



## **LAW-ENFORCEMENT RECORDS and the FREEDOM OF INFORMATION ACT**

Law-enforcement agencies in Virginia have long enjoyed some of the broadest exemptions from releasing information in all of the states. The Virginia FOIA contains ample provisions to safeguard information essential to the accomplishment of the law-enforcement mission. Adequate protection is also provided for sensitive information gathered by law-enforcement agencies in the course of conducting investigations of noncriminal matters. While the majority of the provisions addressing law enforcement records remain the same this year, the General Assembly enacted a new law that will require the release of criminal incident information in matters that are no longer ongoing, with certain limited exceptions, effective July 1, 2021.<sup>1</sup> Previously, criminal investigative files could be withheld indefinitely, or released in the discretion of the custodian, unless disclosure was prohibited by other law. Please see new Part IV below for further details.

With the ability to withhold much information comes the responsibility not to abuse that discretion. This can best be accomplished by adopting a "predisposition to disclose." Using this approach, an agency identifies only that information which must be withheld rather than that which must be released under FOIA. It is important to keep in mind that FOIA generally does not prohibit the release of any information.<sup>2</sup> Information that is exempted may be released at the agency's discretion, and frequently an agency may find that it serves

---

<sup>1</sup> 2021 Acts of Assembly, c. 483.

<sup>2</sup> Note that there are certain prohibitions that apply in the law enforcement context, but most of them are found outside of FOIA itself (see Parts III and IX).



its best interests to do so. It is an established fact that law enforcement benefits when citizens are informed to the maximum extent possible.

## **PART I--REQUIRED RELEASES**

(Subsection A of § 2.2-3706 and subsection B of § 2.2-3706.1)

1. Information in the custody of law-enforcement officials relative to the **identity of any individual, other than a juvenile, who is arrested and charged and the status of the charge or arrest shall be released**. This includes felony, misdemeanor, and traffic arrests. Any chronological listing of adult arrests is a public document. However, reflecting federal mandates, VA law prohibits the dissemination of "criminal history record information" to individuals outside of the law-enforcement community. The release of arrest information is commonly understood to apply to "reasonably contemporaneous" arrests. Requestors seeking older information should be directed to check court records, which are public;

2. **Adult arrestee photographs** taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in **felony** cases, until such time as the release of the photograph will no longer jeopardize the investigation;

3. **Records of completed unattended death investigations** to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. "Unattended death" is defined as a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated. "Immediate family" means the decedent's personal representative or, if no personal representative has qualified, the decedent's next of kin in order of intestate succession as set forth in § 64.2-200; and

4. **Criminal incident information relating to felony offenses**. Criminal incident information includes a general description of the criminal activity reported, the date the alleged crime was committed, the general location where the alleged crime was committed, the identity of the investigating officer or other point of contact, a general description of



any injuries suffered or property damaged or stolen, and diagrams related to the alleged crime or the location where the alleged crime was committed. However, any diagrams described in subdivision 14 of § 2.2-3705.2 (see Part VII, below) are not required to be disclosed.

This is undoubtedly the type of information most frequently requested from law-enforcement agencies, not only by the news media, but also by interested citizens. As defined in FOIA, this is minimal information about an event, frequently much less than an agency would typically disclose. Note, for example, that suspect descriptions, which are commonly made public in such cases as robbery, are not required components of "criminal incident information." Let's look at each of the required components.

"General description of the criminal activity reported": This means the nature of the offense, though the specific criminal charge that may be involved need not be specified. For example:

"Sexual assault" may be used rather than the more specific terms of rape, sodomy, sexual battery, and similar offenses.

"Malicious wounding" instead of stabbing or beating.

"Drug law violation" could be used without specifying the substance involved or whether the case involved possession or distribution.

"The date the alleged crime was committed/The general location where the alleged crime was committed": A specific date should generally be provided, though in some cases a time frame may be appropriate. While the approximate time an event occurred is not required, it may be provided. Street and hundred block is one of the most frequently used methods of identifying location. However, if a street or block contains only several residences or buildings, use of a geographic, community, or subdivision locator identity may be appropriate if protection of a victim's identity is desired.

"Identity of the investigating officer or other point of contact": Self-explanatory, but could include either an officer taking an initial report or a detective assigned to follow up on a



case. While this information must be furnished if a requestor wants it, as a practical matter it generally is not needed as long as there is a point of contact for additional information, such as a public information officer.

