20, 2013. This was reiterated in a later advisory opinion in which the Council stated that records of payments made to a former Deputy County Administrator pursuant to a settlement agreement were subject to release, even if the county characterized the records as “payroll” records rather than “accounting” records. Va. FOI Adv. Council AO-01-21, Jan. 21, 2021. The tax and benefits information could be redacted from the records to disclose only the gross payment amount. *Id.*

The Advisory Council stated in an earlier opinion that given the ambiguity of prior opinions, the absence of controlling precedent, and the subsequent changes to the language of the exemption as construed by both the Attorney General and the Supreme Court, it is unclear whether settlement agreements generally may be withheld pursuant to the current exemption for legal memoranda compiled specifically for use in litigation. Va. Adv. Council AO-01-11, May 6, 2011. Under these circumstances, local government attorneys should be aware that promises by public bodies not to disclose the amounts of settlements may be difficult to keep.

23-4.04(a)(3)(v) Contracts

Information relating to the negotiation and award of a specific contract is exempt when the release of such information would adversely affect the bargaining position or negotiating strategy of the public body. Such information cannot be withheld after the public body has made a decision to award or not to award the contract. If the transaction is one governed by the Virginia Public Procurement Act, however, information disclosure is controlled by the

Procurement Act. Va. Code § 2.2-3705.1(12); see section 25-10 of Chapter 25, “Public Procurement Law.”

23-4.04(a)(3)(vi) Insurance

Reserves established by the Division of Risk Management or by a locality for specific pending claims are expressly exempt. Also, investigative notes, correspondence, and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body’s insurance policy or self-insurance plan are exempt. However, information taken from inactive reports after expiration of the limitations period for the filing of a civil suit is not exempt. Va. Code § 2.2-3705.1(9).

23-4.04(a)(3)(vii) Donors to Non-Profit Organizations

Also exempt from mandatory disclosure are the names and data of any kind that directly or indirectly identify an individual as a member, supporter, donor, or volunteer of any 501(c) entity. Va. Code § 2.2-3705.1(14). However, the exemption does *not* apply to entities established by, for, or in support of a public body. *Id.* Moreover, public agencies may not disclose personal donor information without the express, written permission of every individual who is identifiable from the potential release of the information. Va. Code § 2.2-3808(A)(5).

23-4.04(a)(3)(viii) Ethics Advisory Council Opinions

Informal advice given by the Virginia Conflict of Interest and Ethics Advisory Council is confidential and excluded from the provisions of FOIA. Other records relating to formal advisory opinions or informal advice, including records of requests, notes, correspondence, and draft versions of such opinions or advice, are confidential and excluded from FOIA mandatory disclosure provisions. Va. Code § 30-356(6); see Chapter 27, The Conflict of Interests Act, section 27-2.

23-4.04(a)(4) Miscellaneous Other Exemptions

1. Test Materials. Tests or examinations used or administered by a public body to evaluate student performance, qualifications of employees or job candidates, or applicants for licensing or certification. Va. Code § 2.2-3705.1(4). This includes scoring keys or other documents that would jeopardize the security of the test if released. However, the subjects of employment testing may inspect and review records of their own performance on such tests. *Id.*
2. Software. Proprietary software acquired from a vendor to process data for a public agency or political subdivision, or similar software developed for or by an agency or political subdivision for its own use. Va. Code § 2.2-3705.1(6) and (7).
3. Real estate appraisals. Appraisals and cost estimates of real property to be bought, sold, or leased by a public body, but only until the purchase, sale, or lease is completed. Va. Code § 2.2-3705.1(8).
4. Email. Personal contact information, including phone numbers, email addresses, and physical addresses, provided for the purpose of obtaining electronic mail from the public body or any of its members, is exempt unless the email recipient allows its disclosure.¹² Va. Code § 2.2-3705.1(10). This exemption does not apply to email addresses obtained by public officials for sending emails in their individual capacity, as opposed to on behalf of the public body. Va. FOI Adv. Council AO-07-04, Apr. 7, 2004.

¹² In 2021, the statute was changed from opt-out to opt-in: disclosure is permissible only if the email recipient “indicates his approval for the public body to disclose such information.” The statute does not specify how the person should “indicate” his approval.

5. Dispute Resolution Act. Most communications and materials generated during mediation pursuant to the Virginia Administrative Dispute Resolution Act are exempt from the FOIA. Va. Code §§ 2.2-4119, 2.2-3705.1(11).
6. Taxicab Operators' Financial Data. Financial data submitted by taxicab operators in connection with local rate regulation or to demonstrate the operators' financial responsibility must be kept confidential and are exempt from disclosure under the Act. See Va. Code § 46.2-2062.
7. Checks and warrants. Virginia Code § 58.1-3131 requires local treasurers to maintain a record of warrants and other legal demand instruments listing all payments made on behalf of the locality, including details about the number, amount and payees of the warrants. The same section generally prohibits the release of any information contained in the warrant record, "including any invoice that has been presented to a locality for payment, and the locality has attempted to pay it, but the payment has not been completed because electronic payment has failed or a check was mailed but not cashed." *Id.* This exemption may appropriately be cited in response to individuals who request lists of uncashed checks so that they can charge a commission for "finding" and notifying the payees about the availability of the unclaimed funds.

23-4.04(b) Information Relating to Public Safety

Virginia Code § 2.2-3705.2 consolidates record exemptions relating to public safety, both individual and community safety (i.e., terrorism, school safety audits, and information about crime victims).

23-4.04(b)(1) Security

Information contained in building plans, operational, tactical, or procedural manuals, staff meeting minutes, or other records, that reveals the following security measures for government, commercial, or multi-family residential buildings is exempt from disclosure:

- a. Critical infrastructure;
- b. Vulnerability assessments and security plans for buildings and information technology;
- c. Surveillance techniques and security systems; and
- d. Network and communications systems

Va. Code § 2.2-3705.2(14).

The same categories of records submitted to a public body concerning antiterrorism and cybersecurity are exempt, provided the person submitting the records in writing i) requests the application of the exemption, ii) identifies what portions of the records are exempt, and iii) explains why the application of the exemption is necessary for antiterrorism and cybersecurity planning. This written statement is a public record. *Id.*

This exemption does not authorize the withholding of information to the extent it relates to the structural or environmental soundness of any building, or if the request for disclosure is made in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster, or other catastrophic event. *Id.* The Secretary of Public Safety and Homeland Security must be notified of any request for information excluded under categories (a) and (b) above. *Id.*

Documentation and other information related to state, regional, or local public safety communications systems are exempt. Va. Code § 2.2-3705.2(10).

Security plans and specific vulnerability assessment components of school safety audits pursuant to Va. Code § 22.1-279.8 are exempt except as related to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster or other catastrophic event, or (ii) any person on school property has suffered or been threatened with any personal injury. Va. Code § 2.2-3705.2(4). Also exempt are records received by the Department of Criminal Justice Services regarding school safety audits and threat assessments. Va. Code § 2.2-3705.2(13).

23-4.04(b)(2) Data Regarding Individuals

Non-public subscriber data (name, address, telephone number, and any other information identifying a subscriber of a communications service provider) provided directly or indirectly by such a provider to a public body that operates wireless E-911 or a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system is exempt from disclosure. Va. Code § 2.2-3705.2(6) and (7).

Also exempt is information concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Va. Code § 37.2-900 et seq. held by the Commitment Review Committee, except that no information identifying the victims of a sexually violent predator may be disclosed. Va. Code § 2.2-3705.2(5).

Confidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses are exempt. Va. Code § 2.2-3705.2(1).

23-4.04(c) Information Relating to Administrative Investigations

Virginia Code § 2.2-3705.3 consolidates record exemptions relating to confidential administrative investigations (i.e., investigations related to license applications, fraud, waste and abuse, risk management claims, employment discrimination claims). The exemptions applicable to local governments are described below.

23-4.04(c)(1) Discrimination Claims

Investigator notes, correspondence, and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to personnel of any local public body, including local school boards, may be withheld. However, information from inactive reports is disclosable in a form that does not reveal the identity of individuals. Va. Code § 2.2-3705.3(3).

Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (Va. Code § 2.2-3900 et seq.) or under any similar local human rights ordinance are exempt. However, information from inactive reports is disclosable in a form that does not reveal the identity of the parties involved or other persons supplying information. Va. Code § 2.2-3705.3(5).

In *McChrystal v. Fairfax County Board of Supervisors*, 67 Va. Cir. 171 (Fairfax Cnty. 2005), the court held it was the government's burden to show the information was in fact provided in confidence. It found evidence that it was the government's policy to assure confidentiality was not sufficient to meet that burden. The court also construed the employment discrimination investigation exemption in light of the right of an employee to see his own personnel record as provided for in Va. Code § 2.2-3705.1(1), see section [23-4.04\(a\)\(1\)\(ii\)](#), and held that an employee subject to an employment discrimination investigation was entitled under FOIA to all information (including that identifying individuals involved in the investigation) in the final report but not the investigatory materials giving rise to it. Under § 2.2-3806 of the GDCDPA, however, the employee was entitled to the investigatory material as well. See section [23-7.04](#).

23-4.04(c)(2) Audits

There is an exemption for investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by law, provided to or produced by or for auditors appointed by the local governing body of any county, city, or town or a school board who have responsibility for conducting an investigation of any officer, department or program of such body. Information contained in completed investigations must be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed must include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies must adopt guidelines to govern the required disclosures. Va. Code § 2.2-3705.3(7).

23-4.04(c)(3) Zoning and Code Enforcement Complaints

The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body or to complaints relating to the Uniform Statewide Building Code or Statewide Fire Prevention Code are exempt. Va. Code § 2.2-3705.3(8).

