

**COMMON INTEREST COMMUNITY BOARD  
SB 693 COMMITTEE**

*Tentative* **AGENDA AUGUST 9, 2022  
10:30 A.M. BOARD ROOM 3-- SECOND FLOOR**

**DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION  
PERIMETER CENTER -- 9960 MAYLAND DRIVE  
RICHMOND, VIRGINIA 23233**

**I. CALL TO ORDER**

**II. EMERGENCY EVACUATION PROCEDURES**

**III. APPROVAL OF AGENDA**

- a. Committee Agenda, August 9, 2022

**IV. PUBLIC COMMENT PERIOD**

**V. OVERVIEW**

- a. Review purpose of Committee and Overview of Legislative Study Guidelines
- b. Members and Staff
- c. Proposed Committee Timeline
- d. Overview of Office of the Common Interest Community Ombudsman and CIC Association Complaint Process

**VI. DISCUSSION**

- a. Procedures for Notice of Final Adverse Determination (NFAD)
  - i. Limitations on NFAD and Supporting Documentation
- b. DPOR IT Capacity for Audio and Visual Recordings
- c. Public Records Requirements and Release of Information
- d. DPOR Administrative Capacity to Review Audio and Visual Recordings
- e. Privacy Issues Related to CICs
- f. Other Issues

**VII. RESOURCES AND INFORMATION**

- a. Statutes and Regulations
  - 1. Article 2 of Chapter 23.3 of Title 54.1 of the Code of Virginia
  - 2. Common Interest Community Ombudsman Regulations (18VAC48-70)
  - 3. Virginia Freedom of Information Act (Chapter 37 of Title 2.2 of the Code of Virginia) (excerpts)
  - 4. Section 54.1-108 of the Code of Virginia (DPOR records exemptions from FOIA)
  - 5. CIC Statutes (Excerpts)
- b. Senate Bill 693
  - i. Fiscal Impact Statement for SB 693 (as introduced)
- c. Background on Creation of CIC Ombudsman Office
- d. Information on CIC Complaint Process
  - i. CIC Complaint Statistics
  - ii. Sample NFAD
- e. Information on DPOR System Capacity to Receive Audio and Video Recordings
- f. FOIA Requirements for Public Records
  - i. DPOR Exemptions to FOIA
  - ii. Information on Redaction of Records

**VIII. OTHER BUSINESS**

**IX. FUTURE MEETING DATE**

**X. COMPLETE CONFLICT OF INTEREST FORMS AND TRAVEL VOUCHERS**

**XI. ADJOURN**

Persons desiring to participate in the meeting and requiring special accommodations or interpretative services should contact the Department at (804) 367-0362 at least ten days prior to the meeting so that suitable arrangements can be made for an appropriate accommodation. The Department fully complies with the Americans with Disabilities Act.

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as an official Board position.  
DRAFT AGENDA

**PERIMETER CENTER CONFERENCE CENTER**  
**EMERGENCY EVACUATION OF BOARD AND TRAINING ROOMS**  
(Script to be read at the beginning of each meeting.)

**PLEASE LISTEN TO THE FOLLOWING INSTRUCTIONS ABOUT EXITING THE PREMISES IN THE EVENT OF AN EMERGENCY.**

In the event of a fire or other emergency requiring the evacuation of the building, alarms will sound. When the alarms sound, leave the room immediately. Follow any instructions given by Security staff

**Board Room 1**

Exit the room using one of the doors at the back of the room. Upon exiting the room, turn **RIGHT**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

**Board Room 2**

Exit the room using one of the doors at the back of the room. (Point) Upon exiting the room, turn **RIGHT**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

You may also exit the room using the side door, turn **Right** out the door and make an immediate **Left**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

**Board Rooms 3 and 4**

Exit the room using one of the doors at the back of the room. Upon exiting the room, turn **RIGHT**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

**Training Room 1**

Exit the room using one of the doors at the back of the room. Upon exiting the room, turn **LEFT**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

**Training Room 2**

Exit the room using one of the doors at the back of the room. Upon exiting the doors, turn **LEFT**. Follow the corridor to the emergency exit at the end of the hall.

Upon exiting the building, proceed straight ahead through the parking lot to the fence at the end of the lot. Wait there for further instructions.

# **PUBLIC COMMENT PERIOD**

Five minute public comment, per person, with the exception of any open disciplinary or application files.

DRAFT AGENDA  
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and are not to be construed as a question or official Board decision.  
DRAFT AGENDA

**REVIEW PURPOSE OF COMMITTEE**  
**AND OVERVIEW OF LEGISLATIVE**  
**STUDY**

DRAFT AGENDA  
Materials contained in this agenda are proposed for discussion  
and are not to be construed as regulation or official action.  
DRAFT AGENDA

### SB 693 Committee Members

<b>Lori Overholt, Chair</b>	CIC Board Member
<b>Matt Durham</b>	CIC Board Member, Citizen Residing in a CIC
<b>Paul Orlando</b>	Former CIC Board Member, Resident in a CIC
<b>Sue Tarley</b>	CIC Attorney
<b>Jerry Wright</b>	CIC Attorney
<b>Heather Gillespie</b>	Common Interest Community Ombudsman (non-voting member)
<b>Drew Mulhare</b>	CIC Board Chair, Ex-officio

### DPOR/Common Interest Community Board Staff

<b>Trisha Lindsey</b>	Executive Director
<b>Joe Haughwout</b>	Board Administrator
<b>Raven Custer</b>	Administrative Coordinator

# SB 693 COMMITTEE TIMELINE

## First Committee Meeting

- Overview of CICO and CIC Association Complaint Process
- Discuss Procedures for NFAD; DPOR Capacity to Receive and Review AV Recordings; Public Records Requirements; Privacy and Other Issues

*(8/9/22)*

## Second Committee Meeting

- Review Public Comments/Public Hearing Transcript
  - Review Draft Report of Findings
    - Committee Revisions
- Adopt Final Draft Report to Submit to CIC Board

*(September 2022)*

## CIC Board Meeting

- Review Committee Final Draft Report
- Adopt Final Report of Findings

*(September/October 2022)*

**OVERVIEW OF OFFICE OF THE COMMON  
INTEREST COMMUNITY OMBUDSMAN AND  
CIC ASSOCIATION COMPLAINT PROCESS**

DRAFT AGENDA  
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DRAFT AGENDA



# DISCUSSION

- a. Procedures for Notice of Final Adverse Determination (NFAD)
  - i. Limitations on NFAD and Supporting Documentation
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- f. Other Issues

Code of Virginia

Title 54.1. Professions and Occupations

Subtitle II. Professions and Occupations Regulated by the Department of Professional and Occupational Regulation and Boards within the Department

Chapter 23.3. Common Interest Communities

## **Article 2. Common Interest Community Management Information Fund; Common Interest Community Ombudsman; Common Interest Community Management Recovery Fund**

### **§ 54.1-2354.1. Definitions**

As used in this article, unless the context requires a different meaning:

"Balance of the fund" means cash, securities that are legal investments for fiduciaries under the provisions of subdivisions A 1, 2, and 4 of § [2.2-4519](#), and repurchase agreements secured by obligations of the United States government or any agency thereof, and shall not mean accounts receivable, judgments, notes, accrued interest, or other obligations to the fund.

"Claimant" means, upon proper application to the Director, a receiver for a common interest community manager appointed pursuant to § [54.1-2353](#) in those cases in which there are not sufficient funds to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager or to pay an award of reasonable fees, costs, and expenses to the receiver.

"Director" means the Director of the Department of Professional and Occupational Regulation.

1993, c. 958; 2008, cc. [851](#), [871](#), § 55-528; 2019, c. [712](#).

### **§ 54.1-2354.2. Common Interest Community Management Information Fund**

A. There is hereby created the Common Interest Community Management Information Fund, referred to in this section as "the Fund," to be used in the discretion of the Board to promote the improvement and more efficient operation of common interest communities through research and education. The Fund shall be established on the books of the Comptroller. The Fund shall consist of money paid into it pursuant to §§ [54.1-2349](#), [55.1-1835](#), [55.1-1980](#), and [55.1-2182](#), and such money shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but, at the discretion of the Board, shall remain in the Fund or shall be transferred to the Common Interest Community Management Recovery Fund established pursuant to § [54.1-2354.5](#).

B. Expenses for the operations of the Office of the Common Interest Community Ombudsman, including the compensation paid to the Common Interest Community Ombudsman, shall be paid first from interest earned on deposits constituting the Fund and the balance from the moneys collected annually in the Fund. The Board may use the remainder of the interest earned on the balance of the Fund and of the moneys collected annually and deposited in the Fund for financing or promoting the following:

1. Information and research in the field of common interest community management and operation;
2. Expedient and inexpensive procedures for resolving complaints about an association from members of the association or other citizens;
3. Seminars and educational programs designed to address topics of concern to community associations; and
4. Other programs deemed necessary and proper to accomplish the purpose of this article.

C. Following the close of any biennium, when the Common Interest Community Management Information Fund shows expenses allocated to it for the past biennium to be more than 10 percent greater or less than moneys collected on behalf of the Board, the Board shall revise the fees levied by it for placement into the Fund so that the fees are sufficient but not excessive to cover expenses. A fee established pursuant to § [55.1-1835](#), [55.1-1980](#), or [55.1-2182](#) shall not exceed \$25 unless such fee is based on the number of units or lots in the association.

1993, c. 958, § 55-529; 2008, cc. [851](#), [871](#); 2019, cc. [391](#), [712](#).

### **§ 54.1-2354.3. Common Interest Community Ombudsman; appointment; powers and duties**

A. The Director in accordance with § [54.1-303](#) shall appoint a Common Interest Community Ombudsman (the Ombudsman) and shall establish the Office of the Common Interest Community Ombudsman (the Office). The Ombudsman shall be a member in good standing in the Virginia State Bar. All state agencies shall assist and cooperate with the Office in the performance of its duties under this article.

B. The Office shall:

1. Assist members in understanding rights and the processes available to them according to the laws and regulations governing common interest communities and respond to general inquiries;
2. Make available, either separately or through an existing website, information concerning common interest communities and such additional information as may be deemed appropriate;
3. Receive notices of final adverse decisions;
4. Upon request, assist members in understanding the rights and processes available under the laws and regulations governing common interest communities and provide referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members;
5. Ensure that members have access to the services provided through the Office and that the members receive timely responses from the representatives of the Office to the inquiries;
6. Maintain data on inquiries received, types of assistance requested, notices of final adverse decisions received, actions taken, and the disposition of each such matter;
7. Upon request to the Director by (i) any of the standing committees of the General Assembly having jurisdiction over common interest communities or (ii) the Housing Commission, provide to the Director for dissemination to the requesting parties assessments of proposed and existing common interest community laws and other studies of common interest community issues;
8. Monitor changes in federal and state laws relating to common interest communities;
9. Provide information to the Director that will permit the Director to report annually on the activities of the Office of the Common Interest Community Ombudsman to the standing committees of the General Assembly having jurisdiction over common interest communities and to the Housing Commission. The Director's report shall be filed by December 1 of each year and shall include a summary of significant new developments in federal and state laws relating to common interest communities each year; and
10. Carry out activities as the Board determines to be appropriate.

