


# COMMONWEALTH OF VIRGINIA

## Department of Environmental Quality

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**Subject:** Manual for Processing Requests Pursuant to the Virginia Freedom of Information Act

**To:** DEQ Staff

**From:** Jeff Steers, Interim Director of Enforcement 

**Date:** September 5, 2019

**Copies:** DEQ Staff

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**Summary:**

Virginia Code § 2.2-3700 through 2.2-3715 requires all state agencies to provide the public access to public records. The last agency policy regarding the Virginia Freedom of Information Act was issued November 1, 2013; the guidance presented will replace the November 1, 2013 agency policy. The guidance describes the process and procedure for the agency to respond to public record requests pursuant to Va. Code § 2.2-3700 et. seq.

**Electronic Copy:**

Once effective, an electronic copy of this guidance will be available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>);
- The Department's website at [*if the program chooses to post the guidance directly to a DEQ webpage, please add the link to the DEQ webpage; otherwise, delete this bullet*].

**Contact Information:**

Please contact Natalie Driver Womack at [natalie.womack@deq.virginia](mailto:natalie.womack@deq.virginia) or 804-698-4085 with any questions regarding the application of this guidance.

**Certification:**

As required by Subsection B of § 2.2-4002.1 of the APA, the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

**Disclaimer:**

**This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.**



# The Commonwealth of Virginia Department of Environmental Quality

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# Manual for Processing Information Requests Pursuant to the Virginia Freedom of Information Act

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July 2019

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## DEQ Roles and Responsibilities

**DEQ FOIA Coordinator:** Coordinate responses for multi-regional and multi-program requests to ensure compliance with the Virginia Freedom of Information Act.

**Custodians:** Each director of a DEQ division or regional office is the custodian for the records in the physical possession of his or her division, region or office.

**Custodian of records:** Each employee is deemed the custodian of records, both paper and electronic, in his or her possession. A custodian should not disclose or withhold records subject to discretionary disclosure prior to consultation with the DEQ FOIA Officer.

**Regional FOIA coordinator/ alternate FOIA coordinator:** Each division director and regional manager shall designate a coordinator and alternate coordinator for each DEQ office. The FOIA office coordinator shall perform the following functions:

- Receive and oversee the processing of information requests that are appropriate for their respective division, office or region.
- Track all received information requests to ensure compliance with FOIA.
- Maintain a file of the information requests that they received and responded to, including the tracking system.<sup>1</sup>
- Notify the FOIA Officer of any failure to adhere to FOIA.

**FOIA Officer:** The DEQ FOIA Officer is designated by the Director. DEQ's FOIA Officer performs the following functions:

- Update the FOIA policy as necessary in accordance with changes made by the Virginia General Assembly to FOIA or agency directive;
- Maintain a complete written record of DEQ's custodians, coordinators and alternate coordinators for FOIA purposes;
- Maintain the official version of this Guidance at the [Virginia Regulatory Town Hall](#) website, provide copies of DEQ's FOIA policy to all appropriate state boards and DEQ custodians as necessary;
- Report to the Director instances of untimely responses, unauthorized denial of access, or other violations of law or FOIA or this Guidance;
- Consult with the Director and, when necessary, the Department of Law Office of the Attorney General ("OAG") to ascertain the appropriate course of action when the custodian deems all or a part of a requested set of records to be subject to discretionary withholding; and
- Consult with staff and/or conduct reviews of potentially exempt records before asserting an exemption for releasing a record.
- Coordinates and drafts communication to requesters regarding exempt records.

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<sup>1</sup> [Library of Virginia Retention and Disposition Schedule General Schedule No. GS-101 Series 012029](#). Records regarding information requests and responses should be retained for three (3) years after the last action.

## Introduction

The Virginia Freedom of Information Act (“FOIA”) provides a legal framework that promotes access to agency information, and improves transparency and accountability for agency operations and decisions. DEQ’s Freedom of Information Act Policy and Procedure establishes a transparent, efficient and consistently applied process to respond to public record requests pursuant to FOIA. Va. Code [§ 2.2-3700](#). The purpose of this manual is to provide the public and DEQ employees with instruction concerning the manner in which DEQ implements FOIA. The manual clarifies the requirements for a valid records request, permissible agency responses, as well as detailed procedures for DEQ staff to reference when reviewing, redacting, and releasing agency records pursuant to FOIA.

In the event the Virginia General Assembly amends FOIA, rendering any provision of this Guidance inconsistent with the amended law, this Guidance shall be interpreted in accordance with the amended law. The responsibility for interpreting the provisions of this Guidance is assigned to the DEQ FOIA Officer in consultation with the Director of DEQ (“Director”). Additionally, when records are requested from DEQ pursuant to a court order or subpoena, the Rules of the Supreme Court of Virginia shall apply. Va. Code [§ 2.2-3703.1](#).

