

**FAIRFAX COUNTY, VIRGINIA**  
**PROCEDURAL MEMORANDUM No. 13-06**

**To:** Agency Directors

**Date:** January 1, 2018

**Reference:** April 5, 2010, Memo of County Executive Anthony Griffin on FOIA

**Initiated by:** Office of Public Affairs

**Approved by the County Executive:**



**Subject:** Countywide Virginia Freedom of Information Act Policy

## **I. Purpose**

The purpose of this Countywide FOIA Policy is to set forth a uniform policy for processing, responding to, and tracking requests for public records. This Countywide FOIA Policy seeks to balance the County's commitment to transparency and openness, while ensuring the protection of the County's privacy and security interests.

## **II. Background**

The Virginia Freedom of Information Act, Va. Code Ann. §§ 2.2-3700 through 2.2-3714 (FOIA), was enacted in 1968 to allow residents of Virginia open access to public records in the custody of a public body or its officers and employees, and open entry to meetings of public bodies where the business of the people is being conducted. Except as otherwise provided by law, FOIA governs access to public records in the possession of public bodies or its officers and employees. FOIA specifies that it is to be construed liberally, and that any exemptions to FOIA are to be narrowly construed. County employees should be aware that any knowing or willful violations of FOIA made by an employee of a public body may subject that employee to civil penalties of up to \$5,000.

## **III. Roles and Responsibilities**

### **A. Sponsoring Agencies**

The Office of Public Affairs (OPA) provides guidance on, and oversees compliance with, FOIA. OPA works in conjunction with the Office of the County Executive (COEX), the Office of the County Attorney (OCA), the Department of Information Technology (DIT), the Department of Finance (DOF), and the

Department of Management and Budget (DMB) to review and update Countywide FOIA Policy.

### ***B. Office of Public Affairs***

OPA is responsible for coordinating and managing the County's responses to FOIA requests submitted by members of the media.

OPA's Countywide FOIA Officer serves as the primary point of contact for members of the public requesting public records or information regarding the process.

The Countywide FOIA Officer is also responsible for the following:

1. Advocating for and promoting the County's commitment to transparency in a manner consistent with the law.
2. Assisting County agencies with responding to FOIA requests.
3. Designing and delivering FOIA training to County employees.
4. Managing the County's centralized tracking of FOIA requests.
5. Serving as a point of contact for members of the public who request public records.

### ***C. County Agencies & Agency FOIA Points of Contact***

FOIA is intended to ensure open and transparent government—goals that are shared by Fairfax County, its agencies, and employees. All County employees should understand how FOIA impacts their day-to-day responsibilities, and that records created or maintained in the transaction of public business may be subject to disclosure under FOIA.

Each County agency director is required to designate a staff person as the FOIA point of contact. Each agency's FOIA point of contact must be fully accountable for administering and understanding FOIA, and responding to FOIA requests in their respective agency's custody in compliance with this policy and the law.

### ***D. Office of the County Attorney***

The County Attorney's Office is responsible for providing legal advice on any litigation matter or matter requiring legal review that may arise in a FOIA request or an agency's response. For example, if an agency is unsure whether a FOIA exemption applies to a record, or if the FOIA request is unusually burdensome or is otherwise extraordinary, the agency should promptly request legal advice from the County Attorney's Office. The County Attorney's Office is also responsible for providing annual training to the Countywide FOIA Officer in accordance with FOIA.

### ***E. Department of Information Technology***

DIT maintains the countywide e-mail and messaging systems, hosts central storage for data and electronic files, manages the County account for wireless services, and oversees County Archives. County agencies are the custodians of

the information and data held in the DIT-maintained systems (see County Information Security Policy 70-05). Upon request, DIT will search the County's electronic files for electronic records in order to assist agencies in producing records responsive to FOIA requests.

## **IV. Responding to FOIA Requests**

### **A. Five Working Days to Respond**

The County is required to respond to FOIA requests within five working days after receipt of a request. "Day one" is considered the next working day after the request is received. Requests that are received after 4:30 p.m. are considered received the next working day. Responses are due to FOIA requesters by close of business on the fifth working day. The five-working day period does not include holidays, weekends or other days when the County is closed.

FOIA provides that the County may invoke a seven-working day extension, as needed, in addition to the five working days to respond to FOIA requests—a total of twelve working days to respond to FOIA requests when a request cannot be responded to within five working days. Extensions must be invoked within the initial five working days after receiving the request and must expressly state the specific conditions that make a response within five working days impossible. Regardless of when the seven-working-day extension is invoked, such extension allows agencies a total of twelve working days to respond. An extension may be needed for requests that are multi-agency, complex, or voluminous.