1993, c. 958, § 55-530; 1997, c. [222](#); 1998, c. [463](#); 2001, c. [816](#); 2008, cc. [851](#), [871](#); 2010, cc. [59](#), [208](#); 2012, cc. [481](#), [797](#); 2019, c. [712](#).

### **§ 54.1-2354.4. Association complaint procedures; final adverse decisions**

A. The Board shall establish by regulation a requirement that each association shall establish reasonable procedures for the resolution of written complaints from the members of the association and other citizens. Each association shall

adhere to the written procedures established pursuant to this subsection when resolving association member and citizen complaints. The procedures shall include the following:

1. A record of each complaint shall be maintained for no less than one year after the association acts upon the complaint.
2. Such association shall provide complaint forms or written procedures to be given to persons who wish to register written complaints. The forms or procedures shall include the address and telephone number of the association or its common interest community manager to which complaints shall be directed and the mailing address, telephone number, and electronic mailing address of the Office. The forms and written procedures shall include a clear and understandable description of the complainant's right to give notice of adverse decisions pursuant to this section.

B. A complainant may give notice to the Board of any final adverse decision in accordance with regulations promulgated by the Board. The notice shall be filed within 30 days of the final adverse decision, shall be in writing on forms prescribed by the Board, shall include copies of all records pertinent to the decision, and shall be accompanied by a \$25 filing fee. The fee shall be collected by the Director and paid directly into the state treasury and credited to the Common Interest Community Management Information Fund pursuant to § [54.1-2354.2](#). The Board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the member. The Director shall provide a copy of the written notice to the association that made the final adverse decision.

C. The Director or his designee may request additional information concerning any notice of final adverse decision from the association that made the final adverse decision. The association shall provide such information to the Director within a reasonable time upon request. If the Director upon review determines that the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board, the Director may, in his sole discretion, provide the complainant and the association with information concerning such laws or regulations governing common interest communities or interpretations thereof by the Board. The determination of whether the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board shall be a matter within the sole discretion of the Director, whose decision is final and not subject to further review. The determination of the Director shall not be binding upon the complainant or the association that made the final adverse decision.

1993, c. 958, § 55-530; 1997, c. [222](#); 1998, c. [463](#); 2001, c. [816](#); 2008, cc. [851](#), [871](#); 2010, cc. [59](#), [208](#); 2012, cc. [481](#), [797](#); 2019, c. [712](#).

#### **§ 54.1-2354.5. Common Interest Community Management Recovery Fund**

A. There is hereby created the Common Interest Community Management Recovery Fund, referred to in this section as "the Fund," to be used in the discretion of the Board to protect the interests of associations.

B. Each common interest community manager, at the time of initial application for licensure, and each association filing its first annual report after the effective date shall be assessed \$25, which shall be specifically assigned to the Fund. Initial payments may be incorporated in any application fee payment or annual filing fee and transferred to the Fund by the Director within 30 days.

All assessments, except initial assessments, for the Fund shall be deposited within three business days after their receipt by the Director, in one or more federally insured banks, savings and loan associations, or savings banks located in the Commonwealth. Funds deposited in banks, savings institutions, or savings banks in excess of insurance afforded by the Federal Deposit Insurance Corporation or other federal insurance agency shall be secured under the Virginia Security for Public Deposits Act (§ [2.2-4400](#) et seq.). The deposit of these funds in federally insured banks, savings and loan associations, or savings banks located in the Commonwealth shall not be considered investment of such funds for purposes of this section. Funds maintained by the Director may be invested in securities that are legal investments for fiduciaries under the provisions of § [64.2-1502](#).

Interest earned on the deposits constituting the Fund shall be used for administering the Fund. The remainder of this interest, at the discretion of the Board, may be transferred to the Common Interest Community Management Information Fund, established pursuant to § [54.1-2354.2](#), or accrue to the Fund.

C. On and after July 1, 2011, the minimum balance of the Fund shall be \$150,000. Whenever the Director determines that the principal balance of the Fund is or will be less than such minimum principal balance, the Director shall immediately inform the Board. At the same time, the Director may recommend that the Board transfer a fixed amount from the Common Interest Community Management Information Fund to the Fund to bring the principal balance of the Fund to the amount required by this subsection. Such transfer shall be considered by the Board within 30 days of the notification of the Director.

D. If any such transfer of funds is insufficient to bring the principal balance of the Fund to the minimum amount required by this section, or if a transfer to the Fund has not occurred, the Board shall assess each association and each common interest community manager, within 30 days of notification by the Director, a sum sufficient to bring the principal balance of the Fund to the required minimum amount. The amount of such assessment shall be allocated among the associations and common interest community managers in proportion to each payor's most recently paid annual assessment, or if an association or common interest community manager has not paid an annual assessment previously, in proportion to the average annual assessment most recently paid by associations or common interest community managers, respectively. The Board may order an assessment at any time in addition to any required assessment. Assessments made pursuant to this subsection may be issued by the Board (i) after a determination made by it or (ii) at the time of license renewal.

Notice to common interest community managers and the governing boards of associations of these assessments shall be by first-class mail, and payment of such assessments shall be made by first-class mail addressed to the Director within 45 days after the mailing of such notice.

E. If any common interest community manager fails to remit the required payment within 45 days of the mailing, the Director shall notify the common interest community manager by first-class mail at the latest address of record filed with the Board. If no payment has been received by the Director within 30 days after mailing the second notice, the license shall be automatically suspended. The license shall be restored only upon the actual receipt by the Director of the delinquent assessment.

F. If any association fails to remit the required payment within 45 days of the mailing, the Director shall notify the association by first-class mail at the latest address of record filed with the Board. If no payment has been received by the Director within 30 days after mailing the second notice, it shall be deemed a knowing and willful violation of this section by the governing board of the association.

G. At the close of each fiscal year, whenever the balance of the Fund exceeds \$5 million, the amount in excess of \$5 million shall be transferred to the Virginia Housing Trust Fund established pursuant to Chapter 9 (§ [36-141](#) et seq.) of Title 36. Except for payments of costs as set forth in this article and transfers pursuant to this subsection, there shall be no transfers out of the Fund, including transfers to the general fund, regardless of the balance of the Fund.

H. A claimant may seek recovery from the Fund subject to the following conditions:

1. A claimant may file a verified claim in writing to the Director for a recovery from the Fund.

2. Upon proper application to the Director, in those cases in which there are not sufficient funds to pay an award of reasonable fees, costs, and expenses to the receiver or to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, the Director shall report to the Board the amount of any shortfall to the extent that there are not sufficient funds (i) to pay any award of fees, costs, and expenses pursuant to subsection G of § [54.1-2353](#) by the court appointing the receiver; or (ii) to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, as certified by the court appointing the receiver.

3. If the Board finds there has been compliance with the required conditions, the Board shall issue a directive ordering payment of the amount of such shortfall to the claimant from the Fund, provided that in no event shall such payment exceed the balance in the Fund. When the Fund balance is not sufficient to pay the aggregate amount of such shortfall, the Board shall direct that payment be applied first in satisfaction of any award of reasonable fees, costs, and expenses to the receiver and second to restore the funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager. If the Board has reason to believe that there may be additional claims against the Fund, the Board may withhold any payment from the Fund for a period of not more than one year. After such one-year

period, if the aggregate of claims received exceeds the Fund balance, the Fund balance shall be prorated by the Board among the claimants and paid in the above payment order from the Fund in proportion to the amounts of claims remaining unpaid.

4. The Director shall, subject to the limitations set forth in this subsection, pay to the claimant from the Fund such amount as shall be directed by the Board upon the execution and delivery to the Director by such claimant of an assignment to the Board of the claimant's rights on its behalf and on behalf of the associations receiving distributions from the Fund against the common interest community manager to the extent that such rights were satisfied from the Fund.

5. The claimant shall be notified in writing of the findings of the Board. The Board's findings shall be considered a case decision as defined in § [2.2-4001](#), and judicial review of these findings shall be in accordance with § [2.2-4025](#) of the Administrative Process Act (§ [2.2-4000](#) et seq.).

6. Notwithstanding any other provision of law, the Board shall have the right to appeal a decision of any court that is contrary to any distribution recommended or authorized by it.

7. Upon payment by the Director to a claimant from the Fund as provided in this subsection, the Board shall immediately revoke the license of the common interest community manager whose actions resulted in payment from the Fund. The common interest community manager whose license was so revoked shall not be eligible to apply for a license as a common interest community manager until he has repaid in full the amount paid from the Fund on his account, plus interest at the judgment rate of interest from the date of payment from the Fund.

8. Nothing contained in this subsection shall limit the authority of the Board to take disciplinary action against any common interest community manager for any violation of statute or regulation, nor shall the repayment in full by a common interest community manager of the amount paid from the Fund on such common interest community manager's account nullify or modify the effect of any disciplinary proceeding against such common interest community manager for any such violation.

2008, cc. [851](#), [871](#), § 55-530.1; 2009, c. [557](#); 2013, c. [754](#); 2019, c. [712](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Virginia Administrative Code  
Title 18. Professional And Occupational Licensing  
Agency 48. Common Interest Community Board  
Chapter 70. Common Interest Community Ombudsman Regulations

## Part I. General

### 18VAC48-70-10. Definitions.

Section 54.1-2345 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

Association

Board

Common interest community

Declaration

Governing board

Lot

Section 55.1-1900 of the Code of Virginia provides definition of the following term as used in this chapter:

Condominium instruments

The following words, terms, and phrases, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Adverse decision" or "final adverse decision" means the final determination issued by an association pursuant to an association complaint procedure that is opposite of, or does not provide for, either wholly or in part, the cure or corrective action sought by the complainant. Such decision means all avenues for internal appeal under the association complaint procedure have been exhausted. The date of the final adverse decision shall be the date of the notice issued pursuant to subdivisions 8 and 9 of 18VAC48-70-50.

"Association complaint" means a written complaint filed by a member of the association or a citizen pursuant to an association complaint procedure. An association complaint shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

"Association complaint procedure" means the written process adopted by an association to receive and consider association complaints from members and citizens. The complaint procedure shall include contact information for the Office of the Common Interest Community Ombudsman in accordance with § 54.1-2354.4 of the Code of Virginia. An appeal process, if applicable, shall be set out in an association complaint procedure adopted by the association, including relevant timeframes for filing the request for appeal. If no appeal process is available, the association complaint procedure shall indicate that no appeal process is available and that the rendered decision is final.

"Association governing documents" means collectively the applicable organizational documents, including the current and effective (i) articles of incorporation, declaration, and bylaws of a property owners' association, (ii) condominium instruments of a condominium, and (iii) declaration and bylaws of a real estate cooperative, all as may be amended from time to time. Association governing documents also include, to the extent in existence, resolutions, rules and regulations, or other guidelines governing association member conduct and association governance.

"Complainant" means an association member or citizen who makes a written complaint pursuant to an association complaint procedure.

"Director" means the Director of the Department of Professional and Occupational Regulation.