## Who can use FOIA?

FOIA provides the right to inspect and copy public records to the following individuals:

1. Citizens of the Commonwealth of Virginia;<sup>2</sup>
2. Representatives of newspapers and magazines with circulation in Virginia; and
3. Representatives of radio and television stations broadcasting in or into Virginia. See, Va. Code [§ 2.2-3704 \(A\)](#).

DEQ FOIA staff begin with a presumption that public records are releasable under FOIA unless there is a specific exclusion that applies. Va. Code [§2.2-3705.1](#). (*See Appendix C: Tip #1*)

## How are records provided?

Once a request has been received and responsive public records have been identified and located, the agency will provide the requester the option to have the record(s):

1. delivered via postal mail
2. delivered via e-mail or
3. reviewed in-person by extending an opportunity to visit the appropriate DEQ office. Va. Code [§ 2.2-3704 \(A\)](#).

If the requester elects to receive the records electronically, DEQ will provide public records to the requester in the format in which they exist at DEQ, such as Microsoft Word, Microsoft Excel, Portable Document Format (PDF), etc. If the requester elects to visit a DEQ office, the

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<sup>2</sup> FOIA does not apply to requests made by individuals who are not citizens of the Commonwealth of Virginia. However, DEQ will make every attempt to honor such requests from outside the Commonwealth within a reasonable time.

requester must make an appointment with the FOIA coordinator for that office. If the requester wishes to inspect the original records, he/she may do so during the normal state business hours.<sup>3</sup> The coordinator and requester should establish and confirm a specific date, time, and location for the scheduled visit. The coordinator should take precautions, as necessary, for the preservation and safekeeping of agency records to prevent damage or destruction while the records are being inspected. Such safeguards may include monitoring the requester during the records inspection. If the requester wishes to have copies made of any of the inspected records, the coordinator should make all reasonable efforts to provide the requester copies at the time of the scheduled visit unless the coordinator determines that the production of such records at the time of the visit cannot be reasonably accomplished or is overly burdensome. If the coordinator is unable to produce copies at the time of the scheduled visit, the coordinator will make arrangements with the requester to provide copies of the records within a reasonable time.<sup>4</sup>

### What information are requesters entitled to under FOIA?

FOIA provides that 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. Va. Code [§ 2.2-3704 \(A\)](#).

A public record is defined as all writings or recordings consisting of the following elements:

1. letters, numbers, and words, or their equivalent;
2. in any form<sup>5</sup>
3. prepared by or in the possession of DEQ or its employees in the transaction of public business. Va. Code [§ 2.2-3701](#).

There are two important limitations to the identification and production of DEQ public records. First, an agency is not required to create a new record if one does not already exist. Va. Code [§ 2.2-3704\(D\)](#). Second, the agency may withhold the release of certain records in accordance with the exclusions provided in FOIA or other areas of the law that govern the release of such records.

### Procedure

#### Requirements for Making a Request

There are **two steps** for submitting an information request:

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<sup>3</sup> Normal state hours are from 8:30-4:30. [Department Of Human Resource Management Policy No.: 1.25 Policies And Procedures Manual](#) (Excluding state holidays and closures due to inclement weather)

<sup>4</sup> For more information see pg. 17 Production.

<sup>5</sup> Including databases such as CEDS (Comprehensive Environmental Data Systems)

### Step 1:

The best and preferred practice for submitting a FOIA request is to complete and submit a DEQ [request form](#) to a FOIA coordinator at the [appropriate regional office](#) via e-mail.<sup>6</sup> A FOIA request can also be made orally or in writing (e.g., electronic submission via e-mail or letter submission via postal mail) to the DEQ FOIA Coordinator. Additionally, FOIA does not require an individual to explicitly reference FOIA for a communication to be deemed a request under FOIA. Va. Code § [2.2-3704 \(A\)](#).

### Step 2:

If the request has been submitted to the agency and the information requested is clearly stated, then the agency will deem the request complete. Va. Code [2.2-3704 \(B\)](#). The agency will respond to the requester within the statutory period of five business days. However, if for any reason the request is not deemed complete, the agency will notify the requester for clarification. Until the requester provides the agency with clarification, the statutory time will be paused. If the requester fails to contact the agency within a reasonable time, the request will be closed without any records being released. If a request has been closed as a result of the requester's failure to contact the agency to provide clarification, the requester must resubmit the request with sufficient specificity for agency staff to identify responsive records. *Appendix A See Virginia Freedom of Information Act Response Letter (Item A)*.