The County shall provide any public records responsive to a FOIA request either by inspection or by providing copies of the requested records, at the option of the requester.

### **B. Ways to Respond to a FOIA Request**

Within five working days of receiving a request, County staff must respond to the requester with one of the following responses:

1. *"The requested records are provided and enclosed."* This response should also include an invoice for any assessed FOIA charges, if applicable.
2. *"The requested records are provided in part, and withheld in part. Records that are withheld are considered exempt under [Insert application Virginia Code Section.]"* This response must be made in writing, and the applicable Virginia Code section or other applicable statutory authority must be cited. Consult with the Countywide FOIA Officer or OCA if you need assistance on citing to a specific code section. The approximate volume and subject matter of the withheld records shall also be provided.
3. *"The requested records are entirely withheld because their release is prohibited by law, and/or Fairfax County is exercising its discretion to withhold the records in accordance with VFOIA."* This response must

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be made in writing, and the applicable Virginia Code section must be cited. The approximate volume and subject matter of the withheld records shall also be provided.

4. *"The requested records could not be found or do not exist."* If the agency employees are aware that another public body has or may have the responsive records, then contact information for that other agency shall be provided to the requester (e.g., requests for records related to Fairfax County Public Schools should be directed to the FCPS FOIA officer).
5. *"It is not practically possible to produce the requested records within five working days. Due to the amount of time that will be required to process this request, the County requires an additional seven working days to respond."* If twelve working days is not enough time, then an agency shall make a reasonable effort to reach an agreement with the requester. If the requester and the agency cannot come to a mutually agreeable time period to respond, then immediately contact the Countywide FOIA Officer or OCA.
6. *"As requested, the estimated cost of providing the requested records is \$[X]. Please let me know if you wish to proceed with your request."* Requesters are entitled to seek an estimate, regardless of cost, prior to proceeding with the FOIA request. If a requester asks for an estimate prior to production, you should supply the requester with the estimated cost of supplying the records and determine if they wish to continue with the request.
7. *"Because the cost of providing the records requested is \$200 or more, advance payment of \$[X] is required prior to processing this request."* Under FOIA, the response period does not begin again once the deposit has been received, but is rather tolled until the deposit is delivered by the requester. The request for an advance deposit therefore should be made as soon as possible once its need is determined.
8. *"It is unclear what specific records you are requesting. FOIA requires that requests for public records be made with reasonable specificity. If you would like to narrow your request, please provide me with [information necessary to narrow request (e.g. date range of emails sought)]"*
9. *"Based on our records you have not yet paid the \$[X] owed for a prior request and this amount has been past due for more than 30 days. Pursuant to Va. Code Ann. 2.2-3704(l), the County will require payment of this amount before processing your most recent VFOIA request. Please submit this outstanding payment at your earliest convenience, so that we may proceed with processing your most recent request."*

## **V. Requests for Public Records**

### ***A. Public Records Under FOIA***

A "public record" is any record containing information relating to the conduct of government business, which is prepared, owned, used, or retained by a public body. This includes, but is not limited to, emails, handwritten notes, reports, drafts, letters, spreadsheets, contracts, calendars, audio files, photographs, and videos.

It is the subject matter of the record, not its form, that determines whether the record is a public record.

### ***B. Records Not Covered Under this Policy***

Records that were not created, produced, collected, received or retained in the transaction of public business (e.g., spam emails, certain notes, documents or emails of a personal nature) are not public records and are therefore not subject to mandatory disclosure under FOIA.

Requests for public records in the custody of the following public bodies are not in the custody of Fairfax County Government and therefore are not covered by this Countywide FOIA Policy:

1. Fairfax County Sheriff's Office.
2. Fairfax County Public Schools.
3. Commonwealth's Attorney.
4. Clerk of the Fairfax County Courts.
5. Fairfax County Water Authority.
6. Fairfax County Economic Development Authority.

### ***C. Out of State Requests***

The right to receive copies of or inspect public records under FOIA applies only to citizens of the Commonwealth of Virginia, representatives of newspapers and magazines with circulation in Virginia, and representatives of radio and television stations broadcasting in or into Virginia. Agencies are not prohibited from providing public records in response to out-of-state requesters as a courtesy, and agencies are encouraged to comply with such requests, with the understanding that the responses are not subject to the requirements of FOIA. The County recommends:

1. Agencies require out-of-state requesters to pay a deposit in advance of providing public records not to exceed the amount of the advance estimate even if the cost is below \$200.
2. Agencies charge out-of-state requesters for the actual cost of producing any responsive records.
3. As with any FOIA request, if an agency or employee has concerns about releasing a public record or complying with a request, they should contact OPA or OCA.