"A general description of any injuries suffered or property damaged or stolen": Phrases such as "stab wound," "life-threatening injuries," or "injuries which are not life threatening" are appropriate. Property may be described in such terms as "construction materials," "household goods," or "assorted merchandise" instead of books, chairs, desk, computer. "Cash" vs. a specific amount.

"Any diagrams related to the alleged crime or the location where the alleged crime was committed, except that any diagrams described in subdivision 14 of § 2.2-3705.2 and information therein shall be excluded from mandatory disclosure, but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law." Generally requires the release of crime scene diagrams, unless those diagrams are exempt pursuant to the public safety exemption at subdivision 14 of § 2.2-3705.2 (see Part VII, below) or otherwise prohibited from release (see Part IX below for examples of prohibitions found outside FOIA).

**NOTE:** A **verbal response** as agreed to by the requester and the public body is sufficient to satisfy the requirement to provide criminal incident information.

### **Permitted Withholding of "Criminal Incident Information"**

Even this minimal amount of information may be withheld if the release of the information is likely to do one or more of the following: (1) jeopardize an ongoing investigation or prosecution; (2) jeopardize the safety of an individual; (3) cause a suspect to flee or evade detection; or (4) result in the destruction of evidence. It is important to note that the "criminal incident information" may be withheld only until the specified damage is no longer likely to occur from release of the information.



Financial crime investigations are a good example of why you would want to withhold criminal incident information. Otherwise, the misappropriating treasurer might flee, deleting records as he goes!

**NOTE:** FOIA specifically requires the release of those portions of such information that are not likely to cause the above-referenced damage.

**5. Criminal investigative files in cases that are NOT ONGOING.** Criminal investigative files related to matters that are not ongoing must be released, with certain limited exceptions. See Part IV below for details.

## **PART II--CRIMINAL RECORDS**

### **DISCRETIONARY EXEMPTIONS FROM RELEASE**

(Subsection B of § 2.2-3706)

The following records are excluded from the mandatory disclosure provisions of FOIA, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

**1. Criminal investigative files in cases that are ONGOING.** Criminal investigative files in ongoing matters may be withheld in the discretion of the custodian unless disclosure is prohibited by other law. See Part IV below for details.

**2. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ 2.2-307 et seq.), and (iii) campus police** departments of public institutions of higher education established pursuant to Article 3 (§23.1-809 et seq) of Chapter 8 of Title 23.1;

**3. Records of local law-enforcement agencies relating to neighborhood watch programs** that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;



4. **All records of persons imprisoned in penal institutions** in the Commonwealth, provided such records relate to the imprisonment;
5. Records of law-enforcement agencies, to the extent that such records contain **specific tactical plans**, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;
6. All records of adult persons under (i) investigation or supervision by a **local pretrial services agency** in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision, or monitoring by a **local community-based probation services agency** in accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by **state probation and parole services** in accordance with Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1;
7. Records of a law-enforcement agency to the extent that they disclose the **telephone numbers for cellular telephones, pagers, or comparable portable communication devices** provided to its personnel for use in the performance of their official duties;
8. Those portions of any records containing information related to **undercover operations or protective details** that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. **HOWEVER**, information concerning the overall costs or expenses associated with undercover operations or protective details must be released;
9. Records of (i) **background investigations of applicants** for law-enforcement agency employment, (ii) **administrative investigations** relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;



10. **The identity of any victim, witness, or undercover officer, or investigative techniques or procedures.** However, the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted under § 19.2-11.2<sup>3</sup>; and

11. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, including information obtained from state, local, and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913.

### **PART III--PROHIBITED RELEASES**

(Subsection C of § 2.2-3706)

FOIA specifically **PROHIBITS** the disclosure of the identity of any individual providing information about a crime or criminal activity under a promise of anonymity.

### **PART IV--CRIMINAL INVESTIGATIVE FILES**

(Subdivision B 1 of § 2.2-3706 and subsections A through C of § 2.2-3706.1)

---

<sup>3</sup> § 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege.

Upon request of any witness in a criminal prosecution under § 18.2-46.2, 18.2-46.3, or 18.2-248 or of any violent felony as defined by subsection C of § 17.1-805, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, any telephone number, email address, or place of employment of the witness or victim or a member of the witness' or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause.

Except with the written consent of the victim of any crime involving any sexual assault, sexual abuse, or family abuse or the victim's next of kin if the victim is a minor and the victim's death results from any crime, a law-enforcement agency may not disclose to the public information that directly or indirectly identifies the victim of such crime except to the extent that disclosure is (a) of the site of the crime, (b) required by law, (c) necessary for law-enforcement purposes, or (d) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim.

Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.



As of July 1, 2021, criminal investigative files in ongoing matters may be withheld, but if the matter is no longer ongoing, criminal investigative files generally must be released, although there are exceptions that allow certain portions to continue to be withheld. Therefore, the first question when dealing with a request for criminal investigative files must be whether or not the matter is ongoing. The term "ongoing" is defined in subsection A of § 2.2-3706.1 as follows:

*"Ongoing" refers to a case in which the prosecution has not been finally adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.*

If the matter is ongoing under this definition, then the custodian may use the exemption at subdivision B 1 of § 2.2-3706 to withhold the criminal investigative files, or release them in his discretion, except where disclosure is prohibited by law. This subdivision defines "criminal investigative files" as follows:

*"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 not required to be disclosed in accordance with § 2.2-3706.1."*

On the other hand, if the matter is not ongoing, then the criminal investigative file is subject to mandatory release pursuant to subdivision B 2 of § 2.2-3706.1 That subdivision defines "criminal investigative files" as follows:

*"any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence, relating to a criminal investigation or proceeding that is not ongoing."*

However, some portions of the criminal investigative file may still be withheld even if the matter is not ongoing, pursuant to subsection C of § 2.2-3706.1. That subsection states that criminal investigative files do not have to be released if such release would cause one of the following:





1. *Would interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner;*
2. *Would deprive a person of a right to a fair trial or an impartial adjudication;*
3. *Would constitute an unwarranted invasion of personal privacy;*
4. *Would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by a law-enforcement agency in the course of a criminal investigation, information furnished only by a confidential source;*
5. *Would disclose law-enforcement investigative techniques and procedures, if such disclosure could reasonably be expected to risk circumvention of the law; or*
6. *Would endanger the life or physical safety of any individual.*

Subsection C concludes by noting that it may not be construed to authorize withholding information that is not likely to cause one of these effects.

Reading all of these provisions together when deciding whether to release criminal investigative files, the first question is whether the matter is ongoing. If the matter is ongoing, then the criminal investigative files may be withheld pursuant to the discretionary exemption at subdivision B 1 of § 2.2-3706. In that instance, the second question would be for the custodian to decide whether to invoke the exemption and withhold the records, or to release the records (or portions of the records) in his discretion. If the matter is not ongoing, then the custodian must release the files except if release would cause one of the six effects listed above. In that instance, the second question is then whether any of the effects listed would be caused by the release of the criminal investigative files, and if so, which portions of those files may be withheld in order to avoid those effects.

Additional time to respond: Generally, subsection B of § 2.2-3704 requires that a public body must respond to a request for public records within five working days of receiving the request. Subdivision B 4 of § 2.2-3704 generally allows a public body to invoke up to seven additional work days to respond to a request if it is not practically possible to provide the requested records or to determine whether they are available within the five-work-day



period. However, in the case of in the case of a request for criminal investigative files pursuant to § 2.2-3706.1 when is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period, subdivision B 4 of § 2.2-3704 allows a public body to invoke 60 work days to respond.

## **PART V--NONCRIMINAL INCIDENT RECORDS**

Those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person. [EXAMPLES: credit card numbers and other identifying information recorded on lost property reports, response to domestic disputes where no crime has occurred, providing first aid to someone injured by accident where no crime occurred, etc.] Note that this exemption only allows portions of noncriminal records to be withheld; all other noncriminal records of law-enforcement agencies must be released.

**NOTE:** Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision B 9 of § 2.2-3706 (regarding background, internal affairs, and other administration investigations) and subdivision 1 of § 2.2-3705.1 (general personnel records exemption), as applicable.

## **PART VI--SPECIFIC TYPES OF RECORDS and HOW TO HANDLE**

1. **911 Records:** 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 FOIA. As with other records, whether 911 recordings or transcripts must be released depends on the nature and contents of the records (i.e., whether they are criminal or noncriminal, and if criminal, whether the matter is ongoing). One distinction between 911 records and other call records is that 911 records generally include computer aided dispatch (CAD) information such as the time and duration of the call, the greeting from the 911 dispatcher, and other information which must be released in most instances. Note that



subdivisions 6 and 7 of § 2.2-3705.2 protect certain subscriber information included in 911 databases that is not public already (for example, subscriber information for persons with unlisted phone numbers), but they do not exempt specific 911 call records.