23-4.04(d) Scholastic Records**23-4.04(d)(1) Generally**

Scholastic records are exempt from mandatory disclosure (and in many cases required by Va. Code § 22.1-287 et seq. and federal statutes not to be disclosed) if they contain information about identifiable individual students. Va. Code § 2.2-3705.4(A)(1); 1974-75 Op. Va. Att’y Gen. 343; *see also* Va. FOI Adv. Council AO-04-16 (Dec. 16, 2016) (teacher cannot obtain records directly related to an identifiable student even if teacher is also the subject of those records unless the information identifying the student is redacted; court order may be required because of conflict with Va. Code § 22.1-287). *But see* 1974-75 Op. Va. Att’y Gen. 581 (SAT test scores on school-by-school basis, not revealing information about individual students, must be disclosed). A custodian has no discretion to release a student’s address, phone number, or email address absent written consent from the parent or guardian of a minor student or the written consent of an emancipated student or one over the age of eighteen. Va. Code § 2.2-3705.4(B).

23-4.04(d)(2) Viewing Own Records; Minors

In general, students and their parents or legal guardians are guaranteed access to the student’s own scholastic records. If the student is under eighteen and “unemancipated” the right of access may only be asserted by the parent or guardian. Parents or guardians of students under eighteen may prohibit the release of any information about their children by making a written request to that effect. Students at state-supported colleges or universities, and emancipated high school students may assert the right of access to their own records. Va. Code § 2.2-3705.4(A)(1). *See generally* Ops. Va. Att’y Gen. 1975-76 at 305, 1973-74 at 457. However, students are not entitled access to their parents’ financial records on file with the educational institution, or to “records of instructional supervising and administrative personnel . . . in the sole possession of the maker thereof, and which are not accessible or revealed to any other person except a substitute.” Va. Code § 2.2-3705.4(A)(1). This apparently means that a student cannot force a teacher, counselor, or principal to reveal his or her personal notes about the student.

23-4.04(d)(3) Waivers

Those who are eighteen or older may waive the confidentiality of their scholastic records. When it has received such a waiver from a student or former student, the school system or institution must reveal that person’s records to other requesters. Va. Code § 2.2-3705.4(A)(1). Although a student’s address, phone number, or email address generally may

not be disclosed, a parent or guardian, or student over eighteen, may give written consent for such disclosure. Va. Code § 2.2-3705.4(B).

23-4.04(d)(4) Access by School Board

An Attorney General's opinion concludes that a school system may give school board members access to records of special education programs that reveal the identity of individual participants. 1979-80 Op. Va. Att'y Gen. 389. Another opinion advises that school board member designees who have not yet taken office may also have access to student records. 1979-80 Op. Va. Att'y Gen. 385.

23-4.04(d)(5) Student Elections

The Virginia Supreme Court has held that the vote totals for candidates in a public high school's student government elections are scholastic records exempt from mandatory disclosure. *Wall v. Fairfax Cnty. Sch. Bd.*, 252 Va. 156, 475 S.E.2d 803 (1996).

23-4.04(e) Health and Social Service Records

Virginia Code § 2.2-3705.5 consolidates exemptions relating to health and social services information (i.e., medical and mental health records and records related to recipients of social services). Many of the listed exemptions apply only to state records, but the following are applicable to local governments.

23-4.04(e)(1) Health Records Exemption

Health records are exempt from disclosure except to the person who is the subject of the record or to a person authorized to act on his behalf. The individual's treating physician or clinical psychologist may limit the subject's access to health records by including a written statement that reviewing the records would be reasonably likely to endanger the life or physical safety of the individual or another person, or that such health records make reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to such referenced person. If access is denied based on such a statement, the individual may appeal to another reviewing physician or clinical psychologist, whose licensure, training, and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based, by selecting someone at his own expense or allowing the denying health entity to select someone at its expense. Va. Code §§ 2.2-3705.5(1) and 32.1-127.1:03(F); see *also* 1979-80 Op. Va. Att'y Gen. 384. Note that providers have thirty days to respond to requests for health care records, rather than the usual five-day FOIA deadline. Va. Code § 32.1-127.1:03(E); Va. FOI Adv. Council AO-01-19, Mar. 1, 2019 (discussing same).

23-4.04(e)(1)(i) Jail Inmates

A prior opinion of the Attorney General concludes that a sheriff could not obtain from the local health department the medical records of an inmate in a jail run by the sheriff, unless the inmate consented to the disclosure. 1987-88 Op. Va. Att'y Gen. 33. The Act has since been amended, however, to authorize administrators of jails and prisons to assert an inmate's rights to view his medical records, if there is reasonable cause to believe the inmate has infectious disease or other condition from which other inmates need to be protected. The jail administrator may only view the inmate's record and may not disclose the contents to anyone except the subject inmate, or "as provided by law." Va. Code § 2.2-3705.5(1).

23-4.04(e)(1)(ii) Minors

As with scholastic information, the right of access to medical information of persons under eighteen may be asserted only by their parents or legal guardians, except that emancipated minors and students in public colleges and universities may have access to their own records. *Id.*

23-4.04(e)(1)(iii) Transportation Services

The names and addresses or other contact information of persons receiving transportation services from a state or local public body or its designee under Title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under Va. Code § 63.2-600 are exempt. Va. Code § 2.2-3705.5(13).

23-4.04(e)(2) Social Service Records

Virginia Code § 2.2-3705.5(3) contains exemptions for reports, information, and statistical registries concerning public assistance and social services provided to individuals, except to those persons who have a legitimate interest in accordance with state and federal law and regulation. This section also provides that all records, information, and statistical registries required to be kept confidential pursuant to Va. Code § 63.2-100 et seq. are exempt from disclosure. Virginia Code § 2.2-3705.5(15) protects certain information obtained from involuntary commitment and emergency custody proceedings.

23-4.04(f) Proprietary Records and Trade Secrets

Virginia Code § 2.2-3705.6 contains exemptions for proprietary records and trade secrets (per Va. Code § 2.2-3701, “trade secrets” means the same as the term is defined in the Uniform Trade Secrets Act, Va. Code § 59.1-336 et seq.). Exemptions applicable to local governments include:

1. Financial Statements. Private companies’ financial statements filed in connection with industrial development bond financings, if those statements are not publicly available under other laws. Va. Code § 2.2-3705.6(2).
2. Economic Development. Information related to businesses considering location or expansion in Virginia or related to retention of an existing business, and proprietary information submitted to local, regional or state economic development organizations. Va. Code § 2.2-3705.6(3); *see generally* Va. FOI Adv. Council AO-01-14, Jan. 29, 2014. Merely marking a document “proprietary” does not make it exempt if it does not otherwise comport with the exemption. Va. FOI Adv. Council AO-01-13, Jan. 7, 2013 (audited financial records of a nursing home provider submitted to receive reimbursement under Medicaid not exempt because not used by public body for business development or retention).
3. Bidders’ Trade Secrets. Information designated by any person connected with a procurement transaction or a prospective bidder as proprietary or a trade secret as provided in the Virginia Public Procurement Act, when applying to be pre-qualified to bid. Va. Code § 2.2-3705.6(10); *see also* section [23-4.04\(a\)\(3\)\(v\)](#). Information designated by a bidder supporting a withdrawal of a bid. Va. Code § 2.2-4330(B). Note that the FOIA Advisory Council has concluded this provision does not generally cover proprietary information provided in response to a Request for Information (RFI) that occurs before there is any procurement transaction. FOI Adv. Council AO-03-16, Sept. 14, 2016.
4. Public-Private Partnerships. Information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act (PPTA) or the Public-Private Education Facilities and Infrastructure Act (PPEA), if the publication of such information prior to or after the execution of an interim or a comprehensive agreement would adversely affect the financial interest or bargaining position of the

public entity. The basis for such a determination must be documented in writing by the responsible public entity.

Upon written request and public entity approval, information provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the PPTA or the PPEA if public disclosure would reveal trade secrets or non-public financial information, or would adversely affect the financial interest or bargaining position of the public or private entity. The private entity must specify the records at the time of submission and justify the application of the exemption. Va. Code § 2.2-3705.6(11).

Except as these exemptions apply, however, interim agreements and comprehensive agreements under the PPTA and PPEA generally must be disclosed on request. *Id.*

5. Franchises. Trade secrets and confidential proprietary information that are provided by a franchisee under Va. Code § 15.2-2100 et seq. to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements. The franchisee must specify the records at the time of submission and justify the application of the exemption. Va. Code § 2.2-3705.6(13).
6. Solar Services. Proprietary information related to a solar services agreement with a public body. Va. Code § 2.2-3705.6(29).
7. Telecommunications. Confidential proprietary and trade secret information developed or held by a local public body providing telecommunications services or cable television services provided the locality specifies in writing the records for which the exemption is invoked and the reasons why their release would be harmful to the competitive position of the locality. Va. Code §§ 2.2-3705.6(18) and 15.2-2160. A similar exemption applies to a wireless service authority, except that the written invocation of the exemption is not required. Va. Code § 2.2-3705.6(19).
8. Building Code Compliance. Construction and engineering plans submitted to obtain a building permit if disclosure would identify trade secrets or other competitive information, but only until the building is completed. Va. Code § 2.2-3705.6(30); see also Va. Code § 36-105.3 (information contained in engineering and construction plans for any single-family residential dwelling submitted for the purpose of complying with the USBC or the SFPC are not subject to disclosure under FOIA, except to the applicant or the owner of the property).
9. Resource Management Plans. Proprietary information related to resource management plans that are not required to be submitted in an enforcement action. Va. Code § 2.2-3705.6(25).
10. Voluntary Nutrient Management Plan Program. Personal or proprietary information collected pursuant to such plans. Va. Code § 10.1-104.2.
11. Loan Application for Construction of Affordable Housing. Financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing, when the loan

application is related to a competitive application submitted to the U.S. Department of Housing and Urban Development or the Virginia Housing Development Authority and when release of the records would adversely affect the competitive position of the applicant. Va. Code § 2.2-3705.6(33). Such records shall not be withheld by the locality once they have been made public by HUD or VHDA.

See *also* Va. Code § 15.2-2108.11(I) (portions of any comprehensive business plan that reveal marketing strategies of a municipal cable television service are exempt from FOIA).