### ***D. Requests for Public Records***

Any request to obtain or inspect a public record submitted by a party made eligible under the statute is a FOIA request.

#### **1. Form of Requests**

- a. Any request for public records made by parties covered under FOIA shall be treated as a FOIA request, and responded to within the five working days established in FOIA.
- b. Simple, routine requests for public records are still FOIA requests and all response requirements under FOIA still apply. However, these routine requests may be handled in an informal manner, unless otherwise indicated by the requester.
- c. Requesters do not need to use the term "FOIA" when asking for public records.
- d. FOIA requests do not need to be in writing.
- e. Requesters can be encouraged to submit their requests in writing for clarity, however, requesters cannot be required to submit a written FOIA request or form developed by an agency.
- f. Agencies may require requesters to provide names and legal addresses.

#### **2. Reasonable Specificity**

- a. Requests for public records must be made with "reasonable specificity" to ensure that agency custodians can identify and locate the requested records.
- b. Agency custodians are encouraged to consult with OPA or OCA if they are unsure as to whether a request is reasonably specific.
- c. If a FOIA request is not reasonably specific, then the agency must notify the requester that the request is not reasonably specific within five working days of receipt. Agencies are encouraged to work with requesters in order to make a reasonably specific request for records. Once a reasonably specific request has been made, the County must respond to the requester within five work days of receiving that request.

#### **3. Existing Records**

- a. Fairfax County is not required to create records that do not already exist in response to a FOIA request, although agencies have the discretion to do so in order to satisfy a request.
- b. Records shall be produced in the format requested by the requester if such format is used in the agency's normal course of business.
- c. Non-exempt public records maintained in an electronic data processing system, computer database or any other structured collection of data shall be made available to a requester in a format used by Fairfax County in the regular course of business.

- d. Similarly, if non-exempt public information/data exists in a database, then generating a report to include such information/data is not deemed to be the production of a new record and is required. Please note, however, that Fairfax County is not required to write new code or install additional software to generate a report.

#### **4. Requests for Emails and Other Electronic Records**

- a. If a FOIA request contains a request for emails or other electronic communications, the agency custodian shall determine whether the custodian(s) should conduct the search and/or whether a DIT System Administrator is needed to conduct a search. For DIT to conduct an email or electronic files search, agency custodians shall identify to DIT the email accounts for which an email collection is required along with the date range and pertinent search terms or phrases, or other search parameters, as soon as the necessary parameters are identified. Searches for other communication record types may require similar and/or additional criteria defined.
- b. DIT maintains and archives County employees' emails and other electronic records and retrieves them upon request for agencies. However, the agency that received the FOIA request is still responsible for both determining whether any records retrieved are responsive to the request and supplying such records to the FOIA requester.

## **VI. VFOIA Exemptions**

FOIA contains discretionary exemptions under which public records may be withheld, as well as mandatory exemptions under which public records must be withheld. Additionally, there are mandatory disclosure provisions that require public bodies provide certain public records. If you are uncertain about whether an exemption applies or whether the exemption is mandatory or discretionary, or if any other laws may apply, you should consult with the Countywide FOIA Officer or the Office of the County Attorney.

### **A. Duty to Redact, As Needed**

Under FOIA, an agency custodian may not withhold public records in their entirety simply because a portion of the public record can be withheld under FOIA. Agencies are obligated to release records with the exempt material redacted rather than withholding documents in full simply because the records contain exempt material.

### **B. Mandatory Exemptions**

A record must be withheld from disclosure in its entirety when federal or Virginia law requires that the record is exempt from disclosure. If you believe that records responsive to a FOIA request may be subject to such an exemption, you should consult the Countywide FOIA Officer or the Office of the County Attorney. For example, with limited exceptions, criminal records, records obtained pursuant

to an Invitation to Bid under the Virginia Public Procurement Act, adoption records, and records obtained from the Virginia Fusion Intelligence Center, among others, must be withheld from disclosure in their entirety.