2. **In Car Videos:** Just as with 911 records, whether in car videos must be released depends on the nature and contents of the video in question. For example, felony or misdemeanor traffic stops and the apprehension of criminal suspects would be treated as part of criminal investigations (i.e., subject to all of the usual exemptions and mandatory release provisions) BUT routine traffic stops would be treated as noncriminal (i.e., the custodian may only withhold portions re: personal, medical, or financial information to protect safety or privacy).

3. **Body worn camera videos:** Just as with 911 records and in car videos, whether body worn camera videos must be release depends on the nature and contents of what is shown on the video (criminal or noncriminal, etc.). However, one must be sensitive to the fact that body worn cameras may often go into private spaces such as peoples' homes, whereas most in car videos record matters that occur in public.

4. **Cell Phone Numbers:** Subdivision B 7 of § 2.2-3706: May withhold "records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties."

5. **Roster of Vehicles:** Generally would have to be released EXCEPT identity of undercover cars.

## **PART VII--OTHER EXEMPTIONS FOUND IN FOIA THAT IMPACT LAW ENFORCEMENT**

FOIA contains several other specific exemptions likely to be applicable or of interest to law-enforcement agencies in addition to those enumerated in § 2.2-3706. Some of these other provisions can be found in §§ 2.2-3705.1, 2.2-3705.2, and 2.2-3705.5, and include the following, all of which are discretionary exemptions:



**Subdivision 13 of § 2.2-3705.1:**

Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

**Subdivision 1 of § 2.2-3705.2:**

Confidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.

**Subdivision 2 of § 2.2-3705.2:**

Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

**Subdivision 10 of § 2.2-3705.2:**

Information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the STARS or any other similar local or regional communications system or (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, or programming maintained by or utilized by STARS or any other similar local or regional public safety communications system.

**Subdivision 14 of § 2.2-3705.2:**



Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

- a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;
- b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;
- c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or
- d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his



designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.2.

**Subdivision 8 of § 2.2-3705.3:**

The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) made to a local governing body.

**Subdivision 7 of § 2.2-3705.5:**

Information acquired (i) during a review of any child death conducted by the State Child Fatality Review Team established pursuant to § 32.1-283.1 or by a local or regional child fatality review team to the extent that such information is made confidential by § 32.1-283.2; (ii) during a review of any death conducted by a family violence fatality review team to the extent that such information is made confidential by § 32.1-283.3; (iii) during a review of any adult death conducted by the Adult Fatality Review Team to the extent made confidential by § 32.1-283.5 or by a local or regional adult fatality review team to the extent that such information is made confidential by § 32.1-283.6; (iv) by a local or regional overdose fatality review team to the extent that such information is made confidential by § 32.1-283.7; (v) during a review of any death conducted by the Maternal Mortality Review Team to the extent that such information is made confidential by 32.1-283.8; or (vi) during a review of any death conducted by the Developmental Disabilities Mortality Review Committee to the extent that such information is made confidential by § 37.2-314.1.

## **PART VIII--FOIA VS OTHER LAWS**



In the event of conflict between § 2.2-3706 of FOIA and other provisions of law, subsection F of § 2.2-3706 states that the provisions of § 2.2-3706 shall control.

In the event of conflict between § 2.2-3706.1 of FOIA (requiring the release of criminal incident information and certain criminal investigative files) and other provisions of law, subsection E of § 2.2-3706.1 states that "the other provisions of law, including court sealing orders, that restrict disclosure of criminal investigative files, as defined in subsection B, shall control."

## **PART IX--SPECIFIC PROHIBITIONS ON THE RELEASE OF RECORDS IN OTHER LAWS**

- Social Security Numbers
  - Where collected by tax official are treated as tax information that is exempt from FOIA (§ 58.1-3017)

AND

- The first five digits of an SSN are prohibited from release under the Protection of Social Security Numbers Act (§ 2.2-3815 et seq.)
- Tax returns and other information relating to the income or property of any person or business, EXCEPT for real estate assessments, information relating to building permits, certain personal property assessments (§ 58.1-3)
- Juvenile arrest and court records (§ 16.1-301)
- Certain school records (§§ 22.1-287, 22.1-287.1 and 23.1-405; 20 USC § 1232g)
- Crime victim information (§ 19.2-11.2)
- Certain records or reports submitted in confidence to the Department of State Police relating to an ongoing criminal investigation (§ 52-8.3)



- Criminal history record information (§ 19.2-389) and juvenile record information (§ 19.2-389.1)

*Updated 10/09; 8/10; 10/10; 10/11; 7/13; 7/17; 7/18; 7/19; 6/21.*

*Original Source: Warren R. Carmichael, Director Emeritus of Public Information, Fairfax County, VA Police Department.*