"Record of complaint" means all documents, correspondence, and other materials related to a decision made pursuant to an association complaint procedure.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-20. Submission of documentation.**

Any documentation required to be filed with or provided to the board, director, or Office of the Common Interest Community Ombudsman pursuant to this chapter and Article 2 (§ 54.1-2354.1 et seq.) of Chapter 23.3 of Title 54.1 of the Code of Virginia shall be filed with or provided to the Department of Professional and Occupational Regulation.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

## **Part II. Association Complaint Procedure**

**18VAC48-70-30. Requirement for association to develop an association complaint procedure.**

In accordance with § 54.1-2354.4 of the Code of Virginia, each association shall have a written process for resolving association complaints from members and citizens. The association complaint procedure or form shall conform with the requirements set forth in § 54.1-2354.4 of the Code of Virginia and this chapter, as well as the association governing documents, which shall not be in conflict with § 54.1-2354.4 of the Code of Virginia or this chapter.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-40. Establishment and adoption of written association complaint procedure.**

A. Associations filing an initial application for registration pursuant to § 55.1-1835, 55.1-1980, or 55.1-2182 of the Code of Virginia must certify that an association complaint procedure has been established and adopted at the date of registering or within 90 days of registering with the board.

B. An association that has been delinquent in registering the association and filing its required annual reports is still required to have an established and adopted written association complaint procedure. At the time such an association files an application for registration, it must certify that an association complaint procedure has been established and adopted by the governing board.

C. The association shall certify with each annual report filing that the association complaint procedure has been adopted and is in effect.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.



**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 33, Issue 15, eff. May 1, 2017; Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-50. Association complaint procedure requirements.**

The association complaint procedure shall be in writing and shall include the following provisions in addition to any specific requirements contained in the association's governing documents that do not conflict with § 54.1-2354.4 of the Code of Virginia or the requirements of this chapter.

1. The association complaint must be in writing.
2. A sample of the form, if any, on which the association complaint must be filed shall be provided upon request.
3. The association complaint procedure shall include the process by which complaints shall be delivered to the association.
4. The association shall provide written acknowledgment of receipt of the association complaint to the complainant within seven days of receipt. Such acknowledgment shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided, or if consistent with established association procedure, by electronic means provided the sender retains sufficient proof of the electronic delivery.
5. Any specific documentation that must be provided with the association complaint shall be clearly described in the association complaint procedure. In addition, to the extent the complainant has knowledge of the law or regulation applicable to the complaint, the complainant shall provide that reference, as well as the requested action or resolution.
6. The association shall have a reasonable, efficient, and timely method for identifying and requesting additional information that is necessary for the complainant to provide in order to continue processing the association complaint. The association shall establish a reasonable timeframe for responding to and for the disposition of the association complaint if the request for information is not received within the required timeframe.
7. Notice of the date, time, and location that the matter will be considered shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within a reasonable time prior to consideration as established by the association complaint procedure.
8. After the final determination is made, the written notice of final determination shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within seven days.
9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.
10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-60. Distribution of association complaint procedure.**

A. The association complaint procedure must be readily available upon request to all members of the association and citizens.

B. The association complaint procedure shall be included as an attachment to the resale certificate or the association disclosure packet.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012.

**18VAC48-70-70. Maintenance of association record of complaint.**

A. A record of each association complaint filed with the association shall be maintained in accordance with § 54.1-2354.4 A 1 of the Code of Virginia.

B. Unless otherwise specified by the director or his designee, the association shall provide to the director or his designee, within 14 days of receipt of the request, any document, book, or record concerning the association complaint. The director or his designee may extend such timeframe upon a showing of extenuating circumstances prohibiting delivery within 14 days of receiving the request.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-80. Failure of association to establish and utilize association complaint procedure.**

Failure of an association to establish and utilize an association complaint procedure in accordance with this chapter may result in the board seeking any of the remedies available pursuant to Chapter 23.3 (§ 54.1-2345 et seq.) of Title 54.1 of the Code of Virginia.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012.

## **Part III. Final Adverse Decision**

**18VAC48-70-90. Filing of notice of final adverse decision.**

A complainant may file a notice of final adverse decision in accordance with § 54.1-2354.4 B of the Code of Virginia concerning any final adverse decision that has been issued by an association in accordance with this chapter.

1. The notice shall be filed within 30 days of the date of the final adverse decision.
2. The notice shall be in writing on forms provided by the Office of the Common Interest Community Ombudsman. Such forms shall request the following information:
  - a. Name and contact information of complainant;
  - b. Name, address, and contact information of association;
  - c. Applicable association governing documents; and

d. Date of final adverse decision.

3. The notice shall include a copy of the association complaint, the final adverse decision, reference to the laws and regulations the final adverse decision may have violated, any supporting documentation related to the final adverse decision, and a copy of the association complaint procedure.

4. The notice shall be accompanied by a \$25 filing fee or a request for waiver pursuant to 18VAC48-70-100.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-100. Waiver of filing fee.**

In accordance with § 54.1-2354.4 B of the Code of Virginia, the board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the complainant.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-110. Review of final adverse decision.**

Upon receipt of the notice of final adverse decision from the complainant, along with the filing fee or a board-approved waiver of filing fee, the Office of the Common Interest Community Ombudsman shall provide written acknowledgment of receipt of the notice to the complainant and shall provide a copy of the written notice to the association that made the final adverse decision. The notice of adverse decision will not be reviewed until the filing fee has been received or a waiver of filing fee has been granted by the board.

In accordance with § 54.1-2354.4 C of the Code of Virginia, additional information may be requested from the association that made the final adverse decision. Upon request, the association shall provide such information to the Office of the Common Interest Community Ombudsman within a reasonable time.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-120. Decision from the notice of final adverse decision.**

Upon review of the notice of final adverse decision in accordance with § 54.1-2354.4 C of the Code of Virginia, if the director determines that the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the board, the director may, in his sole discretion, provide the complainant and the association with information concerning such laws or regulations governing common interest communities or interpretations thereof by the board.

The determination of whether the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the board shall be a matter within the sole discretion of the director. Such decision is final and not subject to further review. The determination of the director shall not be binding upon the complainant or the association that made the final adverse decision.

Code of Virginia  
Title 2.2. Administration of Government  
Subtitle II. Administration of State Government  
Part B. Transaction of Public Business  
Chapter 37. Virginia Freedom of Information Act

**§ 2.2-3700. Short title; policy**

A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

1968, c. 479, § 2.1-340; 1976, c. 467, § 2.1-340.1; 1989, c. 358; 1990, c. 538; 1999, cc. [703](#), [726](#); 2001, c. [844](#); 2002, c. [393](#).

**§ 2.2-3701. Definitions**

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ [2.2-3705.1](#) through [2.2-3705.7](#), means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § [2.2-3708.2](#), as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body,

or (b) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ [38.2-5000](#) et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § [9.1-101](#) shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, which unit includes two or more localities.

"Scholastic records" means those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

"Trade secret" means the same as that term is defined in the Uniform Trade Secrets Act (§ [59.1-336](#) et seq.).

1968, c. 479, § 2.1-341; 1970, c. 456; 1974, c. 332; 1975, c. 307; 1977, c. 677; 1978, cc. 573, 826; 1979, cc. 369, 687; 1980, c. 754; 1984, c. 252; 1989, c. 358; 1990, c. 538; 1993, cc. 270, 720; 1994, cc. [845](#), [931](#); 1996, c. [609](#); 1997, c. [641](#); 1999, cc. [703](#), [726](#); 2001, c. [844](#); 2002, c. [393](#); 2003, c. [897](#); 2007, c. [945](#); 2008, cc. [233](#), [789](#); 2010, c. [706](#); 2011, c. [242](#); 2015, cc. [131](#), [195](#), [224](#); 2016, cc. [620](#), [716](#); 2017, cc. [616](#), [778](#); 2018, cc. [54](#), [55](#); 2019, c. [358](#).

## § 2.2-3702. Notice of chapter

Any person elected, reelected, appointed or reappointed to any body not excepted from this chapter shall (i) be furnished by the public body's administrator or legal counsel with a copy of this chapter within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the provisions of this chapter.

1976, c. 467, § 2.1-341.1; 1999, cc. [703](#), [726](#); 2001, c. [844](#); 2002, c. [393](#).

## § 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility

A. The provisions of this chapter shall not apply to:

1. The Virginia Parole Board, except that (i) information from the Virginia Parole Board providing the number of inmates considered by the Board for discretionary parole, the number of inmates granted or denied parole, and the number of parolees returned to the custody of the Department of Corrections solely as a result of a determination by the

Board of a violation of parole shall be open to inspection and available for release, on a monthly basis, as provided by § [2.2-3704](#); (ii) all guidance documents, as defined in § [2.2-4101](#), shall be public records and subject to the provisions of this chapter; and (iii) all records concerning the finances of the Virginia Parole Board shall be public records and subject to the provisions of this chapter. The information required by clause (i) shall be furnished by offense, sex, race, age of the inmate, and the locality in which the conviction was obtained, upon the request of the party seeking the information. The information required by clause (ii) shall include all documents establishing the policy of the Board or any change in or clarification of such policy with respect to grant, denial, deferral, revocation, or supervision of parole or geriatric release or the process for consideration thereof, and shall be clearly and conspicuously posted on the Board's website. However, such information shall not include any portion of any document reflecting the application of any policy or policy change or clarification of such policy to an individual inmate;

2. Petit juries and grand juries;

3. Family assessment and planning teams established pursuant to § [2.2-5207](#);

4. Sexual assault response teams established pursuant to § [15.2-1627.4](#), except that records relating to (i) protocols and policies of the sexual assault response team and (ii) guidelines for the community's response established by the sexual assault response team shall be public records and subject to the provisions of this chapter;

5. Multidisciplinary child sexual abuse response teams established pursuant to § [15.2-1627.5](#);

6. The Virginia State Crime Commission; and

7. The records maintained by the clerks of the courts of record, as defined in § [1-212](#), for which clerks are custodians under § [17.1-242](#), and courts not of record, as defined in § [16.1-69.5](#), for which clerks are custodians under § [16.1-69.54](#), including those transferred for storage, maintenance, or archiving. Such records shall be requested in accordance with the provisions of §§ [16.1-69.54:1](#) and [17.1-208](#), as appropriate. However, other records maintained by the clerks of such courts shall be public records and subject to the provisions of this chapter.

B. Public access to voter registration and election records shall be governed by the provisions of Title 24.2 and this chapter. The provisions of Title 24.2 shall be controlling in the event of any conflict.

C. No provision of this chapter or Chapter 21 (§ [30-178](#) et seq.) of Title 30 shall be construed to afford any rights to any person (i) incarcerated in a state, local or federal correctional facility, whether or not such facility is (a) located in the Commonwealth or (b) operated pursuant to the Corrections Private Management Act (§ [53.1-261](#) et seq.) or (ii) civilly committed pursuant to the Sexually Violent Predators Act (§ [37.2-900](#) et seq.). However, this subsection shall not be construed to prevent such persons from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution.

1999, cc. [703](#), [726](#), § 2.1-341.2; 2001, c. [844](#); 2003, cc. [989](#), [1018](#); 2004, cc. [398](#), [690](#); 2007, cc. [438](#), [548](#), [626](#); 2017, c. [620](#); 2018, cc. [127](#), [584](#); 2019, c. [729](#).

### **§ 2.2-3703.1. Disclosure pursuant to court order or subpoena**

Nothing contained in this chapter shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena. No discretionary exemption from mandatory disclosure shall be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law.

2014, c. [319](#).

### **§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc**

A. Except as otherwise specifically provided by law, 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. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. The custodian may require the requester to

provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days or, in the case of a request for criminal investigative files pursuant to § [2.2-3706.1](#), 60 work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt

records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

J. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ [42.1-76](#) et seq.). In accordance with § [42.1-79](#), the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter.