23-4.04(g) Records of Specific Public Bodies and Other Limited Exemptions

Virginia Code § 2.2-3705.7 consolidates exemptions of limited application or limited to specific public bodies.

23-4.04(g)(1) Correspondence and Working Papers

23-4.04(g)(1)(i) Chief Executive

Certain high-level executive and legislative officials may claim an exemption for their “working papers and correspondence.” Va. Code § 2.2-3705.7(2). At the local level, this exemption applies to “the mayor or chief executive officer of any political subdivision of the Commonwealth.” The chief executive is generally not the board chairman or other presiding officer, but the city manager, county administrator, or comparable full-time professional executive. See Va. Code § 15.2-1541; see Va. FOI Adv. Council AO-12-02, Oct. 30, 2002 (the mayor and manager of a locality may not both claim the exemption; the one who most clearly exercises the executive authority of the locality may claim the exemption). Because school boards are considered to be political subdivisions of the Commonwealth, the Attorney General has concluded that school superintendents may claim the exemption for their correspondence and working papers. 1982-83 Op. Va. Att’y Gen. 729. Departmental budget requests submitted to city council pursuant to Va. Code § 15.2-2503 are not working papers of the city manager, even if the council has delegated the task of budget preparation to the manager. Va. FOI Adv. Council AO-32-01, June 11, 2001. The Advisory Council also has stated that a master plan document submitted to the director of a redevelopment authority was not a working paper of the director as the general land use plan required the authority, not its chief executive officer, to review the master plan. Va. FOI Adv. Council AO-08-04, May 4, 2004.

23-4.04(g)(1)(ii) State Officials

At the state level, this exemption includes the correspondence and working papers of the Office of the Governor, the Lieutenant Governor and the Attorney General, members of the General Assembly and their legislative aides, the Division of Legislative Services, and the presidents of public colleges and universities. This exclusion does not apply to the resumes or applications of persons appointed by the Governor (1) under Va. Code § 2.2-106 to head state executive branch agencies or (2) under Va. Code § 2.2-107 to serve statutory terms of office as members of boards, commissions, councils, or other collegial bodies created by the General Assembly in the executive branch of state government. Va. Code § 2.2-3705.7(2).

23-4.04(g)(1)(iii) Loss of Exemption

Several Attorney General’s opinions support the conclusion that information exempt as a working paper while in the possession of the chief executive officer may lose its exemption once it has been distributed to, or discussed in public by, the members of a public body. Ops. Va. Att’y Gen. 1983-84 at 447, 1982-83 at 724, 1975-76 at 415. Once a report of an outside consultant to the chief executive has been distributed to the public body, placed on the public body’s agenda for action, or actually acted upon, it loses its status as a “working paper” and must be disclosed unless covered by some other exemption. See Va. Code § 2.2-3705.8; see *also* Va. FOI Adv. Council AO-12-00, Dec. 12, 2000 (issued before the adoption of the current Va. Code § 2.2-3705.8). The working papers exemption does not expire unless the working papers are disseminated or otherwise made public by the official to

whom the exemption applies. Va. FOI Adv. Council AO-17-04, Aug. 31, 2004. This opinion apparently negates a prior opinion of the Council which stated that the working papers exemption ends once an affirmative vote to proceed with a particular course of action is taken. Va. FOI Adv. Council AO-12-00, Dec. 12, 2000. The Council has stated that dissemination means the record is “widely made available to others” and that a “zone of privacy” is needed in the deliberative process to protect “creativity and the free-flow of ideas.” Va. FOI Adv. Council AO-02-15, Mar. 27, 2015.

23-4.04(g)(1)(iv) Separation of Powers

A plurality of the Supreme Court concluded that long-distance telephone records of the Governor’s office, from which one could identify certain persons whom the Governor had called, were exempt from disclosure as “working papers” because a legislative requirement for their disclosure would violate the constitutional separation of powers doctrine. *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991). A fourth justice did not adopt the separation of powers ruling, but nevertheless concluded that the phone bills were exempt as memoranda, correspondence or working papers. *Id.* (concurring opinion of Justice Carrico). The word “memoranda” was deleted from this exemption in 1999 Va. Acts chs. 703, 726.

23-4.04(g)(1)(v) What is not a Working Paper

Virginia Code § 2.2-3705.7(2) expressly states that “no record which is otherwise open to inspection under [FOIA] shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.” Also, documents that were either previously public or not otherwise subject to an exclusion do not become working papers merely by being aggregated or changed in format unless there is additional substantive analysis or revision. Moreover, the definition of “working papers” has been limited to documents prepared by or for the official entitled to claim the exemption for his “personal or deliberative use.” *Id.*

23-4.04(g)(2) Tax Records

State income tax, personal property tax, and business license tax returns, and other records showing details about the income, business, or property of individual taxpayers, are exempt from disclosure under Va. Code § 2.2-3705.7(1) and required by Va. Code § 58.1-3 not to be disclosed to anyone but the taxpayer or other officials involved in collection of those taxes. That confidentiality requirement does not apply, however, to the land book and personal property tax book prepared and maintained by local treasurers and commissioners of revenue, or to the real property tax maps, indexes, and property record “cards” maintained by local assessing officers. Summaries of tax collection data that do not reflect individual tax payments, lists of licensed businesses without the amounts of tax paid, and some other items are likewise excepted from the prohibition in § 58.1-3 and thus are not exempt from disclosure under the Act. Ops. Va. Att’y Gen. 1992 at 157, 1993 at 221. The Virginia FOIA Advisory Council has issued an advisory opinion that a list of delinquent real property taxpayers with parcel ID, legal description, and owner’s name with mailing address is a disclosable public record under FOIA. However, if the delinquent tax list does not contain all such fields of information, the treasurer is not required to create such a document. Va. FOI Adv. Council AO-10-02, Oct. 16, 2002.

23-4.04(g)(3) Miscellaneous Other Exemptions

Virginia Code § 2.2-3705.7 also includes exemptions for the following categories of local government records:

1. Library Records. Public library information that reveals both the identity of library patrons and the materials borrowed by those individuals. Va. Code § 2.2-3705.7(3). This exemption should be interpreted to allow a library to withhold records identifying any patron who has used the library’s computer terminals and the Internet sites visited by that patron. Va. FOI Adv. Council AO-26-03, Dec. 8, 2003. A library record

custodian, however, must release a minor's records to the parent or guardian. See also 1989 Op. Va. Att'y Gen. 17 for a detailed discussion of this exemption.

2. Bondholders. Lists of the registered owners of bonds issued by a political subdivision or by a fiduciary. Va. Code § 2.2-3705.7(5).
3. Utility Accounts. The name and service address of customers of a public utility affiliated with a political subdivision, but not the amount of service provided or the amount charged or paid for that service. Va. Code § 2.2-3705.7(7).
4. Redevelopment and Housing. Personal information provided to a local redevelopment and housing authority by persons seeking housing assistance. Va. Code § 2.2-3705.7(8). See Va. FOI Adv. Council AO-14-04, July 19, 2004.
5. Hazardous Waste Facilities. Information regarding the siting of hazardous waste facilities, except as provided in Va. Code § 10.1-1441, if disclosure of that information would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions, and provisions of the siting agreement. Va. Code § 2.2-3705.7(9).
6. Local Retirement Systems. Information held by local retirement systems that relates to trade secrets provided by a private entity. Va. Code § 2.2-3705.7(12).
7. Emergency Response Teams. Certain identifying information regarding members of a citizen emergency response team established by a local government. Va. Code § 2.2-3705.7(20).
8. Parks and Recreation. Information held by local park and recreation departments and local or regional park authorities to the extent such information identifies a person under the age of eighteen years, except that "directory information" as defined by Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g), is not exempt. This exemption can be waived. Va. Code § 2.2-3705.7(21).

See also Va. Code § 24.2-625.1 (records pertaining to voting security exempt from FOIA).

23-4.05 Criminal and Other Law Enforcement Records

23-4.05(a) General

Provisions related to law enforcement records are consolidated in Va. Code §§ 2.2-3706 and 2.2-3706.1. Commonwealth's attorneys are defined as law enforcement officials for purposes of § 2.2-3706.

23-4.05(b) Records Required to be Released

23-4.05(b)(1) Law Enforcement Records

Criminal incident information related to felony offenses is required to be released. Such information is defined to include a general description of the criminal activity reported, the date and general location of the alleged crime, the identity of the investigating officer or other point of contact, and a general description of any injuries suffered or property stolen or damaged. Va. Code § 2.2-3706.1(B). If the requester agrees, this information can be provided orally. *Id.*

Criminal investigative files are excluded from FOIA's mandatory disclosure requirements. Va. Code § 2.2-3706.1(C). "Criminal investigative files" are defined as "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." Va. Code 2.2-3706.1(A). A case is "ongoing" if 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 release of evidence. Va. Code § 2.2-3706.1(A).

Criminal investigative files relating to an investigation or proceeding that is *not* ongoing are also shielded from mandatory disclosure, except they must be disclosed when requested by the victim; the victim's immediate family members, if the victim is deceased and the requesting family member is not a person of interest or suspect in the investigation; 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 suspect in the investigation; and, in certain circumstances, an attorney. Va. Code § 2.2-3706.1(D). With approval of an appropriate circuit court, a person proceeding pro se in a petition for writ of habeas corpus or actual innocence may also be permitted access to certain criminal investigative files. *Id.* No photographic, audio, or video record depicting a victim or allowing a victim to be readily identified may be released except to the victim, members of the immediate family if the victim is deceased, or the victim's parent or guardian if the victim is a minor, as long as the family member, parent, or guardian is not a person of interest or suspect in the investigation. Va. Code § 2.2-3706.1(G).

