

## MEMORANDUM

**To: SB 324 Work Group (2024)**  
**From: Ramin Seddiq, citizen member, SB 324 Work Group**  
**Re: The Virginia Freedom of Information Act, Va. Code § 2.2-3700 et seq. (“VFOIA”)**

- **Proposed Public Body Annual Reporting to FOIA Council**
- **Proposed Annual Summary Report by FOIA Council**
- **[Modified] Proposed VFOIA Fee Structure**

**Date: September 30, 2024**

Senate Bill 324 (Roem, 2024) states in part that “the FOIA Council shall convene a work group [(the “Work Group”)] ... to examine the current FOIA provisions on charges and make recommendations on ways to amend such provisions to make the assessment of charges by public bodies for the production of public records more uniform, more transparent, easier to understand, and less costly.”

According to the proposed study plan prepared by the Virginia Freedom of Information Advisory Council (the “FOIA Council”), the scope of the Work Group’s review and recommendation process includes a “[r]eview of current Virginia law, other states’ laws and prior studies and issue identification[.]” As stated in the proposed agenda for today’s meeting, the Work Group is also to address broader structural issues that may impact charges for requests, including the question of what should be the role of the FOIA Council.

To further the foregoing objectives, the Work Group is encouraged to consider and recommend the following:

### **I. Annual Report<sup>1</sup> to FOIA Council**

VFOIA should be amended<sup>2</sup> as follows:

§ 2.2-3704.1. Posting of notice of rights and responsibilities by state and local public bodies; assistance by the Freedom of Information Advisory Council; ***annual report to Freedom of Information Advisory Council***

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<sup>1</sup> Precedence from other jurisdictions exists for this type of report. See, e.g., 5 U.S.C. § 552(e) and DC Code § 2–538. In its December 2023 Annual Report, the State of New York Committee on Open Government urged the Legislature and the Governor to act now on several fronts, including requiring agencies subject to FOIL (New York’s Freedom of Information Law) to collect and annually report FOIL statistics (see: [https://opengovernment.ny.gov/system/files/documents/2023/12/2023-coog-annual-report\\_final.pdf](https://opengovernment.ny.gov/system/files/documents/2023/12/2023-coog-annual-report_final.pdf)).

<sup>2</sup> Proposed revisions to the VFOIA statute are in bold italics.

*D. On or before February 1 of each year, each public body shall submit to the Virginia Freedom of Information Advisory Council a report which shall cover the preceding calendar year, and which shall include—*

- 1.) The total number of [VFOIA] requests received by the public body;*
- 2.) The total number of [VFOIA] requests processed by the public body;*
- 3.) The total number of [VFOIA] requests for which the public body assessed fees;*
- 4.) The total amount of fees assessed by the public body for each of the following:
  - a.) Search time*
  - b.) Review and redaction*
  - c.) Duplication and transmittal;**
- 5.) The number of determinations made by the public body not to comply with requests for records made to the public body pursuant to [VFOIA] and the reason(s) for each determination;*
- 6.) A list of the [VFOIA] exemptions/exclusions invoked by the public body; and*
- 7.) The total number of times that the public body invoked each exemption/exclusion.*

*The report shall be submitted in an aggregated, searchable format and in a format that may be downloaded in bulk.*

## **II. FOIA Council Annual Summary Report**

Va. Code § 30-179 (“Powers and duties of the Council”) should be amended as follows:

The Council shall:

*8. Prepare an annual summary report of the information received pursuant to Va. Code § 2.2-3704.1(D). On or before April 1 of each year, the Virginia Freedom of Information Advisory Council shall prepare and post on its website a summary report which shall cover the preceding calendar year, and which shall include—*

- 1.) An overview of government-wide FOIA data as reported by public bodies pursuant to Va. Code § 2.2-3704.1(D);*
- 2.) A compilation of the complete reports as submitted by public bodies pursuant to Va. Code § 2.2-3704.1(D); and*
- 3.) A statement that the raw data used to produce the annual summary report shall be made available to members of the public and press upon request.*

## **III. Purpose of the Reports Described in Sections I and II of This Memorandum**

- To better inform the citizens of Virginia regarding VFOIA fees and the use of exemptions/exclusions by public bodies.
- To advise public bodies of the practices and procedures of other public bodies in the Commonwealth.

- To provide the FOIA Council with additional and more complete data so as to enable it to better perform its powers and duties as articulated in the Code of Virginia § 30-179.
- To supply future work groups with the historical data necessary to engage in substantive, technical, and in-depth discussion.
- To empower the Virginia General Assembly to achieve its objective of making the assessment of charges by public bodies for the production of public records more uniform, more transparent, easier to understand, and less costly.

#### **IV. Reiteration of the Proposed VFOIA Fee Structure Originally Presented to the Work Group in the Memorandum Dated July 29, 2024, With Modifications**

Hopefully, the Work Group will continue to consider the proposed VFOIA fee structure originally presented to the Work Group in the Memorandum dated July 29, 2024 (see Exhibit A, which includes modifications to reflect some of the concepts discussed by the Work Group). The Work Group’s efforts<sup>3</sup> to devise and recommend a VFOIA fee cap regime<sup>4</sup> are commendable and promising. However, absent additional structural reforms to the statute, VFOIA fees are likely to remain costly and opaque.