1968, c. 479, § 2.1-342; 1973, c. 461; 1974, c. 332; 1975, cc. 307, 312; 1976, cc. 640, 709; 1977, c. 677; 1978, c. 810; 1979, cc. 682, 684, 686, 689; 1980, cc. 678, 754; 1981, cc. 456, 464, 466, 589; 1982, cc. 225, 449, 452, 560, 635; 1983, cc. 372, 462, 607; 1984, cc. 85, 395, 433, 513, 532; 1985, cc. 81, 155, 502, 618; 1986, cc. 273, 291, 383, 469, 592; 1987, cc. 401, 491, 581; 1988, cc. 39, 151, 395, 411, 891, 902; 1989, cc. 56, 358, 478; 1990, cc. 217, 538, 721, 819, 968; 1991, cc. 213, 561; 1992, cc. 40, 150, 167, 200, 203, 207, 593, 612; 1993, cc. 205, 270, 296, 537, 552, 638, 750, 883; 1994, cc. [485](#), [532](#), [606](#), [839](#), [853](#), [918](#); 1995, cc. [299](#), [362](#), [499](#), [562](#), [638](#), [722](#), [812](#), [837](#); 1996, cc. [168](#), [469](#), [589](#), [599](#), [783](#), [786](#), [794](#), [855](#), [862](#), [902](#), [905](#), [1001](#), [1046](#); 1997, cc. [198](#), [295](#), [439](#), [567](#), [636](#), [641](#), [777](#), [782](#), [785](#), [838](#), [861](#); 1998, cc. [427](#), [891](#); 1999, cc. [438](#), [703](#), [726](#); 2001, c. [844](#); 2002, cc. [715](#), [830](#); 2003, cc. [275](#), [981](#), [1021](#); 2007, c. [439](#); 2009, c. [626](#); 2010, c. [627](#); 2011, c. [604](#); 2016, cc. [620](#), [716](#); 2017, c. [778](#); 2020, c. [1142](#); 2021, Sp. Sess. I, c. [483](#).

### **§ 2.2-3704.01. Records containing both excluded and nonexcluded information; duty to redact**

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.

2016, cc. [620](#), [716](#).



## § 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § [2.2-106](#) or [2.2-107](#).

No provision of this chapter or any provision of Chapter 38 (§ [2.2-3800](#) et seq.) shall be construed as denying public access 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, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.

3. 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 § [2.2-3711](#).

4. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § [2.2-3711](#). However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

6. Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, "vendor proprietary information software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

7. Computer software developed by or for a state agency, public institution of higher education in the Commonwealth, or political subdivision of the Commonwealth.

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale, or lease, prior to the completion of such purchase, sale, or lease.

9. Information concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ [2.2-1832](#) et seq.) of Chapter 18, or by any county, city, or town; and investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body's insurance policy or self-insurance plan. However, nothing in this subdivision shall prevent the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit.

10. Personal contact information furnished to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, "personal contact information" means the information provided to the public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device.

11. Communications and materials required to be kept confidential pursuant to § [2.2-4119](#) of the Virginia Administrative Dispute Resolution Act (§ [2.2-4115](#) et seq.).

12. Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ [2.2-4300](#) et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

13. Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, c. [690](#); 2010, c. [553](#); 2016, cc. [620](#), [716](#), [729](#); 2017, cc. [140](#), [778](#); 2021, Sp. Sess. I, c. [484](#).

### **§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Confidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.
2. Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.
3. Information that would disclose the security aspects of a system safety program plan adopted pursuant to Federal Transit Administration regulations by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.
4. Information concerning security plans and specific assessment components of school safety audits, as provided in § [22.1-279.8](#).

Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster, or other catastrophic event or (ii) any person on school property has suffered or been threatened with any personal injury.

5. Information concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Chapter 9 (§ [37.2-900](#) et seq.) of Title 37.2 held by the Commitment Review Committee; except that in no case shall information identifying the victims of a sexually violent predator be disclosed.

6. Subscriber data provided directly or indirectly by a communications services provider to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if the data is in a form not made available by the communications services provider to the public generally. Nothing in this subdivision shall prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision:

"Communications services provider" means the same as that term is defined in § [58.1-647](#).

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a communications services provider.

7. Subscriber data collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ [56-484.12](#) et seq.) and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if such records are not otherwise publicly available.

Nothing in this subdivision shall prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision:

"Communications services provider" means the same as that term is defined in § [58.1-647](#).

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a communications services provider.

8. Information held by the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, that would (i) reveal strategies under consideration or development by the Council or such commission or organizations to prevent the closure or realignment of federal military installations located in Virginia or the relocation of national security facilities located in Virginia, to limit the adverse economic effect of such realignment, closure, or relocation, or to seek additional tenant activity growth from the Department of Defense or federal government or (ii) disclose trade secrets provided to the Council or such commission or organizations in connection with their work.

In order to invoke the trade secret protection provided by clause (ii), the submitting entity shall, in writing and at the time of submission (a) invoke this exclusion, (b) identify with specificity the information for which such protection is sought, and (c) state the reason why such protection is necessary. Nothing in this subdivision shall be construed to prevent the disclosure of all or part of any record, other than a trade secret that has been specifically identified as required by this subdivision, after the Department of Defense or federal agency has issued a final, unappealable decision, or in the event of litigation, a court of competent jurisdiction has entered a final, unappealable order concerning the closure, realignment, or expansion of the military installation or tenant activities, or the relocation of the national security facility, for which records are sought.

9. Information, as determined by the State Comptroller, that describes the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the State Comptroller, if disclosure of such information would jeopardize the security of the Commonwealth's financial assets. However, records relating to the investigation of and findings concerning the soundness of any fiscal process shall be disclosed in a form that does not compromise internal controls. Nothing in this subdivision shall be construed to prohibit the Auditor of Public Accounts or the Joint Legislative Audit and Review Commission from reporting internal control deficiencies discovered during the course of an audit.

10. Information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the STARS or any other similar local or regional communications system or (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, or programming maintained by or utilized by STARS or any other similar local or regional public safety communications system.

11. Information concerning a salaried or volunteer Fire/EMS company or Fire/EMS department if disclosure of such information would reveal the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties.

12. Information concerning the disaster recovery plans or the evacuation plans in the event of fire, explosion, natural disaster, or other catastrophic event for hospitals and nursing homes regulated by the Board of Health pursuant to Chapter 5 (§ [32.1-123](#) et seq.) of Title 32.1 provided to the Department of Health. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the effectiveness of executed evacuation plans after the occurrence of fire, explosion, natural disaster, or other catastrophic event.

13. Records received by the Department of Criminal Justice Services pursuant to §§ [9.1-184](#), [22.1-79.4](#), and [22.1-279.8](#) or for purposes of evaluating threat assessment teams established by a public institution of higher education pursuant to § [23.1-805](#) or by a private nonprofit institution of higher education, to the extent such records reveal security plans, walk-through checklists, or vulnerability and threat assessment components.

14. Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

- a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;
- b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;
- c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or
- d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public

disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § [2.2-3704](#).

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.

15. Information held by the Virginia Commercial Space Flight Authority that is categorized as classified or sensitive but unclassified, including national security, defense, and foreign policy information, provided that such information is exempt under the federal Freedom of Information Act, 5 U.S.C. § 552.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [398](#), [482](#), [690](#), [770](#); 2005, c. [410](#); 2008, c. [721](#); 2009, c. [418](#); 2010, c. [672](#); 2011, cc. [111](#), [536](#); 2012, cc. [617](#), [803](#), [835](#); 2013, c. [600](#); 2015, c. [183](#); 2016, cc. [554](#), [620](#), [716](#), [717](#); 2017, c. [778](#); 2018, cc. [52](#), [741](#); 2019, c. [358](#).

### **§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Virginia Alcoholic Beverage Control Authority, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ [18.2-340.15](#) et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.
2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth pursuant to § [54.1-108](#).
3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management, to such personnel of any local public body, including local school boards, as are responsible for conducting such investigations in confidence, or to any public institution of higher education. However, nothing in this subdivision shall prevent the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation.
4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ [32.1-323](#) et seq.) of Title 32.1.
5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ [2.2-3900](#) et seq.) or under any local ordinance adopted in accordance with the authority specified in § [2.2-524](#), or adopted pursuant to § [15.2-965](#), or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this subdivision shall prevent the distribution of

information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Information relating to studies and investigations by the Virginia Lottery of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ [58.1-4014](#) through [58.1-4018](#), (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such information has not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv), and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for (i) the Auditor of Public Accounts; (ii) the Joint Legislative Audit and Review Commission; (iii) an appropriate authority as defined in § [2.2-3010](#) with respect to an allegation of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ [2.2-3009](#) et seq.); (iv) the Office of the State Inspector General with respect to an investigation initiated through the Fraud, Waste and Abuse Hotline or an investigation initiated pursuant to Chapter 3.2 (§ [2.2-307](#) et seq.); (v) internal auditors appointed by the head of a state agency or by any public institution of higher education; (vi) the committee or the auditor with respect to an investigation or audit conducted pursuant to § [15.2-825](#); or (vii) the auditors, appointed by the local governing body of any county, city, or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department, or program of such body. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed shall include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ [36-97](#) et seq.) or the Statewide Fire Prevention Code (§ [27-94](#) et seq.) made to a local governing body.

9. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ [9.1-138](#) et seq.), Article 4.1 (§ [9.1-150.1](#) et seq.), Article 11 (§ [9.1-185](#) et seq.), and Article 12 (§ [9.1-186](#) et seq.) of Chapter 1 of Title 9.1.

10. Information furnished to or prepared by the Board of Education pursuant to subsection D of § [22.1-253.13:3](#) in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure of such information to (i) a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board.

11. Information contained in (i) an application for licensure or renewal of a license for teachers and other school personnel, including transcripts or other documents submitted in support of an application, and (ii) an active investigation conducted by or for the Board of Education related to the denial, suspension, cancellation, revocation, or reinstatement of teacher and other school personnel licenses including investigator notes and other correspondence and information, furnished in confidence with respect to such investigation. However, this subdivision shall not prohibit the disclosure of such (a) application information to the applicant at his own expense or (b) investigation information to a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of any complainant or person supplying information to investigators. The completed investigation information disclosed shall include information regarding the school or facility involved, the identity of the person who was the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation fails to support a complaint or does not lead to corrective action, the identity of the

person who was the subject of the complaint may be released only with the consent of the subject person. No personally identifiable information regarding a current or former student shall be released except as permitted by state or federal law.

12. Information provided in confidence and related to an investigation by the Attorney General under Article 1 (§ [3.2-4200](#) et seq.) or Article 3 (§ [3.2-4204](#) et seq.) of Chapter 42 of Title 3.2, Article 10 (§ [18.2-246.6](#) et seq.) of Chapter 6 or Chapter 13 (§ [18.2-512](#) et seq.) of Title 18.2, or Article 1 (§ [58.1-1000](#)) of Chapter 10 of Title 58.1. However, information related to an investigation that has been inactive for more than six months shall, upon request, be disclosed provided such disclosure is not otherwise prohibited by law and does not reveal the identity of charging parties, complainants, persons supplying information, witnesses, or other individuals involved in the investigation.