### **C. Commonly Used Exemptions**

FOIA and other Virginia and federal laws contain many discretionary and mandatory exemptions under which public records may or must be withheld. While it is not feasible to reproduce each exemption in this Policy, the following list of exemptions are commonly used by Fairfax County:

1. Personnel records concerning an identifiable individual (Va. Code Ann. § 2.2-3705.1(1)). Exceptions to the exemption are:
  - a. *This exemption does not apply to a requester who is the subject of the personnel records being requested.*
  - b. *Individuals 18 and older may waive, in writing, the protections afforded by this subsection.*
  - c. *This exemption does not apply to:*
    - i. contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1;
    - ii. records of the name, position, job classification, official salary, or rate of pay of, public employees whose annual salary is more than \$10,000; or
    - iii. records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body.
2. Written advice of legal counsel to public bodies or their employees, or other records protected by the attorney-client privilege (Va. Code Ann. § 2.2-3705.1(2))
3. Legal memorandum and other work product compiled specifically for use in litigation (Va. Code Ann. § 2.2-3705.1(3)).
4. Identifying information regarding individuals filing zoning enforcement complaints in confidence (Va. Code Ann. § 2.2-3705.3).
5. Closed meeting materials that have been recorded or compiled exclusively for use in a lawfully held closed meeting (Va. Code Ann. § 2.2-3705.1(5)).
6. Certain proprietary information (Va. Code Ann. § 2.2-3705.1(6)).
7. Records relating to the negotiation and award of a contract, prior to a contract being awarded (Va. Code Ann. § 2.2-3705.1(12)).



8. The first five digits of a social security number (Va. Code Ann. § 2.2-3815(A)).

Please be advised that this list is not exhaustive and that there are dozens of other exemptions both within FOIA and elsewhere in Virginia and federal law. If agencies are uncertain as to whether an exemption applies to a record, they are encouraged to contact OCA.

Agencies should seek to be consistent in their application of the exemptions.

## **VII. FOIA Charges for Actual Costs of Producing Requested Records**

FOIA allows public bodies to make reasonable charges, not to exceed the actual cost incurred, in accessing, duplicating, supplying, or searching for the requested records. The County shall not impose any extraneous, intermediary, or surplus costs or expenses to recoup the general costs associated with creating or maintaining records or conducting the general business of the County. Each agency custodian is responsible for ensuring that public records are provided to FOIA requesters at the County's actual cost. Providing responsive records by email, if possible, should be encouraged as this method of transmission minimizes copy costs for requesters. Agencies should assess costs for out-of-state requests for records in the same manner as they assess costs for FOIA requests.

### **A. Payments**

1. Written documentation confirming receipt of payment made should be promptly provided to requesters.
2. The FOIA Cost Form included in Attachment A should be used to assess all FOIA costs. A completed invoice shall be provided to the FOIA requester along with the responsive records, if any, upon request.

### **B. Labor Costs**

1. Generally, the time charged for performing responsive tasks should be the actual hourly rate of the lowest compensated Agency employee (not including benefits) qualified to perform searching for, accessing, duplicating and/or producing the requested records.
2. Requesters should be charged for the actual time spent by County staff in producing the requested records rounded down to the nearest 15-minute increment.
3. Requesters shall not be charged any additional fees due to an agency's improper record keeping.
4. The County is not permitted to charge for general overhead, incidental costs, or any costs other than those actually incurred in responding to the FOIA request.

### **C. Copying Costs**

1. Attachment B of this Countywide FOIA Policy provides a schedule of the County's copying cost per page according to DIT.
2. Other copying costs will be determined by DIT or the custodial agency on an as-needed basis, however any copying costs charged to a requester must reflect the actual costs incurred by the County.
3. Copying costs shall only be assessed on public records that are printed—not on public records that are provided electronically to requesters.

### **D. Other Costs**

1. The County may charge for the actual cost of the medium by which the information is provided (e.g., CD, DVD, thumb drive, etc.).
2. The County may charge for postage associated with mailing the responsive records.
3. County agencies may assess charges on a standardized basis for certain types of records (e.g., plats), so long as the charge represents the actual cost of production.

### **E. Billing**

1. Except as otherwise provided in this Memorandum, FOIA charges are required to be billed and collected in accordance with Financial Policy Statement, Processing Monetary Receipts (No. 470).
2. If the estimated costs for producing records exceeds \$200, then the agency custodian should request payment for the full amount of the estimate prior to processing the request.
3. If the final actual cost is less than the advance estimate, then the difference between the actual cost and the advance estimate shall be refunded to the requester.
4. If the final actual cost exceeds the advance estimate, then the agency needs to invoice the requester for the amount over the advance estimate.
5. Agencies are encouraged to provide advance estimates as soon as possible, but estimates must be provided within five working days of the request.
6. Once payment has been received the five working day response clock starts running again and the agency may need to invoke the 7 working day extension.