Moreover, no criminal investigative file or portion thereof may be released to any requester (except attorneys, in certain situations) unless the public body has made "reasonable efforts" to notify the victim, the victim's family members, or the victim's parent or guardian. Va. Code § 2.2-3706.1(F). Upon receipt of notice that the public body has received a request for the information, the victim or the victim's family member has fourteen days to file in an appropriate court a petition for an injunction to prevent disclosure of the records. *Id.*; see *also* Va. Code § 8.01-622.2 (describing considerations for granting injunction). The public body may not respond to the request for information before the fourteen-day period has passed. Va. Code § 2.2-3706.1(F). The normal FOIA response deadlines are tolled during the notification process and any subsequent disposition by the court. *Id.*

When evaluating a petition for an injunction filed by the victim or the victim's family, the court must consider whether disclosure of the requested records would constitute an unreasonable invasion of personal privacy, endanger the life or physical safety of any person, or subject the victim or the victim's family to "severe mental or emotional distress." Va. Code § 8.01-622.2. The court may also consider any other factor it deems relevant, and must enter its findings on the record. *Id.*

In addition, criminal investigative files shall not be disclosed if the release would:

1. interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner;
2. deprive a person of a right to a fair trial;
3. constitute an unwarranted invasion of personal privacy;
4. disclose the identity of a confidential source;
5. disclose law enforcement investigative techniques, if such disclosure could reasonably be expected to risk circumvention of the law; or

6. endanger the life or physical safety of any person.

Va. Code § 2.2-3706.1(E). However, even if one of these exceptions applies, those portions of the records that are unlikely to cause any of those effects must be released. *Id.*

Anonymized, aggregate location and demographic data documenting police encounters with members of the public may be released. Va. Code § 2.2-3706.1(H) ("Nothing in this section shall prohibit the disclosure of" such information).

To the extent these Code sections regarding law enforcement records conflict with other provisions of law (e.g., court-ordered sealing of files), the other provisions shall control. Va. Code § 2.2-3706.1(I).

23-4.05(b)(2) Mug Shots

Adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure must be released unless withholding them is "necessary to avoid jeopardizing" an investigation in felony cases. When that danger has passed, the photographs must be released. Va. Code § 2.2-3706(A)(1). Note that the criminal incident reports can be withheld if they are "likely to jeopardize" a range of specified activities, while mug shots can be withheld only if the withholding is "necessary to avoid jeopardizing" a felony investigation. An opinion of the Attorney General concludes that while a local law enforcement agency must disclose mug shots contained in a database maintained by the local law enforcement agency, such photographs may not be drawn from the Central Criminal Records Exchange for disclosure at any time to comply with a FOIA request. 2015 Op. Va. Att'y Gen. 25.

23-4.05(b)(3) Police Camera Footage

Interpreting Va. Code §§ 2.2-3706 and 2.2-3706.1, the Virginia Attorney General opined that FOIA requires local police departments to release footage from body-worn and/or dashboard cameras related to officer-involved shootings unless an exception applies. Where an exception applies, a local police department may still release the footage unless doing so is otherwise prohibited. Depending on the circumstances, release may be limited to family members. 2021 Op. Va. Att'y Gen. 51.

23-4.05(b)(4) Arrest Information

Law enforcement officials must reveal the identity of any person, except one under the age of eighteen, arrested and charged, and the status of the charge or arrest. Va. Code § 2.2-3706(A)(2); *see also Harmon v. Ewing*, 285 Va. 335, 745 S.E.2d 415 (2013) (per curiam) (using the name of the arresting officer paired with a reasonable timeframe for a request under this subsection is a permissible parameter for seeking the identities of arrested individuals; however, if the officer only provides "information" that leads to an arrest, then such information is protected as a "witness" or a criminal investigative file). The Advisory Council has concluded that when an adult has been arrested and charged with a crime, if the law-enforcement agency has the arrestee's date of birth, it is subject to mandatory release under Va. Code § 2.2-3706(A)(2). Va. FOI Adv. Council AO-08-13, Nov. 7, 2013.

23-4.05(c) Discretionary Release

The records identified below may be released in the custodian's discretion "except where such disclosure is prohibited by law." Va. Code § 2.2-3706(B).

23-4.05(c)(1) Criminal Investigative Files

Criminal investigative files are defined as 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 that information not required to be disclosed under Va. Code § 2.2-3706.1. § Records do not lose their protection as criminal investigative files even if the matter is ultimately determined to be non-criminal. *Fitzgerald v. Loudoun Cnty.*

Sheriff's Office, 289 Va. 499, 771 S.E.2d 858 (2015). Once such a record has been introduced as evidence in an enforcement proceeding, however, it may no longer be exempt from disclosure under this provision. See Va. FOI Adv. Council AO-01-10, Feb. 1, 2010 (exemption not applicable to photographs once introduced as evidence of building code violation in hearing before local building code board of appeals); see *also* Va. FOI Adv. Council AO-06-11, Oct. 17, 2011 (mug shots are not covered by this exemption, but instead by Va. Code § 2.2-3706(A)(1) (see section 23-4.05(b)(2))); however, the Advisory Council noted a possible conflict with Va. Code § 19.2-389, which restricts the release of criminal history record information from the Central Criminal Records Exchange to specified persons). An opinion of the Attorney General attempts to resolve the conflict by concluding that local law enforcement agencies must disclose adult arrestee photographs pursuant to a valid FOIA request if they are contained in a database maintained by the local law enforcement agency, regardless of whether the defendant is still incarcerated or has been released, unless disclosing them will jeopardize a felony investigation. However, photographs may not be drawn from the Central Criminal Records Exchange for disclosure at any time to comply with a FOIA request. 2015 Op. Va. Att'y Gen. 25.

Suicide or accidental death investigation records must be provided to the parent or spouse of the decedent (or, if no parent or spouse is living, the next most immediate family member), provided such person is not a person of interest in the investigation. Va. Code § 2.2-3706(A)(4).

See *also Harrington v. Roessler*, 89 Va. Cir. 366 (Fairfax Cnty. 2014) (criminal investigative privilege exists outside of FOIA).

23-4.05(c)(2) Victims and Witnesses

Law enforcement officials do not have to reveal the identity of victims, witnesses, or undercover officers, but they may do so unless prohibited by Va. Code § 19.2-11.2, which prohibits disclosure of the identity of sexual assault victims without their consent and allows victims of other crimes to request anonymity. Va. Code § 2.2-3706(B)(10). They are also prohibited from revealing the identity of any individual who has furnished information about crimes or criminal activity under a promise of anonymity. Va. Code § 2.2-3706(C).

23-4.05(c)(3) Other Exempt Records

Other categories of law enforcement records that are exempt from disclosure but may be disclosed include:

1. Reports submitted to law enforcement agencies in confidence. Va. Code § 2.2-3706(B)(2).
2. The name, addresses, and operating schedules of neighborhood watch participants who have been promised anonymity. Va. Code § 2.2-3706(B)(3).
3. Records of prison and jail inmates related to their imprisonment. Va. Code § 2.2-3706(B)(4).
4. Tactical plans of law-enforcement agencies. Va. Code § 2.2-3706(B)(5).
5. The telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to law enforcement personnel for use in the performance of their official duties. Va. Code § 2.2-3706(B)(7).
6. Certain undercover investigative information. Va. Code § 2.2-3706(B)(8).

7. Certain records related to background investigations for law enforcement applicants and internal law enforcement administrative investigations. Va. Code § 2.2-3706(B)(9). Access to personnel records of persons employed by a law enforcement agency is governed by the provisions of this subdivision and subdivision 1 of Va. Code § 2.2-3705.1 (see section [23-4.04\(a\)\(1\)](#)), as applicable. Va. Code § 2.2-3706(D). A circuit court judge allowed discovery on background investigations relating to an officer being sued in a civil matter. *Winston v. Fernandez*, No. CL 13-2984 (City of Richmond Cir. Ct. Oct. 10, 2013).
8. Records of the Sex Offender and Crimes Against Minors Registry, except to the extent information is required to be posted on the Internet. Va. Code § 2.2-3706(B)(11).

23-4.05(d) Non-criminal Records

Under Va. Code § 2.2-3706(D), public bodies engaged in law enforcement, fire protection, or emergency medical services may withhold those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical or financial nature when the release of such information would jeopardize the safety or privacy of any person. The current statute negates the holding of *Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 771 S.E.2d 858 (2015) (construing prior language of the statute) that to be disclosable the record must contain an aggregate of data from multiple sources.

The Advisory Council has said that a person's date of birth may be withheld as identifying information of a personal nature if the release of the date of birth would jeopardize the safety or privacy of any person. Va. FOI Adv. Council AO-08-13, Nov. 7, 2013.

23-4.05(e) 911 Calls

Records of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system are subject to the provisions of FOIA. Va. Code § 2.2-3706(E). In practice this means that such recordings are generally subject to disclosure but portions of them may be redacted if an exemption applies, e.g., the identity of an informant or sexual assault victim.

23-4.05(f) Section Controlling Over Other Laws

These rules for information contained in the records of law enforcement agencies are specifically made controlling over other conflicting laws, either in the rest of the Act or elsewhere. Va. Code § 2.2-3706(F). One apparent result of this provision is to change the effect of the decision of the Virginia Supreme Court in *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998). In that case the Court held that FOIA would require the release of a county sheriff's tape recording of calls to the department's 911 dispatcher, but that an overriding provision in what is now Va. Code § 15.2-1722 protected the tape from disclosure. Both statutes have since been amended, and it is clear that the tape would now be subject generally to disclosure, although parts of it might be redacted under specific exemptions in Va. Code § 2.2-3706. Va. Code § 2.2-3706(E); see also Va. FOI Av. Council AO-01-12, Mar. 7, 2012.

23-5 FOIA RESOURCES

23-5.01 Virginia Freedom of Information Advisory Council

The Virginia Freedom of Information Advisory Council is comprised of fourteen members, variously appointed by the Speaker of the House of Delegates, the Senate Committee on Rules, and the Governor. Among the fourteen are two senators and two delegates, as well as the Attorney General, the Librarian of Virginia and the Director of Legislative Services, or their designees. Of the private citizen members, one must be an officer or former officer of

a local government, and one must be a representative of the news media. Va. Code § 30-178.