13. Records of active investigations being conducted by the Department of Behavioral Health and Developmental Services pursuant to Chapter 4 (§ [37.2-400](#) et seq.) of Title 37.2.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [605](#), [690](#), [766](#); 2005, c. [601](#); 2006, cc. [25](#), [95](#); 2008, cc. [387](#), [668](#), [689](#), [758](#); 2009, cc. [237](#), [326](#), [340](#); 2011, cc. [798](#), [871](#); 2012, cc. [476](#), [507](#), [803](#), [835](#); 2013, cc. [571](#), [572](#), [690](#), [717](#), [723](#); 2014, cc. [225](#), [414](#), [609](#), [788](#); 2015, cc. [38](#), [730](#); 2016, cc. [272](#), [620](#), [716](#); 2017, c. [778](#); 2020, c. [48](#).

#### **§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions**

A. The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except as provided in subsection B or where such disclosure is otherwise prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.

2. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment or promotion, or (iii) receipt of an honor or honorary recognition.

3. Information held by the Brown v. Board of Education Scholarship Committee that would reveal personally identifiable information, including scholarship applications, personal financial information, and confidential correspondence and letters of recommendation.

4. Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction

with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.

5. Information held by the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be.

6. Personal information, as defined in § [2.2-3801](#), provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ [23.1-700](#) et seq.) of Title 23.1, including personal information related to (i) qualified beneficiaries as that term is defined in § [23.1-700](#), (ii) designated survivors, or (iii) authorized individuals. Nothing in this subdivision shall be construed to prevent disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information.

For purposes of this subdivision:

"Authorized individual" means an individual who may be named by the account owner to receive information regarding the account but who does not have any control or authority over the account.

"Designated survivor" means the person who will assume account ownership in the event of the account owner's death.

7. Information maintained in connection with fundraising activities by or for a public institution of higher education that would reveal (i) personal fundraising strategies relating to identifiable donors or prospective donors or (ii) wealth assessments; estate, financial, or tax planning information; health-related information; employment, familial, or marital status information; electronic mail addresses, facsimile or telephone numbers; birth dates or social security numbers of identifiable donors or prospective donors. The exclusion provided by this subdivision shall not apply to protect from disclosure (a) information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor or (b) the identities of sponsors providing grants to or contracting with the institution for the performance of research services or other work or the terms and conditions of such grants or contracts. For purposes of clause (a), the identity of the donor may be withheld if (1) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (2) the pledge or donation does not impose terms or conditions directing academic decision-making.

8. Information held by a threat assessment team established by a local school board pursuant to § [22.1-79.4](#) or by a public institution of higher education pursuant to § [23.1-805](#) relating to the assessment or intervention with a specific individual. However, in the event an individual who has been under assessment commits an act, or is prosecuted for the commission of an act that has caused the death of, or caused serious bodily injury, including any felony sexual assault, to another person, such information of the threat assessment team concerning the individual under assessment shall be made available as provided by this chapter, with the exception of any criminal history records obtained pursuant to § [19.2-389](#) or [19.2-389.1](#), health records obtained pursuant to § [32.1-127.1:03](#), or scholastic records as defined in § [22.1-289](#). The public body providing such information shall remove personally identifying information of any person who provided information to the threat assessment team under a promise of confidentiality.

9. Records provided to the Governor or the designated reviewers by a qualified institution, as those terms are defined in § [23.1-1239](#), related to a proposed memorandum of understanding, or proposed amendments to a memorandum of understanding, submitted pursuant to Chapter 12.1 (§ [23.1-1239](#) et seq.) of Title 23.1. A memorandum of understanding entered into pursuant to such chapter shall be subject to public disclosure after it is agreed to and signed by the Governor.

B. The custodian of a scholastic record shall not release the address, phone number, or email address of a student in response to a request made under this chapter without written consent. For any student who is (i) 18 years of age or older, (ii) under the age of 18 and emancipated, or (iii) attending an institution of higher education, written consent of the



student shall be required. For any other student, written consent of the parent or legal guardian of such student shall be required.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, c. [690](#); 2006, c. [518](#); 2008, cc. [561](#), [665](#); 2010, cc. [456](#), [524](#); 2014, c. [313](#); 2016, cc. [554](#), [620](#), [716](#); 2017, c. [778](#); 2018, c. [756](#); 2019, cc. [638](#), [639](#); 2020, cc. [71](#), [78](#).

### § 2.2-3705.5. Exclusions to application of chapter; health and social services records

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § [32.1-127.1:03](#).

Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § [20-124.6](#). In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § [16.1-338](#) or [54.1-2969](#), the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

2. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants; information required to be provided to the Department of Health Professions by certain licensees pursuant to § [54.1-2506.1](#); information held by the Health Practitioners' Monitoring Program Committee within the Department of Health Professions that identifies any practitioner who may be, or who is actually, impaired to the extent that disclosure is prohibited by § [54.1-2517](#); and information relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such information that are in the possession of the Prescription Monitoring Program (Program) pursuant to Chapter 25.2 (§ [54.1-2519](#) et seq.) of Title 54.1 and any material relating to the operation or security of the Program.

3. Reports, documentary evidence, and other information as specified in §§ [51.5-122](#) and [51.5-184](#) and Chapter 1 (§ [63.2-100](#) et seq.) of Title 63.2 and information and statistical registries required to be kept confidential pursuant to Chapter 1 (§ [63.2-100](#) et seq.) of Title 63.2.

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; other correspondence and information furnished in confidence to the Department of Education in connection with an active investigation of an applicant or licensee pursuant to Chapter 14.1 (§ [22.1-289.02](#) et seq.) of Title 22.1; other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ [63.2-1700](#) et seq.) and 18 (§ [63.2-1800](#) et

seq.) of Title 63.2; and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ [8.01-216.1](#) et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ [32.1-310](#) et seq.) of Title 32.1. However, nothing in this subdivision shall prevent the disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

5. Information collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ [32.1-111.1](#) et seq.) of Chapter 4 of Title 32.1.

6. Reports and court documents relating to involuntary admission required to be kept confidential pursuant to § [37.2-818](#).

7. Information acquired (i) during a review of any child death conducted by the State Child Fatality Review Team established pursuant to § [32.1-283.1](#) or by a local or regional child fatality review team to the extent that such information is made confidential by § [32.1-283.2](#); (ii) during a review of any death conducted by a family violence fatality review team to the extent that such information is made confidential by § [32.1-283.3](#); (iii) during a review of any adult death conducted by the Adult Fatality Review Team to the extent made confidential by § [32.1-283.5](#) or by a local or regional adult fatality review team to the extent that such information is made confidential by § [32.1-283.6](#); (iv) by a local or regional overdose fatality review team to the extent that such information is made confidential by § [32.1-283.7](#); (v) during a review of any death conducted by the Maternal Mortality Review Team to the extent that such information is made confidential by § [32.1-283.8](#); or (vi) during a review of any death conducted by the Developmental Disabilities Mortality Review Committee to the extent that such information is made confidential by § [37.2-314.1](#).

8. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § [32.1-276.9](#), to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § [32.1-276.4](#).

9. Information relating to a grant application, or accompanying a grant application, submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ [51.5-178](#) et seq.) of Chapter 14 of Title 51.5 that would (i) reveal (a) medical or mental health records or other data identifying individual patients or (b) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

10. Any information copied, recorded, or received by the Commissioner of Health in the course of an examination, investigation, or review of a managed care health insurance plan licensee pursuant to §§ [32.1-137.4](#) and [32.1-137.5](#), including books, records, files, accounts, papers, documents, and any or all computer or other recordings.

11. Records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § [38.2-5002.2](#).

12. Information held by the State Health Commissioner relating to the health of any person subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of Title 32.1. However, nothing in this subdivision shall be construed to prevent the disclosure of statistical summaries, abstracts, or other information in aggregate form.

13. The names and addresses or other contact information of persons receiving transportation services from a state or local public body or its designee under Title II of the Americans with Disabilities Act, (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § [63.2-600](#).

14. Information held by certain health care committees and entities that may be withheld from discovery as privileged communications pursuant to § [8.01-581.17](#).

15. Data and information specified in § [37.2-308.01](#) relating to proceedings provided for in Article 16 (§ [16.1-335](#) et seq.) of Chapter 11 of Title 16.1 and Chapter 8 (§ [37.2-800](#) et seq.) of Title 37.2.

16. Records of and information held by the Emergency Department Care Coordination Program required to be kept confidential pursuant to § [32.1-372](#).

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [65](#), [666](#), [690](#), [773](#), [1014](#), [1021](#); 2005, cc. [181](#), [227](#), [716](#); 2008, c. [539](#); 2009, cc. [472](#), [813](#), [840](#); 2011, cc. [110](#), [175](#), [535](#); 2012, cc. [476](#), [479](#), [507](#), [803](#), [835](#); 2015, cc. [22](#), [108](#), [127](#); 2016, cc. [620](#), [716](#); 2017, cc. [188](#), [475](#), [600](#), [719](#), [778](#); 2018, c. [600](#); 2019, c. [834](#); 2020, cc. [851](#), [860](#), [861](#).

#### **§ 2.2-3705.6. (Effective until October 1, 2021) Exclusions to application of chapter; proprietary records and trade secrets**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § [62.1-132.4](#) or [62.1-134.1](#).
2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ [15.2-4900](#) et seq.) of Title 15.2.
3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.
4. Information that was filed as confidential under the Toxic Substances Information Act (§ [32.1-239](#) et seq.), as such Act existed prior to July 1, 1992.
5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § [28.2-204](#).
6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.
7. Proprietary information related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.
8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ [32.1-331.12](#) et seq.) of Chapter 10 of Title 32.1.
9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § [2.2-4342](#) as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § [2.2-4317](#).

11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § [33.2-1820](#) or [56-575.17](#) notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity; (ii) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

- (1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the information afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § [33.2-1820](#) or [56-575.17](#); (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.).

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected.

13. Trade secrets or confidential proprietary information that is not generally available to the public through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ [15.2-2100](#) et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the information relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such information were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

14. Information of a proprietary or confidential nature furnished by a supplier or manufacturer of charitable gaming supplies to the Department of Agriculture and Consumer Services (i) pursuant to subsection E of § [18.2-340.34](#) and (ii) pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment.

15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § [3.2-1215](#).

16. Trade secrets submitted by CMRS providers as defined in § [56-484.12](#) to the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § [56-484.15](#), relating to the provision of wireless E-911 service.

17. Information relating to a grant or loan application, or accompanying a grant or loan application, to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ [32.1-162.23](#) et seq.) of Title 32.1 if disclosure of such information would (i) reveal proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § [56-265.4:4](#) and (ii) providing cable television services pursuant to Article 1.1 (§ [15.2-2108.2](#) et seq.) of Chapter 21 of Title 15.2 if disclosure of such information would be harmful to the competitive position of the locality.

In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ [15.2-7200](#) et seq.).

19. Confidential proprietary information and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ [15.2-5431.1](#) et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ [56-484.7:1](#) et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that information required to be maintained in accordance with § [15.2-2160](#) shall be released.

20. Trade secrets or financial information of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Small Business and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ [2.2-1603](#) et seq.). In order for such trade secrets or financial information to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data

or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary.