### **F. Cost Waivers**

Cost reimbursement waivers may be granted to FOIA requesters within the discretion of the agency custodian, but generally should be granted when the cost of producing the response is less than \$50. In the event the cost of producing the responsive records is waived, all other response requirements remain in effect, including the five-working-day

response period. Agencies are advised to inform requesters that the costs of producing the responsive records are waived.

### ***G. Overdue Reimbursement Payments***

1. Before processing a request for records, the County requires the requester to pay any amounts owed for a prior request for public records that has remained unpaid for 30 days or more after billing.
2. A FOIA requester must be notified that his/her request will not be processed until the reimbursement payment has been received for the prior FOIA request, and that once payment is received, the most recent FOIA request pending with the County will be processed.

### ***H. Cost Accounts***

The County has established a discrete General Ledger (GL) account for VFOIA payments: 443170 (Reimbursement for Recorded Tables/FOIA Fees). Any costs associated with FOIA responses should be posted to this account 443170 in the County's financial system (FOCUS).

## **VIII. VFOIA Tracker**

### ***A. Purpose***

To ensure timely, consistent, efficient and compliant FOIA responses, OPA and DIT developed and implemented the VFOIA Tracker, which is an internal County application that tracks all County FOIA requests. The VFOIA Tracker enables County management to track the volume, impact and cost of FOIA requests, and enables employees responding to FOIA requests to do so more efficiently and in compliance with applicable laws. It also allows County agencies to determine whether a FOIA requester is overdue on an outstanding FOIA payment.

### ***B. What Requests Should be Tracked?***

Generally, all FOIA requests are expected to be tracked in the VFOIA Tracker. However, routine transactions in which public records are provided to the requester at the time the request is made are not expected to be included in the VFOIA Tracker. Any request for public records that mentions "FOIA" should be included in the VFOIA Tracker.

### ***C. Reporting***

The Countywide FOIA Officer manages the VFOIA Tracker, and is responsible for providing a FOIA report at the end of each fiscal year to the County Executive. This report will, at a minimum, detail the volume of FOIA requests, and provide data related to the fiscal impact of FOIA on the County.

**ATTACHMENT A – FOIA COST INVOICE**

**FAIRFAX COUNTY GOVERNMENT  
 FOIA COST INVOICE**

Invoice Date:

01.01.2018

Reference No.:

VFOIA-0001

<b>FOIA Requestor Contact Information:</b>
[Requestor Name] [Requestor Contact Information]
<b>Payment Instructions:</b>
Make checks payable to: <i>Fairfax County Government</i>
Checks should be mailed to: [INSERT AGENCY ADDRESS]
Please include the VFOIA reference number included above on your check to ensure proper processing.
<b>Overdue Payment:</b>
Payment of this invoice is due within thirty (30) calendar days of the invoice date. In accordance with the Virginia Freedom of Information Act, the County requires payment of any overdue balances before we will be able to process any future requests.

Labor Costs				
	Position	Hourly Rate	Hours	Total Expense
1				\$0.00
2				\$0.00
3				\$0.00
4				\$0.00
5				\$0.00
6				\$0.00
7				\$0.00
8				\$0.00
<b>Total Hours:</b>			0.0	
<b>Labor Subtotal:</b>				\$0.00

Copying and Other Costs			
Sides Printed	Description	Cost	Total Amount
0	Letter Size Paper (8 x 11), Black & White Copy	\$0.13	\$0.00
0	Letter Size Paper (8 x 11), Color Copy	\$0.19	\$0.00
0	Legal Size Paper (8.5 x 14), Black & White Copy	\$0.13	\$0.00
0	Legal Size Paper (8.5 x 14), Color Copy	\$0.19	\$0.00
0	Ledger Size Paper (11 x 17), Black & White Copy	\$0.14	\$0.00
0	Ledger Size Paper (11 x 17), Color Copy	\$0.20	\$0.00
			\$0.00
			\$0.00
<b>Comments:</b>		<b>Total Copy Fees:</b>	\$0.00
		<b>Grand Total Due:</b>	\$0.00

*Thank you for submitting your FOIA request!*



**ATTACHMENT B – COPYING COSTS**

As of January 1, 2018, the actual County copy costs, *per printed side of a paper copy*, are as follows:

<b>Color / Black &amp; White</b>	<b>Paper Size</b>	<b>Cost</b>
Black & White	8 ½ x 11 (Letter)	\$0.13
Black & White	8 ½ x 14 (Legal)	\$0.13
Black & White	11 x 17 (Ledger)	\$0.14
Color	8 ½ x 11 (Letter)	\$0.19
Color	8 ½ x 14 (Legal)	\$0.19
Color	11 x 17 (Ledger)	\$0.20