23-5.01(a) Duties of Council

The Council's main duties are to: (1) furnish, on request, advisory opinions, guidelines and other appropriate information to citizens or to agencies of state and local government; (2) conduct training seminars and educational programs about the requirements of the Act; and (3) publish educational materials about the Act. Va. Code § 30-179. Local elected officials must receive training from the Council within two months of assuming office and within every two years thereafter. Va. Code § 2.2-3704.3. The clerk of the governing body or school board must maintain public records of the training. Va. Code § 2.2-3704.3. The Council may ask for information and assistance from state agencies and local governments, all of which are directed to provide such assistance and cooperate with the Council. Va. Code §§ 30-179 and 30-181.

The Council is directed to make an annual report to the Governor and General Assembly, including recommendations for changes in the law. Va. Code § 30-179.

23-5.01(b) Staff Contacts

The Council has staff who perform its day-to-day functions. Alan Gernhardt (Executive Director) can be reached at (866) 448-4100 (toll-free) or (804) 698-1810. The names and addresses of council members, an archive of the advisory opinions issued, meeting agendas, and other relevant information can be found on the Council's [website](#).

23-5.02 Virginia Coalition on Open Government

The Virginia Coalition for Open Government (VCOG) is an organization dedicated to enhancing public access to government information. According to its newsletter "members share a commitment to resist attempts to abridge, circumvent or otherwise restrict the right of citizens to attend meetings of public bodies, and to preserve all existing channels of access to public information." Although its primary membership is drawn from the news media, anyone may become a member by paying a tax-deductible annual fee. For further information, contact Megan Rhyne, Executive Director, at (540) 353-8264 or vcog@opengovva.org.

Although local government attorneys may disagree with some of the positions advocated by VCOG, its [blog](#) is a good source of information about FOIA disputes around Virginia and nationally, and its [website](#) contains an excellent searchable database of court decisions, opinions of the Attorney General, and other useful references.

23-6 ENFORCEMENT OF FOIA

23-6.01 Petitions for Mandamus or Injunction

Any person denied access to meetings or records under the Act may petition the courts asking for an injunction to cease the alleged violation or for mandamus to compel the public body or official to comply. Va. Code § 2.2-3713(A); see *Bragg v. Bd. of Sup'rs of Rappahannock Cnty.*, 295 Va. 416, 813 S.E.2d 331 (2018) (addressing sufficiency of supporting affidavit). Typically, petitioners seek injunctions to prevent further unlawful closed meetings, and ask for mandamus when seeking disclosure of records.¹³ A person may also file a petition for mandamus or injunction if he or she feels that a public body is overcharging for the production of records in response to a FOIA request, i.e., has violated

¹³ Note that the Virginia Supreme Court held in an unpublished decision that the circuit court erred when it awarded mandamus relief requiring a school board to contact the FOIA Advisory Council for guidance any time one of its members was not satisfied with the advice of counsel regarding FOIA compliance. *Suffolk City Sch. Bd. v. Story*, Rec. No. 201334 (Jan. 20, 2022). Because "a school board's decision to consult the FOIA Advisory Council is an entirely discretionary act," mandamus was inappropriate.

the statutory limits on charges established by Code § 2.2-3704. Va. FOI Adv. Council AO-08-19, Aug. 22, 2019.

The Virginia Supreme Court held in *Cartwright v. Commonwealth Transportation Commissioner*, 270 Va. 58, 613 S.E.2d 449 (2005), that a requester could seek enforcement of his FOIA rights through a writ of mandamus even if he had an adequate remedy at law through a motion to compel discovery. The inescapable implication of this ruling is that a Virginia citizen who is in litigation with a public body is not limited to obtaining records from the public body through the discovery process, but may continue to request them under FOIA. See also Va. FOI Adv. Council AO-04-05, Mar. 31, 2004 (public body may not demand that all FOIA requests be made through requester's attorney, even when it is in litigation with requester). Conversely, FOIA's records exemptions do not affect whether a document is discoverable or subject to subpoena in a court proceeding. Va. Code § 2.2-3703.1. See *Harrington v. Roessler*, 89 Va. Cir. 366 (Fairfax Cnty. 2014) (criminal investigative privilege exists outside of FOIA).

23-6.01(a) Jurisdiction and Venue

The petition may be brought in either the circuit or general district court of the county or city served by the public body and in which the alleged violation occurs. The proper jurisdiction in which to sue a regional public body serving more than one locality is the city or county in which the principal offices of the body is located. Va. Code § 2.2-3713. State agencies, state officials, state institutions of higher education, and committees of the General Assembly may be sued in the circuit or general district courts in the jurisdiction where the petitioner resides, or in the City of Richmond. Va. Code § 2.2-3713(B).

23-6.01(b) Procedure and Burden of Proof

23-6.01(b)(1) Docket Priority

The Act requires the petition for mandamus or injunction to be heard within seven days after it is filed, 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 three-day notice is not required if a violation of the open meeting requirements is alleged. 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 is given precedence on the docket over all cases that are not otherwise given precedence by law. Va. Code § 2.2-3713(C).

23-6.01(b)(2) Notice Not a Prerequisite

The petitioner need not have requested or received individual notice of a public body's meeting to seek enforcement of the open-meeting requirements. Va. Code § 2.2-3713(A).

23-6.01(b)(3) Petition

The petition for injunction or mandamus must allege "with reasonable specificity" the circumstances allegedly constituting a violation of the Act or denial of the petitioner's rights under it. Va. Code § 2.2-3713(D). However, the petition does not have to contain an allegation of "irreparable injury." *WTAR Radio-TV Corp. v. City Council of Virginia Beach*, 216 Va. 892, 223 S.E.2d 895 (1976).

23-6.01(b)(4) Corporate Petitioner

Regardless of statutes or rules of court applicable in other cases, a corporation filing a petition in general district court to enforce the Act may be represented by an officer, director, or managing agent, without assistance of legal counsel. Va. Code § 2.2-3713(B).

23-6.01(b)(5) Burden of Proof and Presumption

In any case brought under the Act, the public body or official has the burden of proof to establish by a preponderance of the evidence that the relevant information is excludable from disclosure or the subject of a closed meeting is a proper one. The determination of the public body that an exclusion applies is entitled to no deference. Any failure to follow the procedures required by the Act is presumed to be a violation. Va. Code § 2.2-3713(E); see

Hill v. Fairfax Cnty. Sch. Bd. 83 Va. Cir. 172 (Fairfax Cnty. 2011), *aff'd on other grounds*, 284 Va. 306, 727 S.E.2d 75 (2012). The public body or official alleged to have violated the Act may introduce at the court proceeding a copy of a relevant FOIA Advisory Council opinion as evidence that the public body or official did not willfully and knowingly commit the violation if the alleged violation resulted from the good faith reliance on the opinion. Va. Code § 2.2-3715; Va. FOI Adv. Council AO-08-19, Aug. 22, 2019.

23-6.01(b)(6) Exhaustion of Remedies

Ordinarily, before seeking relief in the courts, the citizen seeking access must make an administrative request for that access and be denied. However, the Act does not require a formal request for records when the relief requested does not involve production of records, nor when the requester knows there are no records in existence. *Hale v. Washington Cnty. Sch. Bd.*, 241 Va. 76, 400 S.E.2d 175 (1991).

23-6.01(c) Justification for Mandamus or Injunction

Under the original language of the Act, the Virginia Supreme Court held that a history of violations of the Act might create an inference that “public body” would violate the Act in the future but that mere inference was insufficient to justify a court’s granting injunctive relief against a legislative public body. See *WTAR Radio-TV Corp. v. City Council of Virginia Beach*, 216 Va. 892, 223 S.E.2d 895 (1976). Following that decision, the General Assembly amended Va. Code § 2.2-3713(D) to state that “a single instance of denial of the rights and privileges conferred by [the Act] shall be sufficient to invoke the remedies granted”

Even with that amendment, the Supreme Court has shown some reluctance to enjoin public bodies. For example, in a case in which the trial court expressed the view that there would be no further violations, the Supreme Court held it was an error to grant injunctive relief. *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 288 S.E.2d 415 (1982). Likewise, where the trial court found the public body’s prior violations were not willful or knowing violations, or ones that invalidated the public body’s actions being complained about, the Supreme Court agreed injunctive relief was not justified. *Nageotte v. Bd. of Sup’rs of King George Cnty.*, 223 Va. 259, 288 S.E.2d 423 (1982). The Supreme Court has said that although the Act now permits an injunction based on proof of a single past violation, that relief remains discretionary with the Court, and will not be granted without a finding that the violation was willful, knowing, and substantial. *Hale v. Washington Cnty. Sch. Bd.*, 241 Va. 76, 400 S.E.2d 175 (1991). However, such a finding may be implicit. *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 886 S.E.2d 244 (2023) (“[A]ny willful and knowing requirement that can be derived from the language of *Hale* may be satisfied by an implicit finding.”)

Mandamus and injunction provisions of FOIA are intended to prevail over other, more general provisions of law relating to mandamus or injunction. Va. Code §§ 2.2-3713 and 8.01-644. This means, for example, that a plaintiff may be granted injunctive relief without the showing of irreparable harm that is required to obtain an injunction in most other cases.

23-6.01(d) In Camera Review

Allegedly confidential records should be filed for in camera inspection by the trial court and the appellate court and sealed to protect confidentiality. *Bland v. Va. State Univ.*, 272 Va. 198, 630 S.E.2d 525 (2006).

23-6.01(e) Competing Claims for Access and Privacy

At least one locality has successfully used a declaratory judgment action to resolve a conflict between a request for records and a claim that those records were private. In that instance, a former town department head and the local newspaper requested all written and email correspondence between a current town employee and a former member of the town council. Before the town could respond, an attorney for the current employee served a demand on the town not to release the requested records on the grounds that they were private.

Within the time limit for the town's response to the records request, the town filed a declaratory judgment action, naming both requesters, the objecting current employee and the former council member as defendants, and submitted the disputed records under seal, asking the court to decide which ones should be released. After a review of the records in camera, the court denied the individual requester's demurrer and demand for attorney fees. In doing so, the court noted that the town had been "on the horns of a dilemma" and had "acted properly in seeking [the court's] guidance." After reviewing the disputed records in camera, the court found that some were about public business and ordered their release, while others were "totally personal" and thus not subject to disclosure under the Act. *Town of Saltville v. Surber*, 83 Va. Cir. 161 (Smyth Cnty. 2011).