21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner pursuant to §§ [32.1-276.5:1](#) and [32.1-276.7:1](#).

22. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

23. Information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission pursuant to § [3.2-3103](#).

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if disclosure of such information would adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or

b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of such information would (i) reveal (a) trade secrets of the private entity; (b) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private entity.

In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

- (1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

25. 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 pursuant to §§ [10.1-104.7](#), [10.1-104.8](#), and [10.1-104.9](#), other than when required as part of a state or federal regulatory enforcement action.

26. Trade secrets provided to the Department of Environmental Quality pursuant to the provisions of § [10.1-1458](#). In order for such trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary.

27. Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the public-use airport shall make a written request to the Department of Aviation:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

28. Information relating to a grant, loan, or investment application, or accompanying a grant, loan, or investment application, submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority) established pursuant to Article 11 (§ [2.2-2351](#) et seq.) of Chapter 22, an advisory committee of the Authority, or any other entity designated by the Authority to review such applications, to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a grant, loan, or investment application that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) research-related information produced or collected by a party to the application in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of a party to a grant, loan, or investment application; and memoranda, staff evaluations, or other information prepared by the Authority or its staff, or a reviewing entity designated by the Authority, exclusively for the evaluation of grant, loan, or investment applications, including any scoring or prioritization documents prepared for and forwarded to the Authority.

29. Proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a solar services or carbon sequestration agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory

disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business.

In order for the information specified in clauses (i)(a), (b), and (c) to be excluded from the provisions of this chapter, the private business shall make a written request to the public body:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

30. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

31. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Virginia Department of Transportation in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Virginia Department of Transportation shall determine whether the requested exclusion from disclosure is necessary to protect trade secrets or financial records of the private entity. The Virginia Department of Transportation shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

32. Information related to a grant application, or accompanying a grant application, submitted to the Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant to § [36-139](#), Article 26 (§ [2.2-2484](#) et seq.) of Chapter 24, or the Virginia Telecommunication Initiative as authorized by the appropriations act.

In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information, or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Department shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. The Department shall make a written determination of the nature



and scope of the protection to be afforded by it under this subdivision.

33. Financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. Such records shall not be withheld after they have been made public by HUD or VHDA.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [593](#), [690](#); 2005, cc. [258](#), [411](#); 2006, cc. [73](#), [76](#), [467](#), [831](#), [921](#), [936](#); 2006, Sp. Sess. I, c. [1](#); 2007, cc. [374](#), [693](#); 2008, cc. [71](#), [102](#), [266](#), [387](#), [633](#), [689](#), [736](#), [743](#); 2009, cc. [246](#), [311](#), [325](#), [765](#), [810](#), [869](#); 2010, cc. [310](#), [808](#); 2011, cc. [541](#), [781](#), [798](#), [871](#); 2012, cc. [693](#), [709](#); 2013, cc. [54](#), [482](#), [574](#); 2015, cc. [696](#), [697](#); 2016, cc. [620](#), [716](#), [724](#), [725](#), [775](#); 2017, cc. [662](#), [737](#), [778](#), [796](#), [816](#); 2018, cc. [470](#), [532](#), [533](#); 2019, cc. [358](#), [629](#); 2020, cc. [72](#), [79](#), [1164](#), [1169](#); 2021, Sp. Sess. I, c. [298](#).

This section has more than one version with varying effective dates. Scroll down to see all versions.

#### **§ 2.2-3705.6. (Effective October 1, 2021, until January 1, 2022) Exclusions to application of chapter; proprietary records and trade secrets**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § [62.1-132.4](#) or [62.1-134.1](#).
2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ [15.2-4900](#) et seq.) of Title 15.2.
3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.
4. Information that was filed as confidential under the Toxic Substances Information Act (§ [32.1-239](#) et seq.), as such Act existed prior to July 1, 1992.
5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § [28.2-204](#).
6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.
7. Proprietary information related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.
8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ [32.1-331.12](#) et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § [2.2-4342](#) as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § [2.2-4317](#).

11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § [33.2-1820](#) or [56-575.17](#) notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity; (ii) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

- (1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the information afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § [33.2-1820](#) or [56-575.17](#); (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity,"

and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.).

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected.

13. Trade secrets or confidential proprietary information that is not generally available to the public through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ [15.2-2100](#) et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the information relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such information were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

14. Information of a proprietary or confidential nature furnished by a supplier or manufacturer of charitable gaming supplies to the Department of Agriculture and Consumer Services (i) pursuant to subsection E of § [18.2-340.34](#) and (ii) pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment.

15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § [3.2-1215](#).

16. Trade secrets submitted by CMRS providers as defined in § [56-484.12](#) to the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § [56-484.15](#), relating to the provision of wireless E-911 service.

17. Information relating to a grant or loan application, or accompanying a grant or loan application, to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ [32.1-162.23](#) et seq.) of Title 32.1 if disclosure of such information would (i) reveal proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § [56-265.4:4](#) and (ii) providing cable television services pursuant to Article 1.1 (§ [15.2-2108.2](#) et seq.) of Chapter 21 of Title 15.2 if disclosure of such information would be harmful to the competitive position of the locality.

In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ [15.2-7200](#) et seq.).

19. Confidential proprietary information and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ [15.2-5431.1](#) et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ [56-484.7:1](#) et seq.) of Chapter 15 of Title 56, where disclosure of such information would

be harmful to the competitive position of the authority, except that information required to be maintained in accordance with § [15.2-2160](#) shall be released.

20. Trade secrets or financial information of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Small Business and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ [2.2-1603](#) et seq.). In order for such trade secrets or financial information to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary.

21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner pursuant to §§ [32.1-276.5:1](#) and [32.1-276.7:1](#).

22. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

23. Information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission pursuant to § [3.2-3103](#).

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if disclosure of such information would

adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or

b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of such information would (i) reveal (a) trade secrets of the private entity; (b) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private entity.

In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

- (1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

25. 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 pursuant to §§ [10.1-104.7](#), [10.1-104.8](#), and [10.1-104.9](#), other than when required as part of a state or federal regulatory enforcement action.

26. Trade secrets provided to the Department of Environmental Quality pursuant to the provisions of § [10.1-1458](#). In order for such trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary.

27. Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the public-use airport shall make a written request to the Department of Aviation:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

28. Information relating to a grant, loan, or investment application, or accompanying a grant, loan, or investment application, submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority) established pursuant to Article 11 (§ [2.2-2351](#) et seq.) of Chapter 22, an advisory committee of the Authority, or any other entity designated by the Authority to review such applications, to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a grant, loan, or investment application that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) research-related information produced or collected by a party to the application in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of a party to a grant, loan, or investment application; and memoranda, staff evaluations, or other information

prepared by the Authority or its staff, or a reviewing entity designated by the Authority, exclusively for the evaluation of grant, loan, or investment applications, including any scoring or prioritization documents prepared for and forwarded to the Authority.

29. Proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a solar services or carbon sequestration agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business.

In order for the information specified in clauses (i)(a), (b), and (c) to be excluded from the provisions of this chapter, the private business shall make a written request to the public body:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

30. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

31. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Virginia Department of Transportation in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Virginia Department of Transportation shall determine whether the requested exclusion from disclosure is necessary to protect trade secrets or financial records of the private entity. The Virginia Department of Transportation shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

32. Information related to a grant application, or accompanying a grant application, submitted to the Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant to § [36-139](#), Article 26 (§ [2.2-2484](#) et seq.) of Chapter 24, or the Virginia Telecommunication Initiative as authorized by the appropriations act.

In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information, or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Department shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. The Department shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

33. Financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. Such records shall not be withheld after they have been made public by HUD or VHDA.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [593](#), [690](#); 2005, cc. [258](#), [411](#); 2006, cc. [73](#), [76](#), [467](#), [831](#), [921](#), [936](#); 2006, Sp. Sess. I, c. [1](#); 2007, cc. [374](#), [693](#); 2008, cc. [71](#), [102](#), [266](#), [387](#), [633](#), [689](#), [736](#), [743](#); 2009, cc. [246](#), [311](#), [325](#), [765](#), [810](#), [869](#); 2010, cc. [310](#), [808](#); 2011, cc. [541](#), [781](#), [798](#), [871](#); 2012, cc. [693](#), [709](#); 2013, cc. [54](#), [482](#), [574](#); 2015, cc. [696](#), [697](#); 2016, cc. [620](#), [716](#), [724](#), [725](#), [775](#); 2017, cc. [662](#), [737](#), [778](#), [796](#), [816](#); 2018, cc. [470](#), [532](#), [533](#); 2019, cc. [358](#), [629](#); 2020, cc. [72](#), [79](#), [1164](#), [1169](#); 2021, Sp. Sess. I, c. [298](#), [532](#).

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#### **§ 2.2-3705.6. (Effective January 1, 2022) Exclusions to application of chapter; proprietary records and trade secrets**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § [62.1-132.4](#) or [62.1-134.1](#).
2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ [15.2-4900](#) et seq.) of Title 15.2.
3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.
4. Information that was filed as confidential under the Toxic Substances Information Act (§ [32.1-239](#) et seq.), as such Act existed prior to July 1, 1992.
5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § [28.2-204](#).
6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Proprietary information related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ [32.1-331.12](#) et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § [2.2-4342](#) as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § [2.2-4317](#).

11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § [33.2-1820](#) or [56-575.17](#) notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity; (ii) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

(1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the information afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § [33.2-1820](#) or [56-575.17](#); (b) information concerning the terms



and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 (§ [33.2-1800](#) et seq.) or in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ [56-575.1](#) et seq.).

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected.

13. Trade secrets or confidential proprietary information that is not generally available to the public through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ [15.2-2100](#) et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the information relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such information were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

14. Information of a proprietary or confidential nature furnished by a supplier or manufacturer of charitable gaming supplies to the Department of Agriculture and Consumer Services (i) pursuant to subsection E of § [18.2-340.34](#) and (ii) pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment.

15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § [3.2-1215](#).

16. Trade secrets submitted by CMRS providers as defined in § [56-484.12](#) to the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § [56-484.15](#), relating to the provision of wireless E-911 service.

17. Information relating to a grant or loan application, or accompanying a grant or loan application, to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ [32.1-162.23](#) et seq.) of Title 32.1 if disclosure of such information would (i) reveal proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § [56-265.4:4](#) and (ii) providing cable television services pursuant to Article 1.1 (§ [15.2-2108.2](#) et seq.) of Chapter 21 of Title 15.2 if disclosure of such information would be harmful to the competitive position of the locality.

In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ [15.2-7200](#) et seq.).

19. Confidential proprietary information and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ [15.2-5431.1](#) et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ [56-484.7:1](#) et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that information required to be maintained in accordance with § [15.2-2160](#) shall be released.

20. Trade secrets or financial information of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Small Business and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ [2.2-1603](#) et seq.). In order for such trade secrets or financial information to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary.

21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner pursuant to §§ [32.1-276.5:1](#) and [32.1-276.7:1](#).

22. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

23. Information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission pursuant to § [3.2-3103](#).

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if disclosure of such information would adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or

b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of such information would (i) reveal (a) trade secrets of the private entity; (b) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private entity.

