

SENATE BILL NO. 324

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology

on _____)

(Patron Prior to Substitute--Senator Roem)

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

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3704 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.

A. Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

26 1. The requested records are being entirely withheld. Such response shall identify with reasonable
27 particularity the volume and subject matter of withheld records, and cite, as to each category of withheld
28 records, the specific Code section that authorizes the withholding of the records.

29 2. The requested records are being provided in part and are being withheld in part. Such response
30 shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each
31 category of withheld records, the specific Code section that authorizes the withholding of the records.

32 3. The requested records could not be found or do not exist. However, if the public body that
33 received the request knows that another public body has the requested records, the response shall include
34 contact information for the other public body.

35 4. It is not practically possible to provide the requested records or to determine whether they are
36 available within the five-work-day period. Such response shall specify the conditions that make a response
37 impossible. If the response is made within five working days, the public body shall have an additional
38 seven work days or, in the case of a request for criminal investigative files pursuant to § 2.2-3706.1, 60
39 work days in which to provide one of the four preceding responses.

40 C. Any public body may petition the appropriate court for additional time to respond to a request
41 for records when the request is for an extraordinary volume of records or requires an extraordinarily
42 lengthy search, and a response by the public body within the time required by this chapter will prevent the
43 public body from meeting its operational responsibilities. Before proceeding with the petition, however,
44 the public body shall make reasonable efforts to reach an agreement with the requester concerning the
45 production of the records requested.

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

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

51 F. 1. Except with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4
52 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy

53 Act (20 U.S.C. § 1232g) and such requests for scholastic records by a parent or legal guardian of a minor
54 student or by a student who is 18 years of age or older, a public body may make reasonable charges not
55 to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested
56 records and shall make all reasonable efforts to supply the requested records at the lowest possible cost,
57 except that (i) for the first hour of the first request made by a requester to a public body during a calendar
58 year, a public body shall not charge a requester for any costs incurred during the first hour spent accessing
59 or searching for the requested records and (ii) for any additional time spent accessing or searching for
60 such records, or for any additional record requests, the public body shall not charge an hourly rate for
61 accessing or searching for the records exceeding the lesser of the hourly rate of pay of the lowest-paid
62 individual capable of fulfilling the request or \$40 per hour.

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

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

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

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

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

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

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

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

130 J. In the event a public body has transferred possession of public records to any entity, including
131 but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating

132 the transfer of such records shall remain the custodian of such records for purposes of responding to
133 requests for public records made pursuant to this chapter and shall be responsible for retrieving and
134 supplying such public records to the requester. In the event a public body has transferred public records
135 for storage, maintenance, or archiving and such transferring public body is no longer in existence, any
136 public body that is a successor to the transferring public body shall be deemed the custodian of such
137 records. In the event no successor entity exists, the entity in possession of the public records shall be
138 deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and
139 supply such records to the requester. Nothing in this subsection shall be construed to apply to records
140 transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the
141 Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia
142 shall be the custodian of such permanently archived records and shall be responsible for responding to
143 requests for such records made pursuant to this chapter.

144 **2. That the provisions of this act shall expire on July 1, 2025.**

145 **3. That the Virginia Freedom of Information Advisory Council (the FOIA Council) shall study**
146 **whether the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code**
147 **of Virginia) allowing public bodies to charge requesters for the production of public records should**
148 **be permanently amended to make access to public records easier for requesters. In conducting its**
149 **study, the FOIA Council shall convene a work group consisting of citizens of the Commonwealth,**
150 **representatives of state and local government entities, broadcast, print, and electronic media**
151 **sources, open government organizations, and other interested parties, to examine the current FOIA**
152 **provisions on charges and make recommendations on ways to amend such provisions to make the**
153 **assessment of charges by public bodies for the production of public records more uniform, more**
154 **transparent, easier to understand, and less costly. Technical assistance shall be provided to the**
155 **FOIA Council by the Division of Legislative Services. All agencies of the Commonwealth shall**
156 **provide assistance to the FOIA Council for this study, upon request. The work group shall complete**
157 **its meetings by November 30, 2024, and present its findings and recommendations for consideration**
158 **by the FOIA Council at its meeting in December 2024. The chairman of the FOIA Council shall**

159 submit to the Division of Legislative Automated Systems an executive summary of the work group's
160 findings and recommendations with any additional comments by the FOIA Council no later than
161 the first day of the 2025 Regular Session of the General Assembly. The executive summary shall
162 state whether the FOIA Council intends to submit to the General Assembly and the Governor a
163 report of its findings and recommendations for publication as a House or Senate document. The
164 executive summary and report shall be submitted as provided in the procedures of the Division of
165 Legislative Automated Systems for the processing of legislative documents and reports and shall be
166 posted on the General Assembly's website.

167 #