23-6.02 Other Remedies for Violations

23-6.02(a) Act not Criminal

The Act is not a criminal statute. The Commonwealth's attorney is given the same right as any other citizen to bring lawsuits to enforce the Act, either individually or in a representative capacity. Va. Code § 2.2-3713(A). This authority is, however, purely discretionary. The Attorney General has concluded that the Commonwealth's attorney has no obligation to represent a private citizen who alleges that the Act has been violated. 1983-84 Op. Va. Att'y Gen. 437.

23-6.02(b) Civil Penalties

If the court hearing a petition under the Act finds that an officer, employee, or member of a public body has willfully and knowingly violated the Act, it must impose a civil penalty of at least \$500, but no more than \$2,000, for the first violation. Va. Code § 2.2-3714(A). Subsequent violations increase the civil penalty to not less than \$2,000 or more than \$5,000. *Id.* If the court finds that the records were not produced because they were altered or destroyed for the purpose of avoiding the response required by the Act, the court may impose a penalty of up to \$100 per altered or destroyed record, even if a writ of mandamus or injunction is not granted. Va. Code § 2.2-3714(B).

If the court finds that the public body improperly certified a closed meeting, it may impose a fine of up to \$1,000, even if a writ of mandamus or injunction is not granted. Va. Code § 2.2-3714(C). Mitigating factors include the public body's reliance on opinions of the Attorney General, supportive case law, and Advisory Council published opinions. *Id.* The penalty is to be imposed on the officer, employee, or member of the public body "in his individual capacity," which implies that the penalty may not be paid from public funds. *Id.*; see also *RF&P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908 (1994); *Ripol v. Westmoreland Cnty. Indus. Dev. Auth.*, 82 Va. Cir. 69 (Westmoreland Cnty. 2010).

23-6.02(c) Costs and Attorney's Fees

If the petitioner "substantially prevails on the merits of the case," he is entitled to recover his reasonable costs, including expert fees and costs, and attorney's fees from the public body, unless the court finds that "special circumstances" make that award unjust. Va. Code § 2.2-3712(D). The "merits of the case" refers to the main object of the FOIA suit and not merely to whether any violations of FOIA were found. In *Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 727 S.E.2d 75 (2012), the Court found that the principal objective of the plaintiff was to overturn a school board's decision allegedly made in violation of the opening meeting requirements. As the plaintiff did not succeed in that object, she did not substantially prevail on the merits even though she succeeded in showing that the school board failed to produce some disclosable documents in a timely manner.

Two "special" circumstances that the court may consider "among other things" are reliance on a prior court decision and reliance on an opinion of the Attorney General. See *Dixon v. Va. Commonwealth Univ.*, No. 2010-11537 (Fairfax Cnty. Cir. Ct., Sept. 9, 2010) (declining to award attorney fees for failure to disclose home and business addresses of Board of Visitors members because VCU had relied on opinion of Attorney General). Reliance

on the opinion of the public body's own attorney is not expressly mentioned. One circuit court has awarded a petitioner attorney fees in a case in which a city did not consult its city attorney but relied on the advice of its Commonwealth's attorney. *Media General, Inc. v. City of Bristol*, 72 Va. Cir. 207 (City of Bristol 2006). See also the unpublished opinion of the Virginia Supreme Court, *Suffolk City School Board v. Story*, Rec. No. 201334 (Jan. 20, 2022), in which the Court remanded to determine if fees and costs should be awarded, and cited *Harmon v. Ewing*, 285 Va. 335, 745 S.E.2d 415 (2013) (per curiam) in noting that whether the award for attorney's fees would be unjust because of special circumstances lies in the sound discretion of the trial court.

In *Nageotte v. Board of Supervisors of King George County*, 223 Va. 259, 288 S.E.2d 423 (1982), the Supreme Court of Virginia implied that a violation that was not found to be willful and knowing would not give rise to either civil penalties or an award of attorney's fees. The current statutory language, however, suggests that the standards are not the same. Compare Va. Code §§ 2.2-3713 and 2.2-3714. In another case involving a closed meeting violation, the Supreme Court held that the petitioner was entitled to attorney's fees, even though neither the record nor the Court's opinion contained any indication that the violation was willful and knowing. *White Dog Publ'g v. Culpeper Cnty. Bd. of Sup'rs*, 272 Va. 377, 634 S.E.2d 334 (2006). Similarly, in *Fenter v. Norfolk Airport Authority*, 274 Va. 524, 649 S.E.2d 704 (2007), the Supreme Court approved the award of attorney's fees without reference to a knowing or willful violation after finding the public body failed to properly respond to a records request.

The Supreme Court has declined, however, to award attorney fees to a partially successful petitioner who did not request them in his initial petition or object in timely manner to the trial court's failure to address whether such fees should be awarded. *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022).

23-6.03 Effect of Violations

Virginia courts have generally not been willing to infer adverse consequences for violations of the Act beyond those specifically prescribed in the statutory language. See *Commonwealth ex rel Woodzell v. Collins*, No. 16-47 (Bath Cnty. Cir. Ct. Jan. 11, 2017) (violations of FOIA are not grounds for removal of a public official pursuant to Va. Code § 24.2-233.1); *McLaughlin v. Town of Front Royal*, 38 Va. Cir. 387 (Warren Cnty. 1996).

23-6.03(a) Discussion in Closed Meeting

For example, the Supreme Court held that improper closed meetings by a board of supervisors did not cause their later actions to be invalid. *Nageotte v. Bd. of Sup'rs of King George Cnty.*, 223 Va. 259, 288 S.E.2d 423 (1982). Similarly, although the Richmond Circuit Court held that the state Racing Commission's closed discussion of Colonial Downs' racing plans was not allowed under the "legal matters" exemption in Va. Code § 2.2-3711(A)(7), it declined to invalidate the Commission's later votes on the same subject taken in a public meeting. *Colonial Downs, L.P. v. Virginia Racing Comm'n*, No. HN-59, (City of Richmond Cir. Ct. Mar. 15, 2000).

23-6.03(b) Failure to Cite Correct Records Exemption

In *Lawrence v. Jenkins*, 258 Va. 598, 521 S.E.2d 523 (1999), the plaintiff made a document request to a local zoning administrator who furnished the records after redacting the name of the person who initiated the zoning complaint. In making his response, however, the zoning administrator failed to cite the specific provision of the Act exempting the identity of the complainant from disclosure. Due to that failure, the trial court issued a writ of mandamus ordering disclosure of the name. The Supreme Court reversed, holding that because former Va. Code § 2.1-342(A) (now § 2.2-3706(B)) authorized the withholding of the zoning complainant's name, the zoning administrator's error had not denied the petitioner any right to which he was statutorily entitled, and giving him the information by mandamus was not appropriate.

Distinguishing *Lawrence*, a circuit court ordered a public body to produce exemptible records when it failed to timely claim any exemption in accordance with the timeframe of Va. Code § 2.2-3704(B) (see section 23-4.02(d)). *Harki v. Dep't of Criminal Justice Servs.*, 91 Va. Cir. 387 (City of Norfolk 2015). The public body had for several weeks been negotiating a production agreement with the requester when it changed its mind and asserted an exemption. The court held that the failure to identify the exemption in writing within twelve days was a violation of the statute for which the remedy was the production of the documents, albeit in accordance with the terms of production agreement.

23-6.03(c) Defective Appointments

An official appointed in a manner that does not comply with the Act's requirements is a de facto officer, whose actions taken before he is notified of the defect in his appointment are deemed valid. Va. Code § 2.2-3711(C); see also 2009 Op. Va. Att'y Gen. 9, which concludes that a school board member appointed at a city council meeting for which no public notice was given is not validly appointed, but fails to mention the de facto officer provision in Va. Code § 2.2-3711(C). Once the defect is known, the appointing body should take further action, consistent with the Act's requirements, to correct it.

23-7 DATA COLLECTION & DISSEMINATION

23-7.01 Scope

The Privacy Protection Act of 1976 (PPA), renamed the Government Data Collection and Dissemination Practices Act (GDCDPA) and found at Va. Code § 2.2-3800 et seq., is concerned with the collection, maintenance, use, and dissemination of personal information by public agencies in Virginia. The GDCDPA does not itself generally prohibit the dissemination of collected information or render collected information confidential. See 1999 Op. Va. Att'y Gen. 17 (legislature did not intend the GDCDPA to prohibit the disclosure of personal information required by law to be disclosed under FOIA). For the most part, the GDCDPA provides a procedural framework for the collection, maintenance, use, and dissemination of personal information. Among others, the GDCDPA applies to any agency, authority, board, department, division, commission, institution, bureau, or like unit of counties, cities, towns, or regional governments, and constitutional officers, except as otherwise expressly provided by law. Va. Code § 2.2-3801(6) (definition of "agency"). The GDCDPA applies to individuals in their official capacities as representatives of their respective agencies. A private entity that contracts with a governmental unit to collect data on a single subject is not an agency. *Mansoor v. Cnty. of Albemarle*, 124 F. Supp. 2d 367 (W.D. Va. 2000), *aff'd on other grounds*, 319 F.3d 133 (4th Cir. 2003). While there is little Virginia Supreme Court case law on the subject, there are numerous Attorney General opinions discussing various aspects of the GDCDPA and its relationship with other laws.

With the advent of the Internet, there is an increasing concern about the collection and dissemination of personal information. It can be expected that the local practitioner may well now be faced with more questions about the GDCDPA than were raised in the past. Indeed, the GDCDPA requires local governments with Internet websites to develop Internet privacy policies and to post such policies on the websites. The state is required to provide guidelines for the privacy policies. Va. Code § 2.2-3803(B).