### Agency's Procedure for Responding to a Request

If a requester has directly communicated his/her request to a DEQ employee and the requested information can be identified and located with reasonable specificity, then the agency will respond to the requester within five working days. The agency's failure to respond to a request within the specified time period is deemed a denial of the request. Va. Code § [2.2-3704 \(E\)](#). The majority of requests to DEQ are responded to within five days; however, some responses may require additional time because records have to be reviewed for potential exemptions or the agency may experience some difficulty in gathering the records depending on the volume of the responsive records or number of individuals who may have responsive records.

FOIA requires one of the following options be exercised when responding to a request:

1. Record(s) Released in Full
  - a. The agency provides all responsive records to the requester in full. [See Virginia Freedom of Information Act Response Letter \(Item B\)](#).
2. Record(s) Entirely Withheld
  - a. The agency is withholding the record(s). The agency must provide a general description of the information withheld, such as the volume and subject of the records. The agency also will provide the requester with the specific Code section that authorizes the agency to withhold the record(s). Va. Code § [2.2-3704 \(B\) \(1\)](#). [See Virginia Freedom of Information Act Response Letter \(Item C\)](#).

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<sup>6</sup> [Submit a FOIA Request](#)



3. Record(s) Withheld in-part and Released in-part
  - a. The agency provides the requester notification that the entire record(s) or a portion of the record(s) has been withheld. Accompanying the notification, the agency also will provide the specific code section authorizing the agency to withhold the record(s). The agency also will provide a general description of the information withheld that includes the quantity and subject matter of the records that were withheld. Va. Code § 2.2-3704 (B) (2). [See Virginia Freedom of Information Act Response Letter Item D.](#)
4. No Records
  - a. The agency will provide notification to the requester that the requested records could not be found or do not exist. [See Virginia Freedom of Information Act Response Letter Item E.](#)
5. Additional Time Needed
  - a. The agency may require additional time in order to provide the requested records or determine whether they are available beyond the statutory five-day period. In the event that this occurs, the agency will specify the condition causing the need to respond after the five-day period and notify the requester that an additional seven working days will be needed to fulfill the request. [See Virginia Freedom of Information Act Response Letter Item F.](#) (*See Appendix C: Tip #2*)

## Practical Application

There are two types of disclosures, mandatory and discretionary. All DEQ records are subject to mandatory disclosure unless they are excluded or prohibited. **Records excluded, but not prohibited, from the mandatory release may qualify for discretionary disclosure after consulting with the DEQ FOIA officer.**

## Exclusions of General Application

### Personnel Information

Personnel information concerns employment related information associated with identifiable individuals. Personnel information is excluded from mandatory disclosure. The agency has the discretion to release or exclude such information unless the disclosure is prohibited by law. The agency's policy is to exclude the release of such information.

However, the agency will release the following:

1. information responsive to a request submitted by the subject of the record;
2. information responsive to a request submitted by a third party, when the subject of the record is 18 years of age or older and waives the rights afforded to him or her under Va. Code [§ 2.2-3705.1](#);
3. information associated with contracts between a public body and its officers or employees other than contracts settling public employment disputes held confidential as personnel records under Va. Code [§ 2.2-3705.1](#);
4. the name, position, job classification, official salary, or rate of pay of, allowances or reimbursements for expenses paid to, any officer, official, or employee of public body whose annual rate of pay is \$10,000 or more

5. the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees whose annual rate of pay is more than \$10,000. Va. Code [§2.2-3705.1 \(1\)](#).

### *Attorney - Client Privilege and Attorney Work Product*

The agency withholds any advice of legal counsel that is protected under the attorney-client privilege. Va. Code [§ 2.2-3705.1 \(2\)](#). Similarly, legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under Va. Code [§ 2.2-3711](#) will be withheld. Va. Code [§ 2.2-3705.1 \(3\)](#).

### *Tests*

The agency withholds tests and other examinations used, administered or prepared by DEQ to evaluate an employee or employment seekers qualifications or aptitude for employment, retention or promotion or qualifications for any license or certificate issued by DEQ. Va. Code [§ 2.2-3705.1\(4\)](#).

### *Closed Meetings*

The agency withholds records compiled exclusively for use in closed meetings lawfully held pursuant to Va Code [§ 2.2-3711](#). Va Code [§ 2.2-3705.1 \(5\)](#).

### *Proprietary Information*

The agency withholds vendor proprietary information software contained in DEQ records. Vendor proprietary information software includes computer programs that are acquired from a vendor for purposes of processing data for DEQ. Va. Code [§ 2.2-3705.1 \(6\)](#).

### *Software*

The agency withholds computer software developed by or for a state agency. Va. Code [§ 2.2-3705.1 \(7\)](#).

### *Real Property Transactions*

The agency withholds appraisals and cost estimates of real property subject to a proposed purchase, sale, or lease, prior to the completion of such transaction. Va. Code [§ 2.2-3705.1 \(8\)](#).

