

February 21, 2023

Virginia Freedom of Information Advisory Council (the "Council")
c/o Alan Gernhardt, Esq., Executive Director
Pocahontas Building, 10th Floor
900 East Main Street
Richmond, VA 23219

Via email: foiacouncil@dls.virginia.gov

Dear Mr. Gernhardt,

Pursuant to Code of Virginia § 30-179(1) and other applicable sections, please respond to the following:

1.) What constitutes an adequate and lawful search as the term "search" is used in the Code of Virginia at §§ 2.2-3704(C), 2.2-3704(F) and 2.2-3704.1(A)(6)? To elaborate for clarity, if the Council were training a new FOIA Officer on how to conduct an adequate and lawful search under VFOIA, what instructions, parameters and factors would the Council present to the new FOIA Officer?

2.) Does the Council believe that VFOIA enforcement proceedings (as described in Va. Code § 2.2-3713) include the procedural tool of discovery (as articulated in Va. R. Sup. Ct. 4:1)? In your response to this question, please include the following: a.) whether discovery should be available in instances when the petitioner has waived the seven-day expedited hearing available pursuant to Va. Code § 2.2-3713(C); b.) which of the discovery methods stated in Va. R. Sup. Ct. 4:1(a) should be available; and c.) if the Council takes no position on this question and leaves it solely to the discretion of the courts, then please state any and all factors and circumstances that the Council believes courts should take into consideration in deciding whether or not to authorize discovery in VFOIA enforcement proceedings.

3.) Code of Virginia § 30-179(4) states in part: "Information provided to the Council by a public body shall not be released to any other party unless authorized by such public body;". Is the "information" referred to in the preceding sentence limited only to information that is provided to the Council at the Council's request or does it include information that is volunteered to the Council by the public body? Furthermore, if a member of the Council testifies in a VFOIA enforcement proceeding (pursuant to Va. Code § 2.2-3713), is the Council authorized to divulge the "information" described in the second sentence of Va. Code § 30-179(4) during such VFOIA enforcement proceeding or would it claim a privilege?

Please respond in writing. The foregoing questions are not specific to any pending litigation. Your responses may be published. Thank you in advance.

Very truly yours,

Ramin Seddiq
PO Box 5533
McLean, VA 22103
ramins2536@gmail.com



Ramin Seddiq <ramins2536@gmail.com>

Citizen Inquiry

2 messages

Ramin Seddiq <ramins2536@gmail.com>
To: FOIA Council <foiacouncil@dls.virginia.gov>

Tue, Feb 21, 2023 at 11:29 AM

Good morning Mr. Gernhardt,

I hope you're well. Attached to this email, please find a few questions for the Council.

Best regards,

Ramin Seddiq
ramins2536@gmail.com

--

Confidentiality Notice:

The information contained in this e-mail and any electronic files or data attached hereto are privileged and confidential. The information is for the sole use of the intended recipient. If you are not the intended recipient, you are hereby notified that any review, reliance, distribution by others, forwarding, or copying of this communication is strictly prohibited. If you have received this e-mail in error, please immediately notify sender, and delete all copies from your computer system.



RS - Questions to VFOIA Council - 02-21-2023.pdf
192K

FOIA Council <foiacouncil@dls.virginia.gov>
To: Ramin Seddiq <ramins2536@gmail.com>

Fri, Feb 24, 2023 at 4:33 PM

Dear Mr. Seddiq:

- 1) Please see [AO-04-10](#) regarding searches for public records; as stated therein, "the circumstances of a search may vary depending on any number of factors, such as the nature and scope of the request, the volume of records being requested, the age of the records, the media upon which the records are recorded and the manner in which they are kept....while the methods and extent of searches may vary, any search for records made under FOIA must be carried out in good faith."
- 2) This office has statutory authority under Code § 30-179 to offer advisory opinions and guidance regarding FOIA, but we do not have any such authority to offer opinions or guidance regarding court procedures outside FOIA or the Rules of Court. Anecdotally, there are reported FOIA cases where discovery has been used to take depositions, filed contested records with the court under seal for in camera review, etc. so generally speaking, it is my understanding that discovery would be available. I would note, however, that Rule 4:0 of the Rules of the Supreme Court of Virginia specifies that Part Four is applicable to civil cases in circuit courts and certain other proceedings, whereas Part Seven A is applicable to general district courts. FOIA petitions may be brought in either general district or circuit court, so what discovery is available and what Rules apply may vary depending on the petitioner's choice. Beyond that, it is my understanding that it would be up to each court to rule on discovery matters in any given case.
- 3) Subdivision 4 of § 30-179 states in full as follows: "Request from any public body such assistance, services, and information as will enable the Council to effectively carry out its responsibilities. Information provided to the Council by a public body shall not be released to any other party unless authorized by such public body." In that context, we have generally interpreted it to apply to information provided in response to such a request from the Council, although I do not believe the issue has ever been brought before a court for a binding decision. I would note that I have personally testified twice under subpoena as to factual matters involving the provision of advice on FOIA, but this Code section was never raised as a challenge to providing that testimony. However, pursuant to the Council's Litigation Policy ([here](#)), Council staff would seek to quash any subpoena seeking to have Council staff provide expert testimony (rather than factual testimony).

- Alan

[Quoted text hidden]

--
Thank you for contacting this office. I hope I have been of assistance.

Alan Gernhardt, Esq., Executive Director
Joseph Underwood, Esq., Senior Attorney
Virginia Freedom of Information Advisory Council
900 East Main St., 10th Floor
Richmond, Virginia 23219
(804) 698-1810
1-866-448-4100 (toll free)
Website - <http://foiacouncil.dls.virginia.gov/>

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. Please be advised that any staff advisory opinion delivered by e-mail is based solely upon the facts and information presented in your attached e-mail inquiry.