In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

- (1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

25. 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 pursuant to §§ [10.1-104.7](#), [10.1-104.8](#), and [10.1-104.9](#), other than when required as part of a state or federal regulatory enforcement action.

26. Trade secrets provided to the Department of Environmental Quality pursuant to the provisions of § [10.1-1458](#). In order for such trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary.

27. Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the public-use airport shall make a written request to the Department of Aviation:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

28. Information relating to a grant, loan, or investment application, or accompanying a grant, loan, or investment application, submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority) established

pursuant to Article 11 (§ [2.2-2351](#) et seq.) of Chapter 22, an advisory committee of the Authority, or any other entity designated by the Authority to review such applications, to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a grant, loan, or investment application that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) research-related information produced or collected by a party to the application in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of a party to a grant, loan, or investment application; and memoranda, staff evaluations, or other information prepared by the Authority or its staff, or a reviewing entity designated by the Authority, exclusively for the evaluation of grant, loan, or investment applications, including any scoring or prioritization documents prepared for and forwarded to the Authority.

29. Proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a solar services or carbon sequestration agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business.

In order for the information specified in clauses (i)(a), (b), and (c) to be excluded from the provisions of this chapter, the private business shall make a written request to the public body:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

30. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

31. Trade secrets, including, but not limited to, financial information, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Virginia Department of Transportation in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Virginia Department of Transportation shall determine whether the requested exclusion from disclosure is necessary to protect trade secrets or financial records of the private entity. The Virginia Department of Transportation shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

32. Information related to a grant application, or accompanying a grant application, submitted to the Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical,

technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant to § [36-139](#), Article 26 (§ [2.2-2484](#) et seq.) of Chapter 24, or the Virginia Telecommunication Initiative as authorized by the appropriations act.

In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Department:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data, information, or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Department shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. The Department shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

33. Financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. Such records shall not be withheld after they have been made public by HUD or VHDA.

34. Information of a proprietary or confidential nature disclosed by a health carrier or pharmacy benefits manager pursuant to § [38.2-3407.15:6](#), a wholesale distributor pursuant to § [54.1-3436.1](#), or a manufacturer pursuant to § [54.1-3442.02](#).

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [593](#), [690](#); 2005, cc. [258](#), [411](#); 2006, cc. [73](#), [76](#), [467](#), [831](#), [921](#), [936](#); 2006, Sp. Sess. I, c. [1](#); 2007, cc. [374](#), [693](#); 2008, cc. [71](#), [102](#), [266](#), [387](#), [633](#), [689](#), [736](#), [743](#); 2009, cc. [246](#), [311](#), [325](#), [765](#), [810](#), [869](#); 2010, cc. [310](#), [808](#); 2011, cc. [541](#), [781](#), [798](#), [871](#); 2012, cc. [693](#), [709](#); 2013, cc. [54](#), [482](#), [574](#); 2015, cc. [696](#), [697](#); 2016, cc. [620](#), [716](#), [724](#), [725](#), [775](#); 2017, cc. [662](#), [737](#), [778](#), [796](#), [816](#); 2018, cc. [470](#), [532](#), [533](#); 2019, cc. [358](#), [629](#); 2020, cc. [72](#), [79](#), [1164](#), [1169](#); 2021, Sp. Sess. I, cc. [298](#), [304](#), [532](#).

This section has more than one version with varying effective dates. Scroll down to see all versions.

### **§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions**

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § [2.2-3704.01](#).

1. State income, business, and estate tax returns, personal property tax returns, and confidential records held pursuant to § [58.1-3](#).
2. Working papers and correspondence of the Office of the Governor, the Lieutenant Governor, or the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates or the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in the Commonwealth. However, no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence. Further, information publicly

available or not otherwise subject to an exclusion under this chapter or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § [2.2-106](#) or [2.2-107](#).

As used in this subdivision:

"Members of the General Assembly" means each member of the Senate of Virginia and the House of Delegates and their legislative aides when working on behalf of such member.

"Office of the Governor" means the Governor; the Governor's chief of staff, counsel, director of policy, and Cabinet Secretaries; the Assistant to the Governor for Intergovernmental Affairs; and those individuals to whom the Governor has delegated his authority pursuant to § [2.2-104](#).

"Working papers" means those records prepared by or for a public official identified in this subdivision for his personal or deliberative use.

3. Information contained in library records that can be used to identify (i) both (a) any library patron who has borrowed or accessed material or resources from a library and (b) the material or resources such patron borrowed or accessed or (ii) any library patron under 18 years of age. For the purposes of clause (ii), access shall not be denied to the parent, including a noncustodial parent, or guardian of such library patron.

4. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.

5. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.

6. Information furnished by a member of the General Assembly to a meeting of a standing committee, special committee, or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § [30-110](#) or of formulating advisory opinions to members on standards of conduct, or both.

7. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address, but excluding the amount of utility service provided and the amount of money charged or paid for such utility service.

8. Personal information, as defined in § [2.2-3801](#), (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § [36-4](#) concerning persons participating in or persons on the waiting list for housing assistance programs funded by local governments or by any such authority; or (iv) filed with any local redevelopment and housing authority created pursuant to § [36-4](#) or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § [15.2-2304](#) or [15.2-2305](#). However, access to one's own information shall not be denied.

9. Information regarding the siting of hazardous waste facilities, except as provided in § [10.1-1441](#), if disclosure of such information 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.

10. Information on the site-specific location of rare, threatened, endangered, or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exclusion shall not apply to requests from the owner of the land upon which the resource is located.

11. Memoranda, graphics, video or audio tapes, production models, data, and information of a proprietary nature produced by or for or collected by or for the Virginia Lottery relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such information not been publicly released, published, copyrighted, or patented. Whether released, published, or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.

12. Information held by the Virginia Retirement System, acting pursuant to § [51.1-124.30](#), or a local retirement system, acting pursuant to § [51.1-803](#), or by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for post-retirement benefits other than pensions, acting pursuant to Article 8 (§ [15.2-1544](#) et seq.) of Chapter 15 of Title 15.2, or by the board of visitors of the University of Virginia, acting pursuant to § [23.1-2210](#), or by the board of visitors of The College of William and Mary in Virginia, acting pursuant to § [23.1-2803](#), or by the Virginia College Savings Plan, acting pursuant to § [23.1-704](#), relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would (i) reveal confidential analyses prepared for the board of visitors of the University of Virginia, prepared for the board of visitors of The College of William and Mary in Virginia, prepared by the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan, or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality of the future value of such ownership interest or the future financial performance of the entity and (ii) have an adverse effect on the value of the investment to be acquired, held, or disposed of by the retirement system, a local finance board or board of trustees, the board of visitors of the University of Virginia, the board of visitors of The College of William and Mary in Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested, or the present value of such investment.

13. Financial, medical, rehabilitative, and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ [51.5-53](#) et seq.) of Title 51.5.

14. Information held by the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts, or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such information has not been publicly released, published, copyrighted, or patented. This exclusion shall also apply when such information is in the possession of Virginia Commonwealth University.

15. Information held by the Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such information shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prevent the disclosure of information related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents.

16. Information related to the operation of toll facilities that identifies an individual, vehicle, or travel itinerary, including vehicle identification data or vehicle enforcement system information; video or photographic images; Social Security or

other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use.

17. Information held by the Virginia Lottery pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed. If the value of the prize won by the winner exceeds \$10 million, the information described in clause (ii) shall not be disclosed unless the winner consents in writing to such disclosure.

18. Information held by the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result.

19. Information pertaining to the planning, scheduling, and performance of examinations of holder records pursuant to the Virginia Disposition of Unclaimed Property Act (§ [55.1-2500](#) et seq.) prepared by or for the State Treasurer or his agents or employees or persons employed to perform an audit or examination of holder records.

20. Information held by the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams established pursuant to an ordinance of a local governing body that reveal the name, address, including e-mail address, telephone or pager numbers, or operating schedule of an individual participant in the program.

21. Information held by state or local park and recreation departments and local and regional park authorities concerning identifiable individuals under the age of 18 years. However, nothing in this subdivision shall operate to prevent the disclosure of information defined as directory information under regulations implementing the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, unless the public body has undertaken the parental notification and opt-out requirements provided by such regulations. Access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For such information of persons who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person who is the subject of the information may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such information for inspection and copying.

22. Information submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management that reveal names, physical addresses, email addresses, computer or internet protocol information, telephone numbers, pager numbers, other wireless or portable communications device information, or operating schedules of individuals or agencies, where the release of such information would compromise the security of the Statewide Alert Network or individuals participating in the Statewide Alert Network.

23. Information held by the Judicial Inquiry and Review Commission made confidential by § [17.1-913](#).

24. Information held by the Virginia Retirement System acting pursuant to § [51.1-124.30](#), a local retirement system acting pursuant to § [51.1-803](#) (hereinafter collectively referred to as the retirement system), or the Virginia College Savings Plan, acting pursuant to § [23.1-704](#) relating to:

- a. Internal deliberations of or decisions by the retirement system or the Virginia College Savings Plan on the pursuit of particular investment strategies, or the selection or termination of investment managers, prior to the execution of such investment strategies or the selection or termination of such managers, if disclosure of such information would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan; and
- b. Trade secrets provided by a private entity to the retirement system or the Virginia College Savings Plan if disclosure of such records would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan.

For the records specified in subdivision b to be excluded from the provisions of this chapter, the entity shall make a written request to the retirement system or the Virginia College Savings Plan:



- (1) Invoking such exclusion prior to or upon submission of the data or other materials for which protection from disclosure is sought;
- (2) Identifying with specificity the data or other materials for which protection is sought; and
- (3) Stating the reasons why protection is necessary.

The retirement system or the Virginia College Savings Plan shall determine whether the requested exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to prevent the disclosure of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses.

25. Information held by the Department of Corrections made confidential by former § [53.1-233](#).

26. Information maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ [2.2-4600](#) et seq.) and required to be provided by such participants to the Department to establish accounts in accordance with § [2.2-4602](#).

27. Personal information, as defined in § [2.2-3801](#), contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services Care Centers, except that access shall not be denied to the person who is the subject of the information.

28. Information maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § [2.2-2716](#) that reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license or other document issued under Chapter 3 (§ [46.2-300](#) et seq.) of Title 46.2 or the comparable law of another jurisdiction, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the information. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor, unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.

29. Information prepared for and utilized by the Commonwealth's Attorneys' Services Council in the training of state prosecutors or law-enforcement personnel, where such information is not otherwise available to the public and the disclosure of such information would reveal confidential strategies, methods, or procedures to be employed in law-enforcement activities or materials created for the investigation and prosecution of a criminal case.

30. Information provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft where the information would not be subject to disclosure by the entity providing the information. The entity providing the information to the Department of Aviation shall identify the specific information to be protected and the applicable provision of this chapter that excludes the information from mandatory disclosure.

31. Information created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § [17.1-100](#).

32. Information reflecting the substance of meetings in which (i) individual sexual assault cases are discussed by any sexual assault response team established pursuant to § [15.2-1627.4](#), (ii) individual child abuse or neglect cases or sex offenses involving a child are discussed by multidisciplinary child sexual abuse response teams established pursuant to § [15.2-1627.5](#), or (iii) individual cases of abuse, neglect, or exploitation of adults as defined in § [63.2-1603](#) are discussed by multidisciplinary teams established pursuant to §§ [15.2-1627.5](#) and [63.2-1605](#). The findings of any such team may be disclosed or published in statistical or other aggregated form that does not disclose the identity of specific individuals.