### *Non-disclosure of Personal Contact Information*

The agency withholds individual personal contact information if the individual has provided his or her personal contact information for the purpose of receiving electronic mail from the agency; and the individual specifically requests that his or her personal contact information not be disclosed. Personal contact information is defined as an individual's home and/or business physical address, e-mail address, telephone number and/or comparable number assigned to an electronic device. Va Code [§ 2.2-3705.1 \(10\)](#).

### *Financial Information*

The agency withholds account numbers, routing numbers, credit card numbers, debit card numbers or other account information with a financial institution unless the individual requesting the information is also the subject of the information. Va. Code [§ 2.2-3705.1 \(13\)](#).

## Exclusions related to public safety

### *Public Safety*

The following information contained in a public record is excluded from the mandatory disclosure provision of FOIA, but the information may be disclosed at the discretion of the custodian of the record, except where such disclosure is prohibited by law in accordance with Va. Code [§2.2-3704.01](#). Va. Code [§2.2-3705.2 \(14\)](#).

## Exclusions related to administrative investigations

### *Administrative investigations*

Active investigation: The agency will withhold investigator notes, correspondence, information, and records furnished in confidence regarding an active investigation by the following authorities and/or pursuant to the following statutes:

1. Employment discrimination complaints made to the Department of Human Resources Management,
2. The Virginia Human Rights Act,
3. The Auditor of Public Accounts,
4. The Joint Legislative Audit and Review Commission,
5. Fraud and Abuse Whistle Blower Protection Act,
6. The Office of State Inspector General for investigations initiated through the Fraud, Waste and Abuse Hotline or an investigation initiated pursuant to § 2.2-307 et seq.,
7. Internal auditor(s) appointed by the head of a state agency. Va. Code [§ 2.2-3705.3 \(5\)](#).

Closed investigations: If an investigation has been completed, the agency will release public records in its possession including investigator notes, correspondence, and other information. However, the identity of the complainants, and/or persons supplying information regarding items 1-7 to investigators must not be revealed.

## Exclusions related proprietary records and trade secrets

Trade secrets are defined as follows:

- information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that
- derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, **and**
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Va Code [§ 59.1-336](#).

The agency has identified three steps that should be taken in order for an exclusion to be asserted for trade secrets and proprietary information.

- The submitting entity must invoke the trade secret exclusion upon submission of the data or other materials for which protection from disclosure is sought

- The submitting entity must identify the data or other materials for which protection is sought, and
- The submitting entity must state the reasons why protection is necessary. Va. Code [§ 2.2-3705.6 \(26\)](#).

In accordance Va. Code [§ 2.2-3705.6](#), the records in DEQ possession have been designated as qualifying for the trade secret or proprietary information exclusion, the following records will be withheld from release:

1. Financial statements not publicly available that are filed with applications for industrial development financing in accordance with [Industrial Development and Revenue Bond Act](#). Va. Code [§ 15.2-4900](#).
2. Information that was filed as confidential under the [Toxic Substances Information Act](#). Va. Code [§32.1-239](#).
3. Documents and other information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth regarding Resource Management Plans pursuant to [§§ 10.1-104.7, 10.1-104.8 or 10.1-104.9](#) other than required as part of a state or federal regulatory enforcement action. Va. Code [§2.2-3705.6 \(25\)](#).
4. Trade secret information provided in plans, specifications, and information DEQ requires to be submitted because DEQ has reason to believe that the individual is generating, storing, transporting, disposing of, or treating waste if the submitting party has identified the information claimed as trade secret at the time of submission to the agency. However, DEQ will release plans, specifications and information to the appropriate officials of the Environmental Protection Agency pursuant to the requirements of the federal Solid Waste Disposal Act or otherwise required by law. Va. Code [§ 10.1-1458](#).
5. Trade secret information provided in plans specifications, and information to the Board upon request if the Board in its discharge of duties has reason to believe that the facility is causing or may be about to cause, an air pollution problem. Any information, except emission data, as to secret processes, formulae or methods of manufacture or production will not be released unless for purposes of enforcement of [§ 10.1-1314.1](#) or the federal Clean Air Act or regulations and orders of the board. Va Code [§§10.1-1314; 10.1-1314.1](#).
6. Trade secret information provided in plans, specifications, and other pertinent information, such as secret formulae, secret processes, or secret methods other than effluent data used by an owner or under the owner's discretion provided to determine the effect of the wastes from his discharge on the quality of state waters will not be released unless disclosure is necessary to an appropriate official of the Environmental Protection Agency pursuant to the requirements of the Federal Water Pollution Act Amendments of 1972. Va. Code [§62.1-44.21](#). *(See Appendix C: Tip #3)*

### **Exclusions related working papers and correspondence (executive privilege)**

"Working papers" are defined as those records that are prepared by or for a public official for his or her personal or deliberative use. If a state employee has created records for or on behalf

of the following entities listed below, please contact the FOIA Officer and the Policy Director. Va. Code [§ 2.2-3705.7 \(2\)](#).