23-7.02 Personal Information

The GDCDPA is primarily concerned with personal information. Personal information is broadly defined as "all information that describes, locates or indexes anything about an individual," including specifically information related to education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record of an individual, or which affords a basis for inferring personal characteristics, such as finger or voice prints, photographs, things done by or to an individual, the record of an individual's presence, registration or membership in an organization or activity, or admission to an institution. By statutory definition, personal information excludes real estate assessment

information and routine information maintained for the purpose of internal office administration, where use of the information could not affect adversely any data subject. Va. Code § 2.2-3801.

Examples of personal information are a person's sex, age, place of employment, race, and ethnicity, 1987-1988 Op. Va. Att'y Gen. 9, as are the personnel records of schoolteachers, 1983-1984 Op. Va. Att'y Gen. 279, and the scholastic records of students, 1997-78 Op. Va. Att'y Gen. 311. A public employee's retirement status is personal information. 1976-1977 Op. Va. Att'y Gen. 225. Social security numbers are personal information, 1983-1984 Op. Va. Att'y Gen. 277, but the telephone numbers and addresses of business licensees are not. 1982-1983 Op. Va. Att'y Gen. 727. Pictures and data (GPS location, time, and date) collected from license plate reader technology are personal information. *Neal v. Fairfax Cnty. Police Dep't*, 295 Va. 334, 812 S.E.2d 444 (2018); 2013 Op. Va. Att'y Gen. 7. Information about businesses, as opposed to individuals, is generally not personal information and thus is not governed by the GDCDPA. Therefore, food establishment health inspection records are not records containing personal information. 1977-1978 Op. Va. Att'y Gen. 309.

23-7.03 Administration of Personal Information System

23-7.03(a) Collection of Information

The GDCDPA regulates personal information contained in "information systems." An "information system" is defined as "the total components and operations of a record-keeping process, . . . whether automated or manual" which contains personal information about data subjects, including names, personal numbers, and other identifying particulars of data subjects. Va. Code § 2.2-3801(1). In *Neal v. Fairfax County Police Department*, 295 Va. 334, 812 S.E.2d 444 (2018), the Virginia Supreme Court considered whether a passive license-plate reader database constituted an "information system" pursuant to the Act. While the database did not contain any information related to the individual to whom a specific license plate number was registered, the case was remanded to the circuit court to determine if the total components and operations of the process "provide a means through which a link between a license plate number and the vehicle's owner may be readily made." On remand, the lower court answered in the affirmative and permanently enjoined the Fairfax Police Department from using the system. On appeal, the Virginia Supreme Court reversed, finding that the license-plate database did not contain both "personal information" and "the name, personal number, or other identifying particulars of a data subject," and therefore did not qualify as an information system for purposes of the GDCDPA. *Neal v. Fairfax Cnty. Police Dep't*, 299 Va. 253, 849 S.E.2d 123 (2020).

Information managed by means of computer networks and the Internet is included in the definition of information system. A data subject is an individual about whom personal information is indexed or located in an information system. Va. Code § 2.2-3801(3). The GDCDPA provides that personal information should be collected, to the greatest extent feasible, from the data subjects directly, or through the sharing of data through agencies, in order to accomplish a proper purpose of the agency. Va. Code § 2.2-3803(A)(2).

Agencies covered by the GDCDPA may collect, maintain, use, and disseminate only that personal information permitted or required by law to be collected, maintained, used and disseminated, or which is necessary to accomplish a proper purpose of the agency. Va. Code § 2.2-3803(A)(1). A "proper purpose" is defined to include:

- a. the streamlining of administrative processes to improve service delivery;
- b. the reduction of paperwork and administrative burdens on applicants for public services;

- c. improved management of public programs;
- d. the prevention of fraud and improving of auditing capabilities; and
- e. data compilation and analytics to assist in the purposes set forth above and other policy development goals.

Va. Code § 2.2-3801.

Personal information must be “appropriate and relevant to the purpose for which it has been collected,” Va. Code § 2.2-3800(C)(3), and “information shall not be collected unless the need for it has been clearly established in advance,” Va. Code § 2.2-3800(C)(2). Because the Commonwealth needed to report racial and ethnic statistics to the federal government for audit, the Attorney General has stated that the Commonwealth could require local school divisions to collect racial and ethnic data as part of the official school triennial census. 1983-1984 Op. Va. Att’y Gen. 321. Without explicitly so stating, the Attorney General implied that local libraries could collect sex, age, and place of employment data on library card applications in order to permit a library to plan and identify relative demand and use within the library system as well as to protect the loan of public property. 1987-1988 Op. Va. Att’y Gen. 9. A locality may place surveillance and audio monitoring equipment, both visible and concealed, at a public building for purposes of enforcement of criminal penalties for destruction or damage to the locality’s property, as well as potential disciplinary action against public employees for acts of negligence. Warnings regarding the equipment must be clearly visible pursuant to the requirement of Va. Code § 2.2-3800(C)(1) that there shall be no personal information system whose existence is secret. 2002 Op. Va. Att’y Gen. 3.

23-7.03(b) Maintenance of the Information Systems

The information system must be maintained with accuracy, completeness, timeliness, and pertinence to insure the fairness to the data subjects. Va. Code § 2.2-3803(A)(4). Agencies are required to maintain a list of all persons or organizations which have regular access to personal information, as well as a record, including identity and purpose, of every access to any personal information in an information system. The latter requirement is inapplicable to agency personnel who have access to the system for the purpose for which the personal information was obtained. Va. Code § 2.2-3803(A)(6) and (7). Agencies are affirmatively required to establish safeguards to secure the information from foreseeable threats to security, to establish rules of conduct concerning the use of personal information, and to inform persons involved in the design, development, operation, or maintenance of the information system of the GDCDPA’s requirements. Va. Code § 2.2-3803(A)(8) and (9). Agencies are required to report the existence of any information systems operated, including a description of the nature of the data in the system and the purpose for which it is maintained. An inventory listing or similar display of this information must be made available to the public. The practitioner should carefully review the GDCDPA concerning the details of the above-described requirements, as well as others contained in GDCDPA.

23-7.03(c) Dissemination of Information

With regard to dissemination of personal information, the Attorney General has indicated in a series of opinions that the GDCDPA does not prohibit dissemination of personal information unless the dissemination is otherwise specifically prohibited by law. See 1999 Op. Va. Att’y Gen. 17; 1977-1978 Op. Va. Att’y Gen. 310 (seniority rosters containing personal information may be disclosed); 1977-1978 Op. Va. Att’y Gen. 489 (“Unless there is a prohibition against dissemination . . . by virtue of some other statute, [personal information] may be disseminated”); 1977-1978 Op. Va. Att’y Gen. 481. Other opinions indicate that dissemination of personal information is proper so long as it serves a proper purpose. 1982-1983 Op. Va. Att’y Gen. 216 (client information can be shared among human services agencies to carry out legislative purpose unless such sharing is explicitly

prohibited); 1981-1982 Op. Va. Att’y Gen. 286 (Virginia Employment Commission may disseminate labor certification information to aid in enforcement of labor laws). However, the Attorney General stated it would violate the GDCDPA for the Virginia Supplemental Retirement System to release information on the retirement status of particular employees to participating localities when such information would be used for employment retention purposes. The Attorney General reasoned that such disclosure did not serve the purpose of administering the retirement system. 1976-1977 Op. Va. Att’y Gen. 225.

In *Hinderliter v. Humphries*, 224 Va. 439, 297 S.E.2d 684 (1982), the Virginia Supreme Court ruled that a member of a county board of supervisors violated the GDCDPA by permitting her daughter to review an internal affairs investigative report about a police officer. The Court ruled that the GDCDPA was violated because the release to the daughter did not serve a proper purpose. In reaching its conclusion, the Court assumed but did not decide that no law explicitly permitted the release of the internal affairs file. Thus, it remains an open question as to whether personal information can be released merely because no other law explicitly prohibits its release, or whether a release must also accomplish a proper purpose. Following *Hinderliter*, it appears that the safest course for a local government to take is to release personal information only when such a release serves a proper purpose, or when some other law explicitly permits the dissemination. See also *Mansoor v. Cnty. of Albemarle*, 124 F. Supp. 2d 367 (W.D. Va. 2000) (dissemination of psychological report for purpose of chilling employee speech states claim under GDCDPA as not necessary to accomplish a proper agency purpose), *aff’d on other grounds*, 319 F.3d 133 (4th Cir. 2003).

The conclusions of the Attorney General in these cited opinions and of the Supreme Court in *Hinderliter* may be altered in some situations since the General Assembly has added a definition to Va. Code § 2.2-3803 of what constitutes a “proper purpose,” as discussed in section [23-7.03\(a\)](#).

Dissemination of social security numbers is prohibited in certain instances. See section [23-7.05](#).

23-7.04 Rights of Data Subjects

Agencies collecting personal information are required to inform persons from whom they are collecting the information whether they are required or may refuse to supply the information requested and the consequences of failure to provide information. Va. Code § 2.2-3806(A)(1). Allegations that an employee was misinformed about the specific consequences of providing information are sufficient to sustain a claim for violations of Va. Code § 2.2-3806(A)(1). *Mansoor v. Cnty. of Albemarle*, 124 F. Supp. 2d 367 (W.D. Va. 2000), *aff’d on other grounds*, 319 F.3d 133 (4th Cir. 2003). Agencies must give notice to data subjects of the possible dissemination of personal information to other agencies, nongovernmental organizations, or information systems not having regular access, indicate the intended use of the information, and indicate the specific consequences of failing to provide the information. The notice provision is satisfied by being displayed on the application or other data collection forms filled out by data subjects. Va. Code § 2.2-3806(A)(2). When personal information is disclosed to agencies, nongovernmental organizations, or information systems, agencies have discretion whether to notify the data subject. 1987-1988 Op. Va. Att’y Gen. 301. Data subjects or their agents are entitled to know the names of recipients of personal information, other than those with regular access authority, unless such disclosure jeopardizes a law enforcement action. Va. Code § 2.2-3806(A)(3)(c).

