FOIA Highlights

What is the Freedom of Information Act?
- The FOIA governs public records relating to public business open to public disclosure. However, FOIA is not records retention & records retention is not FOIA, although each affects the other.
- Regardless of physical form, recorded information is considered a public record if it is produced, collected, received or retained in connection with the transaction of public business.
- Requests for simple public information such as phone numbers or location of offices are considered routine & answered as a matter of course.
- Information ≠ public document, e.g., “why did that fire truck show up at Cville Coffee?” is a request for information, whereas “I was in an accident on January 7th. Can I have copies of the police report?” is a request for public records.
- If a locality transfers records for storage, maintenance or archiving, locality remains custodian of records.

The FOIA request
- Requestor is not required to mention the FOIA when making a request.
- The request may be put in writing using form created for County FOIA policy.
- A County employee can fill out the form on behalf of the requestor. This is very helpful in terms of documenting the request and clarifying what the requestor wants.
- A County employee may ask questions in order to clarify the request if necessary.

FOIA and email
- Email is considered correspondence under the FOIA; the content determines if email is a public record. Email = “envelope”—it’s the form of the public record.
- An email containing a grocery list, lunch invite or quick note to spouse is not a public record.
- An email answering a question about a contract, setting up a meeting, or correspondence about Executive Summaries can be considered a public record.
- Can public and media access email under the FOIA? Yes, so long as the content of the email pertains to public business.
- Personal v. work computer v. iPhone—the machine doesn’t matter, the content of the email matters.
Public records

- Records must exist at time of request to be subject to FOIA
- Locality is not required to create a public record but can summarize information as agreed between requestor & locality—e.g., all outstanding construction bonds from 2014 to 2016, pull from spreadsheet/database/CityView
- If records have been destroyed per Records Retention Schedule they don’t have to be recreated. HOWEVER, if records/email still exist, they are required to be provided.

Duties of designated custodian of records

- Be familiar with FOIA requirements
- Respond to all requests for public records—it’s okay to say “no, we don’t have this”
- Consult locality’s attorney to determine whether exemption from mandatory disclosure applies
- Take all necessary precautions to preserve public records for safekeeping—do not leave them in your car, do not take them to the bar

FOIA response

- 5 working days to respond and time begins the day after receipt of the request.
- One of 5 responses required:
  - All records made available to the requestor
  - All records withheld from requestor with citation of the VA Code section for records exemption Virginia Code § 2.2-3704(B)(1)
  - Some records are provided, some records are withheld, or portions of records redacted, with citation of the VA Code section for records exemption Virginia Code § 2.2-3704(B)(2)
  - The records can’t be found or don’t exist. If staff knows another public body might have the records, contact information must be provided Virginia Code § 2.2-3704(B)(3)
  - It’s practically impossible to provide the records within 5 days. An additional 7 working days may be requested to provide the records Virginia Code § 2.2-3704(B)(4)

Some exemptions

- Name, address & phone number of complainants of zoning violations, Building Code, or Fire Code if furnished in confidence
- Personnel records
  - Public employee salary & position descriptions are considered public records, but records containing information concerning identifiable individuals is exempt
- Portions of records containing account numbers or routing information for credit, debit or other account
- Written advice of locality’s attorney
- Closed meeting records
- Engineering & construction drawings identifying trade secrets or revealing certain information which would jeopardize safety & security of building occupants in event of terrorism
- Cybersecurity plans & measures

**Litigation Hold**
- Potential or pending litigation to which the County is a party
- Preservation of documents related to cases
- Memo/attorney instructions on which documents to hold, which sources to search & how to search & retain documents
- Different from records retention—CAO reviews RM-3’s & will request that certain records be retained due to past, pending or potential litigation or other issues

**Albemarle County FOIA policy**
- County Administrative Policy AP-12
- Located at Inside Albemarle under “Where Can I Find...?” under “Administrative Policies” and listed as AP-12 Freedom of Information Act (FOIA) requests
- See Section III of the policy for more information on responses to requests for public records
- Each department is expected to have a Point of Contact for FOIA requests & ELB has a list as part of “Getting to Know Albemarle County”
- For FOIA requests requiring retrieval of records from multiple departments, designate a specific person to coordinate with designees for FOIA requests on the response
- Consult County Attorney’s Office on legal questions pertaining to the response

**FOIA charges**
- Reasonable charges not to exceed actual costs for staff time & photocopying
- Staff time = the amount of time searching, accessing, duplicating & supplying records
- 30 minutes or more at the employee’s hourly rate (benefits not included)
- Expected to be administrative personnel, not Division/Department Heads
- HR has pay rates—call them & ask for hourly rate if unknown
- 6 or more pages at 10¢ per page
- Cannot charge for electronic copies (e.g., scan & send document or spreadsheet)
- CD/DVD/thumb drive charged at cost of item
- Factors determining cost
  - Number of hours to compile, copy & assemble records
  - Cost of computer time
  - Cost of reproducing records
Cannot charge for a “watcher” overseeing requestor reviewing records

Prior to actually reproducing records, make an estimate of time & costs—this helps in 2 ways: figure out time/logistics scope of request & who will be doing the work. Also, you don’t get stuck with a pile of documents & no payment.

For costs estimated to exceed $200.00, ask requestor for deposit, which must be paid before further processing of request.

Common errors

- Not responding within 5 days—sending a response on “Day 5” requesting a 7 day extension is an acceptable response
- Not keeping track of time spent searching, accessing, duplicating & supplying requested records
- Not charging or overcharging for other materials (CD/DVD/thumb drive)
- Overcharging requestor for records

Locality rights under the FOIA

- A locality is not required to create a record that does not exist. If a record has been destroyed under the Records Retention Act, the locality is not required to re-create it for a FOIA request.
- The locality can ask the requestor to provide a name & legal address for response purposes
- The locality may request payment of an outstanding previous FOIA request bill prior to processing another request from a requestor who has not paid for the previous request.