1. Office of the Governor<sup>7</sup>
2. Lieutenant Governor
3. The Attorney General
4. The members of the General Assembly
5. The Division of Legislative Services
6. The mayor or other chief executive officer of any political subdivision of the Commonwealth
7. The president or other chief executive officer of any public institution of higher education in Virginia. (*See Appendix C: Tip #4*)

### Agency specific exclusions

#### Hazardous waste facilities

The agency will withhold records regarding the siting of hazardous waste<sup>8</sup> facilities if disclosure 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\(9\)](#).

The agency will release records related to the application for certification of site approval in accordance with Virginia law. Va. Code [§ 10.1-1441](#).

#### Site-Specific Location

The agency will withhold records containing information on the site-specific location of rare, threatened, endangered, or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archeological sites if disclosure would jeopardize the resource.

If the owner of the land upon which the resource is located requests the information, then the agency will release the information. Va. Code [§ 2.2-3705.7 \(10\)](#).

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<sup>7</sup> "Governor's Secretaries" means the Secretary of Administration, the Secretary of Agriculture and Forestry, the Secretary of Commerce and Trade, the Secretary of Education, the Secretary of Finance, the Secretary of Health and Human Resources, the Secretary of Natural Resources, the Secretary of Public Safety and Homeland Security, the Secretary of Technology, the Secretary of Transportation, and the Secretary of Veterans and Defense Affairs. [Va. Code § 2.2-200 \(E\)](#).

<sup>8</sup> "Hazardous waste" means a solid waste or combination of solid waste which, because of its quantity, concentration or physical, chemical or infectious characteristics, may:

1. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating illness; or
2. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. Va. Code [§ 10.1-1400](#).

## Enforcement Confidential

FOIA creates a temporary exclusion pursuant to Va. Code [§ 2.2-3705.7\(15\)](#) for DEQ records documenting “enforcement strategies<sup>9</sup>, including proposed sanctions for enforcement actions.” Such documents are excluded from disclosure under FOIA only until “a proposed sanction resulting from the investigation has been proposed to the director of the agency.”<sup>10</sup>

This exclusion does not apply to inspection reports, warning letters, notices of alleged violations, and documents detailing the nature of any environmental contamination that may have occurred.

The agency will withhold records of DEQ, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board related to the following types of investigations:

- **enforcement strategies, including proposed sanctions for enforcement actions**

After the investigation has concluded and a sanction has been proposed to the Director, DEQ enforcement strategy documents will be disclosed pursuant to FOIA unless another FOIA exclusion applies.

- **Active federal environmental enforcement actions that are considered confidential under federal law**

Federal documents pertaining to a federal enforcement action and in the possession of DEQ are not subject to disclosure under FOIA if:

1. the enforcement action is active (*i.e.*, ongoing), and
2. the documents are considered confidential under federal law.

Whether the documents are considered confidential under federal law is based upon the designation as such by the federal agency or its counsel providing the documents. State records that are otherwise subject to disclosure under FOIA do not become exempt by virtue of their use or potential use in a federal action.

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<sup>9</sup> “Enforcement strategy documents” include enforcement recommendation and plan documents (“ERPs”); memoranda, e-mails and other documents dedicated to the discussion of appropriate enforcement strategy and its progress; documents and proposals drafted and/or received in the course of enforcement action settlement negotiations and pertaining directly thereto; draft orders, including draft findings of fact and conclusions of law; civil charge or civil penalty worksheets and documents prepared as part of the active prosecution of adversarial administrative and judicial enforcement actions.

<sup>10</sup> A sanction “proposed to the director of the agency” For consent orders that are not subject to public comment, a sanction has been “proposed to the Director” at the presentation of a consent order for final approval and proposed execution by the DEQ Director.

For consent orders and consent special orders that are subject to public comment, a sanction has been “proposed to the Director” when the Director or his designee approves the order for public comment.

For proposed administrative orders resulting from an adversarial administrative proceeding such as a formal hearing or informal fact-finding, a sanction would be “proposed to the director” at the presentation for final approval and proposed execution of the order by the Director or his designee, following any review requested by the Director or his designee.

## Required Withholding of Records

Virginia laws may identify specific records that must be withheld from disclosure. The following laws include such requirements with respect to records that DEQ may possess.

### Private Identification Numbers

If an individual has submitted the following information to the agency for the purpose of paying fees, fines, taxes or other charges collected by DEQ, Virginia law prohibits the agency from disclosing:

1. Social security numbers
2. Identification numbers on driver's license
3. Credit and debit card numbers
4. Bank accounts
5. Electronic and billing systems

The agency may release the private identification numbers if the private identification numbers are:

1. Necessary to conduct or complete the transaction for which the information was submitted; or
2. Required to be disclosed by other law or court order. Va. Code [§ 2.2-3808.1](#).