Perhaps the most important right given to data subjects is the right, upon request, to inspect, or to have an agent inspect, all personal information about the data subject, the nature of the sources of the personal information, and the identities of all nonregular recipients of personal information about the data subjects. The agency receiving such a request from a data subject must respond within the time limits established in the Virginia

Freedom of Information Act for responses to requests for public records, unless the agency and the data subject can agree on a longer time. Va. Code § 2.2-3806(A)(3).

In *McChrystal v. Fairfax County Board of Supervisors*, 67 Va. Cir. 171 (Fairfax Cnty. 2005), a circuit court held that pursuant to § 2.2-3806(a)(3), an employee who was subject to an employment discrimination investigation was entitled to all information gathered in the course of the investigation, including the identity of complainants. It noted that the GDCDPA provided greater access to a narrower group of citizens than the FOIA (see sections [23-4.04\(a\)\(1\)\(ii\)](#) and [23-4.04\(c\)\(1\)](#)).

The inspection rights do not extend to a data subject's mental health records if the subject's treating physician has included a written statement that in the physician's opinion a review of the records by the data subject would be injurious to the subject's wellbeing. Va. Code § 2.2-3806(A)(3)(a). In this regard, the GDCDPA copies the restriction set out in the Freedom of Information Act. *Id.* § 2.2-3705(A)(5).

Although government employees often have the inclination to tell persons to put requests for information "in writing," agencies are not permitted to require that requests by the data subject to review information be in writing.

The Attorney General has stated that alleged child abusers have the right, under the GDCDPA, to learn the nature of the complaints brought against the alleged abuser, as well as to obtain the statements of the persons providing the information. The GDCDPA does not, however, require disclosure of the names of the persons who gave the statements. 1985-1986 Op. Va. Att'y Gen. 225. If the information about the alleged abuser is contained in the medical or psychological records of others, but the information could be located by reference to the alleged abuser, the information must be disclosed but in a redacted form to exclude information about others. *Id.* The Sex Offender and Crimes Against Minors Registry, however, is excluded from the coverage of the GDCDPA. Va. Code § 2.2-3802(3).

A department of social services also is required to release personal information about a requester contained in child protective service and foster care placement plan records to an authorized agent of the requester. The department has the discretion to determine, however, that the requester does not have a legitimate interest in such records that do not involve her. 1995 Op. Va. Att'y Gen. 281.

Apart from the right to inspect personal information, data subjects are entitled to challenge, correct, or explain information contained in the information system. Indeed, agencies have a positive duty to inform data subjects of their rights to challenge, correct, or explain the information. Va. Code § 2.2-3806(A)(5)(e). Agencies are required, upon a challenge by the data subject, to investigate and correct or purge any errors or any information that is not necessary or pertinent to maintain. If the agency does not take action with respect to the personal information which is satisfactory to the data subject, then the data subject may submit a written statement of 200 words or less setting forth his or her position, which must be sent to all past and future recipients of the information. Va. Code § 2.2-3806(A)(5)(a)-(d). If the information is corrected or purged, then all past recipients must be furnished notification of the correction or purging. Va. Code § 2.2-3806(A)(5)(f).

23-7.05 Social Security Numbers

Since January 1, 1975, with a few exceptions, the federal Privacy Act has prohibited state and local agencies from establishing new requirements for citizens to disclose their social security numbers for any purpose other than the basic employment and payroll tax records for which such numbers were originally created, unless the agency was already collecting the numbers for such purpose as of that date.

Tracking that federal limitation, the GDCDPA prohibits any state or local agency from requiring a person to disclose or furnish his social security number for any purpose unless such number is specifically required by state law in effect prior to January 1, 1975, or is specifically required or authorized by federal law. An agency may not *collect* a social security number *or any portion thereof* unless the collection of such number is (i) authorized or required by state or federal law *and* (ii) essential for the performance of that agency's duties. The apparent effect of this provision is to allow a state or local agency that was collecting social security numbers for a particular purpose as of January 1, 1975, to continue doing so, provided the agency can still demonstrate that the numbers are essential for its performance of the function for which they are collected.

Despite this general restriction, the collection of a social security number for the sole purpose of complying with the Virginia Debt Collection Act or the Setoff Debt Collection Act is specifically allowed by the GDCDPA. Va. Code § 2.2-3808(A). Since identification of accounts payable is perhaps the most common reason for an agency to collect social security numbers, this express authorization eliminates the need for agencies to demonstrate that continued collection of the numbers for accounting purposes is essential to their performance. With certain specified exceptions, agency-issued identification cards, student identification cards, or license certificates issued or replaced on or after July 1, 2003, have not been allowed to display an individual's entire social security number and any issued prior to July 1, 2003, that contain such numbers should have been replaced by July 1, 2006, with the exception of voter identification cards which must have non-social security numbers after the 2010 decennial redistricting. Va. Code § 2.2-3808(B)-(D).

Applicants for marriage licenses may be required to provide social security numbers or control numbers issued by the Department of Motor Vehicles. Va. Code § 32.1-267(B); see 1999 Op. Va. Att'y Gen. 124. However, that information, for any licenses filed on or after July 1, 1997, may not be disclosed to the general public. Va. Code § 32.1-267(F); see *also* 2002 Op. Va. Att'y Gen. 182. Applicants for library cards may not be required to provide social security numbers, 1987-1988 Op. Va. Att'y Gen. 9, nor may applicants for dog licenses. *Id.*

Taxpayers' social security numbers also may be used by local real estate tax offices as identification numbers for tax files but may not be included in the public assessment roll or book, and taxpayers may not be required to give their numbers for real estate assessment purposes. 1987-1988 Op. Va. Att'y Gen. 11. Provided that such information is treated as confidential tax information, local tax officials may require taxpayers to provide social security numbers. Va. Code § 58.1-3017. However, a local government may not require that constitutional officers, such as commissioners of the revenue, collect social security numbers. 1999 Op. Va. Att'y Gen. 193. Federal law requires that individuals asked to supply their social security numbers must be advised whether disclosure is mandatory or voluntary, and what uses will be made of the number. 5 U.S.C. § 552a (1988). A state law requiring voter registrants to provide their social security numbers violated the First and Fourteenth Amendments by unduly burdening the right to vote if such numbers may be made public. *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993).

Because social security numbers are generally considered to be personal information, when a government releases them, the GDCDPA's requirements with regard to the release of personal information are triggered. 1985-1986 Op. Va. Att'y Gen. 227. That opinion concluded a city could release the social security numbers of its employees to the city treasurer but had to comply with the applicable notice, safeguard, and record-keeping requirements. *Id.* Since many local treasurers would require employee social security numbers for purposes of processing the locality's payroll and reporting social security withholding, the opinion's conclusion that this is a "release" of the numbers seems fairly debatable.

No agency (as defined in Va. Code § 42.1-77, rather than Va. Code § 2.2-3801(6)) shall send or deliver, or cause to be sent or delivered, any letter, envelope, or package that displays a social security number on the face of the mailing envelope or package or from which such number is visible, whether on the outside or inside of the mailing envelope or package. Va. Code § 2.2-3808(D).

While the foregoing restrictions remain in effect, the Protection of Social Security Numbers Act, adopted in 2009, has also created an affirmative duty on the part of state and local agencies that collect social security numbers not to disclose the first five digits of them to persons outside the agency, except pursuant to judicial order, for legitimate law enforcement purposes, or in various enumerated situations involving the exchange of information between agencies in the line of duty. Va. Code § 2.2-3815. Records containing social security numbers may, however, be disclosed to the persons who are the subject of the records. No locality may issue a check with a social security number, or any derivative thereof, on it. 42 U.S.C. § 405(c)(2)(C).

23-7.06 Exceptions

By statute, the GDCDPA does not apply to information contained in numerous types of personal information systems. Va. Code § 2.2-3802. Information contained in systems maintained by courts, police and sheriff's departments, and departments of social services, the Criminal Justice Information System, and the Virginia Juvenile Information System are among the excepted information systems when they deal with investigations and intelligence gathering relating to criminal activity.

Other statutes exclude certain information from the GDCDPA. For example, Va. Code § 54.1-2324 excludes information filed by cemetery companies with the Cemetery Board. See Va. Code § 57-35.20 (financial information reported by cemetery companies to the commissioner of the revenue), Va. Code § 2.2-3802(3) (excluding Sex Offender and Crimes Against Minors Registry). In *Carraway v. Hill*, 265 Va. 20, 574 S.E.2d 274 (2003), the Virginia Supreme Court held that the GDCDPA does not apply to constitutional officers.

Apart from exceptions for particular information systems, particular types of personal information are statutorily excluded from the GDCDPA. Letters of reference or recommendation placed in the personnel files of data subjects are exempt from the mandatory dissemination provisions of the GDCDPA, as are tests and examinations administered or prepared by public bodies for hiring or licensing purposes. Va. Code § 2.2-3806. The language of these exceptions with more limited application is contained in the Virginia Freedom of Information Act, Va. Code §§ 2.2-3705.1(4) and 2.2-3705.4 (limits letters of recommendation exemption to educational institutions).

23-7.07 GDCDPA Remedies

The exclusive remedy available for violations of the GDCDPA is that which is established in the statute itself. *Hinderliter v. Humphries*, 224 Va. 439, 297 S.E.2d 684 (1982). The statute provides for injunctive or mandamus relief, as well as costs and attorneys' fees against any person or agency "which has engaged, or is about to engage in any acts or practices" in violation of the GDCDPA. Va. Code § 2.2-3809. In order to obtain relief, a plaintiff need not prove that an adequate remedy at law does not exist or that irreparable injury will occur. *Hinderliter v. Humphries*, 224 Va. 439, 297 S.E.2d 684 (1982). Courts may also impose civil penalties against individual public officials for willful and knowing violations of the GDCPA's restrictions in Va. Code § 2.2-3808(A) on disclosure of social security numbers. Va. Code § 2.2-3809. The civil penalties will be not less than \$250 nor more than \$1,000 for the first violation, and not less than \$1,000 nor more than \$2,500 for subsequent violations. *Id.*