During the public comment phase of the September 16, 2024 FOIA Council meeting, Alice Minium, speaking on behalf of OpenOversightVA and herself stated in part that she “spent seven thousand dollars of [her] own money in FOIA fees last year.” Ms. Minium stated further: “I think forty dollars an hour is still too high ... the burden I don’t think should be on the requester for holding the government accountable. It should be on the government.”

“The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.” – Patrick Henry, first and sixth post-colonial Governor of Virginia and native of Studley, Hanover County, VA.

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<sup>3</sup> According to the draft legislation provided by FOIA Council staff on September 27, 2024, the Work Group is considering two fee cap options: 1.) “Charges for staff time will be calculated based on the median hourly rate of pay of employees of the public body or \$40 per hour, whichever is the lesser amount.”; or 2.) “Charges for staff time will be calculated based on the median hourly rate of pay of employees of the public body or the actual hourly rate of the employee who is accessing, duplicating, supplying, or searching for the requested records, whichever is the lesser amount.” These fee cap regimes are apparently inspired by and based on York County’s VFOIA policy.

<sup>4</sup> As the Work Group discusses and deliberates on the fee cap regimes, it should also consider the following: 1.) A well-informed and thorough assessment of these options requires access to reliable pay rate data; and 2.) For the “median hourly rate” subsection, setting the hourly rate at the statewide median pay rate for government employees (as opposed to the public body or local government level) is likely to produce more uniformity, more transparency, and better ease of understanding.

# EXHIBIT A

## [Modified]<sup>5</sup> Proposed VFOIA Fee Structure

### I. When records are requested for commercial (for-profit) use:

a.) Fee charged for search time: Free for the first one (1) hour (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the [median]<sup>6</sup> hourly rate of pay of [state employees]<sup>7</sup> or \$40 per hour. [The hourly rate calculated shall not include the cost of fringe benefits or any overhead costs. When calculating the median rate of pay, the rate of pay of full-time and part-time employees shall be included, but the rate of pay of temporary employees shall not be included.]

b.) Fee charged for review time: Free for the first one (1) hour (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the [median] hourly rate of pay of [state employees] or \$40 per hour. [The hourly rate calculated shall not include the cost of fringe benefits or any overhead costs. When calculating the median rate of pay, the rate of pay of full-time and part-time employees shall be included, but the rate of pay of temporary employees shall not be included.]

c.) Duplication charges: Actual, reasonable charges as per the public body's published fee/cost schedule.

### II. When the records are requested for educational/scholarly purposes or by a noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media:

a.) Fee charged for search time: Free for the first three (3) hours (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the [median] hourly rate of pay of [state employees] or \$40 per hour. [The hourly rate calculated

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<sup>5</sup> Modified from the proposed VFOIA fee structure originally presented to the Work Group in the Memorandum dated July 29, 2024. Modifications are in brackets.

<sup>6</sup> According to The Virginian-Pilot, “[o]ut of 111,704 state employees and 221 agencies, the median salary for a state employee was \$62,038.” About the data used in its report, The Virginian-Pilot article states: “All information regarding state employees was acquired via the Freedom of Information Act, or FOIA. Those who made less than \$10,000 in 2022 were omitted. Agencies provided the data as a snapshot from Dec. 31, 2022 as a representation of the 2022 calendar year. Some agencies chose to omit data regarding bonuses. Often, multiple databases were combined in order to include salaries, bonus figures and other data in one spreadsheet.” As of Sept. 29, 2024, the article was available at: <https://www.pilotonline.com/2023/10/04/explore-the-data-virginia-state-employee-salaries/>

<sup>7</sup> Assuming the median salary of \$62,038 reported in The Virginian-Pilot is for “F” status employees (2,080 hours per year, see: <https://www.dhrm.virginia.gov/docs/default-source/hrpolicy/policy-1-25-hours-of-work-5-15-19889824C01024.pdf?sfvrsn=0>), then  $62,038/2,080 = \$29.83/\text{hour}$ .

shall not include the cost of fringe benefits or any overhead costs. When calculating the median rate of pay, the rate of pay of full-time and part-time employees shall be included, but the rate of pay of temporary employees shall not be included.]

b.) Fee charged for review time: No charge.

c.) Duplication charges: No charge for the first one hundred (100) pages per request. After the first 100 pages: Actual, reasonable charges as per the public body's published fee/cost schedule.

### **III. When the records are requested by any other requesters (including members of the general public):**

a.) Fee charged for search time: Free for the first two (2) hours (applicable only to the first two VFOIA requests made to a public body by the requester in a calendar year). Thereafter, the lesser of the [median] hourly rate of pay of [state employees] or \$40 per hour. [The hourly rate calculated shall not include the cost of fringe benefits or any overhead costs. When calculating the median rate of pay, the rate of pay of full-time and part-time employees shall be included, but the rate of pay of temporary employees shall not be included.]

b.) Fee charged for review time: No charge.

c.) Duplication charges: No charge for the first one hundred (100) pages per request. After the first 100 pages: Actual, reasonable charges as per the public body's published fee/cost schedule.

### **IV. Addition of the following to VFOIA:**

*Records shall be furnished without any charge or at a charge reduced below the fees established by the public body if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Any of the three categories of requesters noted above may seek this fee waiver.*