### *Communications and Materials pursuant to the Virginia Administrative Dispute Resolution Act*

The agency will withhold communications and material required to be kept confidential in accordance with the Virginia Administrative Dispute Resolution Act. Va. Code [§ 2.2-4119](#) of the Virginia Administrative Dispute Resolution Act ([§ 2.2-4115 et seq.](#)).

### *Negotiation and awards of contract and transactions under The Virginia Public Procurement Act:*

The agency will withhold records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the agency.

The agency will release such records after it has made a decision to award or not to award the contract. FOIA does not apply to procurement transactions conducted pursuant to the Virginia Public Procurement Act; the release of records are governed by the Virginia Public Procurement Act. Va. Code [§§ 2.2-3705.1\(12\); 2.2-4300 et seq.](#)

## Production

### Counting the Cost

DEQ may make reasonable charges for its actual costs incurred in accessing, duplicating, supplying, or searching for the requested records. DEQ will not impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with maintaining records or transacting the general business of the agency. Any duplicating fee charged by DEQ will not exceed the actual cost of duplication.

### Outstanding Balance

Prior to processing a request from a requester with a 30 day or more outstanding balance, the agency will require the requester to remit payment. Va. § [2.2-3704 \(I\)](#) *See Virginia Freedom of Information Act Response Letter Item G. (See Appendix C: Tip #5)*

### Assessing Cost

The agency assesses the cost of responding to a FOIA request in two ways: (1) Costs are assessed regarding the staff time DEQ employees provide in order to gather and produce the records requested (2) costs are assessed regarding any tangible records productions that are made through copies and CDs.

**Staff time-** The agency bills staff time per half hour according to the level of knowledge, skills, and abilities employed by a DEQ staff member to fulfill the information request. The agency bills according to whether the efforts asserted by each employee would be deemed general knowledge, skills, and abilities or technical knowledge, skills, and abilities. The Virginia Department of Human Resources defines knowledge, skills, and abilities, as follows:

- **Knowledge** refers to acquired principles and practices related to a particular job.
- **Skills** refers to acquired psychomotor behaviors (coordinated activities that involving arms, hands, fingers, and feet such as making copies and electronically transmitting records.)
- **Abilities** are the talents, observable behaviors or acquired dexterity.<sup>11</sup> *See Appendix B: Accessing Cost*

**General Knowledge Skills and Ability (G-KSA)** If a DEQ staff member employs general knowledge, skills, and ability (G-KSA), then the costs are assessed per half hour. G-KSA is defined as an employee conducting general application, usage, and search function of agency databases such as Enterprise Content Management (ECM), Comprehensive Environmental Data System (CEDS) preformatted reports. G-KSA are also defined as conducting tasks such as photocopying and transmitting electronic records. *See Appendix B: Accessing Cost*

**Technical Knowledge Skills and Ability (T-KSA)** If a DEQ staff member employs technical knowledge, skills, and ability (T-KSA), then the costs are assessed per half hour. T-KSA is defined as an employee conducting advanced application, and usage, and search function of agency databases such as Ad-Hoc Logi. T-KSA includes the ability to establish filters, parameters,

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<sup>11</sup> [Department of Human Resource Management Policy 3.05](#)



and queries on one or multiple databases to retrieve specific records that meet a specific search criteria.

Non-DEQ Databases: In some instances, contractors maintain DEQ's data. (i.e. Opus Inspection, Inc. maintains vehicle emissions.) DEQ will provide the information requested in accordance with DEQ rates. *See Appendix B: Assessing Cost.*

### Tangible Records Production Cost

**Electronic records:** Electronic records productions are the preferred method of the agency. The agency will transmit the information through an electronic file share, e-mail or postal mail (CD). There is no associated cost with transmitting the records electronically outside of staff time outlined above. However, if the requester would prefer that the records to be placed on a CD and sent via postal mail, then any cost associated with this type of production will be borne by the requester and DEQ staff should include this cost.

**Photocopied or copied records:** If the requester does not wish to inspect the original records but wishes to be provided with copies of the requested records in physical paper form, the requester may elect to have copies made and sent to the requester. DEQ's basic charge for photocopying existing paper records is per 8 1/2" x 11" single-sided. See Appendix B. When the request involves hundreds of pages, the staff may estimate the pages using the formula, 2 inches equals 500 pages (1 inch equals 250 pages, etc.), which is based on the standard size of a ream of paper. The cost associated with copying and mailing the records will be borne by the requester. *See Appendix B: Accessing Cost.*

**Agency inability to copy requested records:** If the agency is unable to copy the records for the requester, then the agency may fulfill its obligations by allowing the requester to contact a private copying service to produce the requested records. In such instances, steps must be taken to ensure that the integrity of the original records is retained. If a private copying service is used, direct payment to the company is the responsibility of the requester and the cost per page will not be assessed by DEQ.

### DEQ Invoice<sup>12</sup>

If the cost associated with filling a FOIA request is over \$25.00, then the requester will be sent a FOIA invoice. The charges will show an itemization of the fees incurred for the production of the FOIA request.

- **Less than \$25.00:** If the cost of providing the records, staff time and/or tangible records production, is less than \$25.00, the coordinator will release the requested records without any charges. [See Virginia Freedom of Information Act Response Letter Item H.](#)
- **More than \$25.00:** If the cost of providing the records, staff time and/or tangible records production, is more than \$25.00, the coordinator will provide the requester with an invoice of the charges related to the cost of FOIA production. [See Virginia Freedom of Information Act Response Letter Item H.](#)

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<sup>12</sup> [DEQ Invoice](#)

- **Likely to Exceed \$ 200.00:** If prior to processing a request the agency determines the cost of providing the records is likely exceed \$200, then the agency will obtain an agreement to pay from the requester. The FOIA officer or FOIA coordinator will contact the requester to obtain a written agreement to pay the cost associated with fulfilling the request. Once the requester's agreement to pay has been received, the agency will begin processing the request. However, the agency's statutory required response time will be paused until the requester notifies the agency that he/she is willing to pay the cost associated with the agency fulfilling the request. Va. Code [§ 2.2-3704 \(H\)](#). [See Virginia Freedom of Information Act Response Letter Item I](#). *See Appendix B: Accessing Cost (See Appendix C: Tip #6)*

### Submission of payment

Requesters are encouraged to reimburse DEQ by check for FOIA expenses. Checks should be made payable to **Treasurer of Virginia and mailed to:**

**The Department of Environmental Quality  
Receipts Control  
Post Office Box 1104  
Richmond, Virginia 23218.**

In instances where the estimated cost of providing records exceeds \$200, the Receipts Control office will notify the FOIA officer when the entire estimated payment has been received.

### Fee waivers

DEQ may grant fee waivers to other Virginia agencies; each request submitted by a Virginia agency will be reviewed on a case-by-case basis. DEQ will consider the nature of the request, as well as the time expended by operational staff to fulfill the request to determine if fees will be assessed.

### Penalties for violation

Employees may be held personally liable for violations of FOIA. If a legal proceeding is commenced against any employee of DEQ for a violation of FOIA, and the court finds that a violation was **willfully and knowingly** made, the court shall impose upon such officer or employee of DEQ a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 or more than \$5,000. Va. Code [§ 2.2-3714](#).

**Appendix A: Virginia Freedom of Information Act Response Letter**

[Date]

[Requester's Name] [Title]

[Requester's Street Address or P.O. Box]

Requester's City, State, and Zip Code]

**Virginia Freedom of Information Act Response Letter**

Dear \_\_\_\_\_:

The agency received your Freedom of Information request on \_\_\_\_\_. The box(es) checked below corresponds to the results of the search for the records requested.

**RECORDS:**

- (Item A) → Returned Request:** In accordance with Va. Code [§ 2.2-3704 \(B\)](#), the Department has reviewed your request and determined the request lacks reasonable specificity. Please submit a new request, specifying the records you are requesting.
- (Item B) → Release in Full:** In accordance with Va. Code [§ 2.2-3704](#), the records you requested are enclosed.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (Item C) → Records Entirely Withheld:** In accordance with Va. Code [§ 2.2-3704 \(B\)\(1\)](#), the Department has elected to withhold records from your release. The following records are being withheld (*See* description, quantity, and statutory exemption of withheld records)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (Item D) Records Withheld and Released in-part:** In accordance with Va. Code [§ 2.2-3704 \(B\)\(2\)](#), the Department is releasing a portion of the record. A portion of the record is being withheld. The following records are being withheld (*See* description, quantity, and statutory exemption of withheld records)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (Item E) No Records:** In accordance with Va. Code [§ 2.2-3704 \(B\)\(3\)](#), the Department has conducted a review of our files and determined the records you requested cannot be found or do not exist in DEQ files.

- (Item F) Additional Time Needed:** We are currently working to process your request. However in accordance with Va. Code [§ 2.2-3704 \(B\)\(4\)](#), it is not possible for DEQ to provide the requested records within five (5) working days due to \_\_\_\_\_ . We anticipate, however, that we will be able to do so by \_\_\_\_\_ (Date not to exceed twelve (12) working days after perfection of the request.).

**COST:**

- (Item G) Request When Requester Has Outstanding Fees:** It has been noted that you/your company has an unpaid balance of \$\_\_\_\_\_ for the fulfillment of previous FOIA request(s). Please contact the [FOIA Officer](#). Va. Code [§ 2.2-3704 \(I\)](#).
- (Item H) No Fees Assessed:** The agency’s policy is to recover the cost of providing records when the cost is \$25.00 or more. However, the production cost associated with your request is under \$25.00; therefore, there is no cost associated with you request. Your records will be transmitted to you.
- (Item H) Fees Assessed:** The agency’s policy is to recover the cost of providing records, when that cost is \$25.00 or more. The cost associated with the production of your records is \$\_\_\_\_\_. Please see the DEQ invoice attached. Please make payments to the **Treasurer of Virginia**. Mail payments to:  
**The Department of Environmental Quality**  
**Receipts Control**  
**Post Office Box 1104**  
**Richmond, Virginia 23218.**
- (Item I) Likely to Exceed 200/Agreement to pay:** It has been determined that the cost of fulfilling your request is likely to exceed \$200.00. DEQ requires an agreement to pay for the requested records before the agency continues to process your request. Please send a written statement (e-mail or Postal Mail) to the FOIA coordinator that you agree to pay the fees associated with the production of the information request. Please note that upon the completion of processing your request, any remaining balance will be billed to you and any overage paid will be refunded to you. **(Information to be input by the FOIA coordinator)** Va. Code [§ 2.2-3704 \(H\)](#)

**Name and Affiliated Organization:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Phone number:** \_\_\_\_\_

**E-mail Address:** \_\_\_\_\_

Sincerely *DEQ FOIA Officer*

## Appendix B: Accessing Cost

### DEQ FOIA CHARGES SUMMARY

COST CATEGORY	CHARGE	FOR REFERENCE ONLY
<b>STAFF TIME</b> General Knowledge Skills and Ability (G-KSA)	\$ 11.10 per 1/2 hour	\$22.20 per hour
<b>STAFF TIME</b> Technical Knowledge Skills and Ability (T-KSA)	\$15.20 per 1/2 hour	\$30.40 per hour
<b>Copies per side</b>	\$.05	

#### Staff Time Summary

##### General Knowledge Skills and Ability (G-KSA)

If a DEQ staff member employs general knowledge, skills, and ability (G-KSA), then the costs are assessed per half hour. G-KSA is defined as an employee conducting general application, usage, and search function of agency databases such as Enterprise Content Management (ECM), Comprehensive Environmental Data System (CEDS) preformatted Ad-Hoc Logi reports. G-KSA are also defined as conducting tasks such as photocopying and transmitting electronic records.

##### Technical Knowledge Skills and Ability (T-KSA)

If a DEQ staff member employs technical knowledge, skills, and ability (T-KSA), then the costs are assessed per half hour. T-KSA is defined as an employee conducting advanced application, and usage, and search function of agency databases such as Ad-Hoc Logi. T-KSA includes the ability to establish filters, parameters, and queries on one or multiple databases to retrieve specific records that meet a specific search criteria's.

Non-DEQ Databases: In some instances, contractors maintain DEQ's data. (i.e. Opus Inspection, Inc. maintains vehicle emissions.) DEQ will provide the information requested in accordance with DEQ rates.

## Appendix C: Helpful Tips

**Tip # 1:** DEQ employees should be mindful of the agency's record retention practices and limitations on data storage. Please be sure to follow The Library of Virginia retention policy.<sup>13</sup>

**Tip #2:** The five-day countdown begins the first working day after the request is received by the agency. If additional time is needed to respond to the requester, please contact your regional coordinator, the agency coordinator, and/or the FOIA officer.

**Tip #3** If an individual contacts you regarding records that have been designated as qualifying for the trade secret or proprietary information exclusion, please contact the FOIA officer. Each media has specific requirements for the submission of potentially proprietary or trade secreted information.

- [Air](#)→ [Memo Number 03-005. Guidance on Confidential Information and Responding to FOIA Requests for Air Permitting Records](#)
- [Land](#)→ [Land Protection & Revitalization Guidance Memo No. LPR-SW-2013-03](#)

**Tip #4:** As a DEQ employee, if a requester is seeking records prepared by or for a public official for his or her personal or deliberative use be sure to contact the FOIA Officer and Policy Director. Again, always remember to check the caption of your e-mail (To and From), as well as the individuals listed on the e-mail chain.

**Tip #5:** If a requester with an outstanding balance submits a FOIA request, contact the FOIA Officer before processing the request.

**Tip #6:** If you determine that fulfilling the request will be overly burdensome, please be sure to contact your regional FOIA coordinator, the agency FOIA coordinator, and the FOIA Officer. The coordinators and/or the FOIA officer will come to an agreement with the requester regarding to the date of production of records and/or payment specifications.

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<sup>13</sup> [Retention Schedules](#)