33. Information contained in the strategic plan, marketing plan, or operational plan prepared by the Virginia Economic Development Partnership Authority pursuant to § [2.2-2237.1](#) regarding target companies, specific allocation of resources and staff for marketing activities, and specific marketing activities that would reveal to the Commonwealth's competitors

for economic development projects the strategies intended to be deployed by the Commonwealth, thereby adversely affecting the financial interest of the Commonwealth. The executive summaries of the strategic plan, marketing plan, and operational plan shall not be redacted or withheld pursuant to this subdivision.

34. Information discussed in a closed session of the Physical Therapy Compact Commission or the Executive Board or other committees of the Commission for purposes set forth in subsection E of § 54.1-3491.

35. Information held by the Commonwealth of Virginia Innovation Partnership Authority (the Authority), an advisory committee of the Authority, or any other entity designated by the Authority, relating to (i) internal deliberations of or decisions by the Authority on the pursuit of particular investment strategies prior to the execution of such investment strategies and (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the Authority, if such disclosure of records pursuant to clause (i) or (ii) would have an adverse impact on the financial interest of the Authority or a private entity.

36. Personal information provided to or obtained by the Virginia Lottery in connection with the voluntary exclusion program administered pursuant to § 58.1-4015.1.

37. Personal information provided to or obtained by the Virginia Lottery concerning the identity of any person reporting prohibited conduct pursuant to § 58.1-4043.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, cc. [426](#), [690](#), [832](#); 2005, cc. [165](#), [508](#); 2007, cc. [406](#), [652](#), [660](#), [737](#), [739](#); 2008, cc. [16](#), [739](#); 2009, cc. [223](#), [827](#), [845](#); 2010, c. [300](#); 2011, cc. [827](#), [867](#); 2012, c. [726](#); 2013, cc. [199](#), [481](#), [554](#), [574](#); 2014, cc. [225](#), [808](#); 2015, cc. [38](#), [137](#), [549](#), [730](#); 2016, cc. [550](#), [620](#), [716](#), [729](#); 2017, cc. [587](#), [642](#), [778](#), [804](#), [824](#); 2018, cc. [58](#), [141](#); 2019, cc. [163](#), [170](#), [247](#), [300](#), [358](#), [729](#), [775](#); 2020, cc. [70](#), [587](#), [1164](#), [1169](#), [1218](#), [1227](#), [1246](#), [1256](#); 2021, Sp. Sess. I, cc. [344](#), [345](#).

### § 2.2-3705.8. Limitation on record exclusions

Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

1999, cc. [485](#), [518](#), [703](#), [726](#), [793](#), [849](#), [852](#), [867](#), [868](#), [881](#), § 2.1-342.01; 2000, cc. [66](#), [237](#), [382](#), [400](#), [430](#), [583](#), [589](#), [592](#), [594](#), [618](#), [632](#), [657](#), [720](#), [932](#), [933](#), [947](#), [1006](#), [1064](#); 2001, cc. [288](#), [518](#), [844](#), § 2.2-3705; 2002, cc. [87](#), [155](#), [242](#), [393](#), [478](#), [481](#), [499](#), [522](#), [571](#), [572](#), [633](#), [655](#), [715](#), [798](#), [830](#); 2003, cc. [274](#), [307](#), [327](#), [332](#), [358](#), [704](#), [801](#), [884](#), [891](#), [893](#), [897](#), [968](#); 2004, c. [690](#); 2017, c. [778](#).

### § 2.2-3706. Disclosure of law-enforcement and criminal records; limitations

A. Records required to be released. All public bodies engaged in criminal law-enforcement activities shall provide the following records when requested in accordance with the provisions of this chapter:

1. Adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation;
2. Information relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest; and
3. Records of completed unattended death investigations to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. For the purposes of this subdivision, "unattended death" means a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated, and "immediate family" means the decedent's personal representative or, if no personal representative has qualified, the decedent's next of kin in order of intestate succession as set forth in § [64.2-200](#).

B. Discretionary releases. The following records are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

1. Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence, relating to a criminal investigation or prosecution not required to be disclosed in accordance with § [2.2-3706.1](#);
2. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to Chapter 3.2 (§ [2.2-307](#) et seq.), and (iii) campus police departments of public institutions of higher education established pursuant to Article 3 (§ [23.1-809](#) et seq.) of Chapter 8 of Title 23.1;
3. Records of local law-enforcement agencies relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;
4. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment;
5. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;
6. All records of adult persons under (i) investigation or supervision by a local pretrial services agency in accordance with Article 5 (§ [19.2-152.2](#) et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision, or monitoring by a local community-based probation services agency in accordance with Article 9 (§ [9.1-173](#) et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by state probation and parole services in accordance with Article 2 (§ [53.1-141](#) et seq.) of Chapter 4 of Title 53.1;
7. Records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties;
8. Those portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. Nothing in this subdivision shall operate to allow the withholding of information concerning the overall costs or expenses associated with undercover operations or protective details;
9. Records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;
10. The identity of any victim, witness, or undercover officer, or investigative techniques or procedures. However, the identity of any victim or witness shall be withheld if disclosure is prohibited or restricted under § [19.2-11.2](#); and
11. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ [9.1-900](#) et seq.) of Title 9.1, including information obtained from state, local, and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § [9.1-913](#).

C. Prohibited releases. The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.

D. Noncriminal records. Public bodies (i) engaged in emergency medical services, (ii) engaged in fire protection services, (iii) engaged in criminal law-enforcement activities, or (iv) engaged in processing calls for service or other communications to an emergency 911 system or any other equivalent reporting system may withhold those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature where the release of such information would jeopardize the safety or privacy of any person. Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision B 9 of this section and subdivision 1 of § [2.2-3705.1](#), as applicable.

E. Records of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system shall be subject to the provisions of this chapter.

F. Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.

1999, cc. [703](#), [726](#), § 2.1-342.2; 2000, c. [227](#); 2001, c. [844](#); 2002, cc. [393](#), [715](#), [769](#), [830](#); 2004, cc. [685](#), [735](#); 2006, cc. [857](#), [914](#); 2007, c. [133](#); 2010, c. [627](#); 2011, cc. [798](#), [871](#); 2013, c. [695](#); 2016, cc. [184](#), [546](#); 2017, c. [828](#); 2018, c. [48](#); 2021, Sp. Sess. I, c. [483](#).

### **§ 2.2-3706.1. Disclosure of law-enforcement records; criminal incident information and certain criminal investigative files; limitations**

A. For purposes of this section:

"Immediate family" means the decedent's personal representative or, if no personal representative has qualified, the decedent's next of kin in order of intestate succession as set forth in § [64.2-200](#).

"Ongoing" refers to a case in which the prosecution has not been finally adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.

B. All public bodies engaged in criminal law-enforcement activities shall provide the following records and information when requested in accordance with the provisions of this chapter:

1. Criminal incident information relating to felony offenses contained in any report, notes, electronic communication, or other document, including filings through an incident-based reporting system, which shall include:

- a. A general description of the criminal activity reported;
- b. The date and time the alleged crime was committed;
- c. The general location where the alleged crime was committed;
- d. The identity of the investigating officer or other point of contact;
- e. A description of any injuries suffered or property damaged or stolen; and

f. Any diagrams related to the alleged crime or the location where the alleged crime was committed, except that any diagrams described in subdivision 14 of § [2.2-3705.2](#) and information therein shall be excluded from mandatory disclosure, but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law.

A verbal response as agreed to by the requester and the public body is sufficient to satisfy the requirements of this subdivision 1; and

2. Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence, relating to a criminal investigation or proceeding that is not ongoing.

C. The provisions of subsection B shall not apply if the release of such information:

1. Would interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner;
2. Would deprive a person of a right to a fair trial or an impartial adjudication;
3. Would constitute an unwarranted invasion of personal privacy;

4. Would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by a law-enforcement agency in the course of a criminal investigation, information furnished only by a confidential source;
5. Would disclose law-enforcement investigative techniques and procedures, if such disclosure could reasonably be expected to risk circumvention of the law; or
6. Would endanger the life or physical safety of any individual.

Nothing in this subsection shall be construed to authorize the withholding of those portions of such information that are unlikely to cause any effect listed herein.

D. Nothing in this section shall prohibit the disclosure of current anonymized, aggregate location and demographic data collected pursuant to § [52-30.2](#) or similar data documenting law-enforcement officer encounters with members of the public.

No photographic, audio, video, or other record depicting a victim or allowing for a victim to be readily identified, except for transcripts of recorded interviews between a victim and law enforcement, shall be released pursuant to subdivision B 2 to anyone except (i) the victim; (ii) members of the immediate family of the victim, if the victim is deceased; or (iii) the parent or guardian of the victim, if the victim is a minor.

E. In the event of a conflict between this section as it relates to requests made under this section and other provisions of law, the other provisions of law, including court sealing orders, that restrict disclosure of criminal investigative files, as defined in subsection B, shall control.

2021, Sp. Sess. I, c. [483](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**18VAC48-70-125. Referral for further action.**

In addition to the provisions of this chapter, any matter involving a violation of applicable laws or regulations of the board may be referred for further action by the board in accordance with the provisions of Chapter 23.3 (§ 54.1-2345 et seq.) of Title 54.1; Chapters 18 (§ 55.1-1800 et seq.), 19 (55.1-1900 et seq.), and 21 (§ 55.1-2100 et seq.) of Title 55.1 of the Code of Virginia; and the board's regulations.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**Part IV. Office of the Common Interest Community Ombudsman****18VAC48-70-130. Purpose, responsibilities, and limitations.**

The Office of the Common Interest Community Ombudsman shall carry out those activities as enumerated in § 54.1-2354.3 of the Code of Virginia.

**Statutory Authority**

§§ 54.1-2349 and 54.1-2354.4 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 28, Issue 19, eff. July 1, 2012; amended, Virginia Register Volume 36, Issue 6, eff. December 11, 2019.

**FORMS (18VAC48-70).**

[Common Interest Community Complaint Form, F491-CICCOMP-vs4 \(rev. 4/2022\).](#)

[Notice of Final Adverse Decision, F491-CICNOTE-vs3 \(eff. 4/2022\).](#)

[Waiver of Filing Fee Request Form, F491-CICFW-vs3 \(eff. 4/2022\).](#)

**Statutory Authority****Historical Notes**

Website addresses provided in the Virginia Administrative Code to documents incorporated by reference are for the reader's convenience only, may not necessarily be active or current, and should not be relied upon. To ensure the information incorporated by reference is accurate, the reader is encouraged to use the source document described in the regulation.

As a service to the public, the Virginia Administrative Code is provided online by the Virginia General Assembly. We are unable to answer legal questions or respond to requests for legal advice, including application of law to specific fact. To understand and protect your legal rights, you should consult an attorney.

Code of Virginia  
Title 54.1. Professions and Occupations  
Chapter 1. General Provisions

### **§ 54.1-108. Disclosure of official records.**

Official records of the Department of Professional and Occupational Regulation or the Department of Health Professions or any board named in this title shall be subject to the disclosure provisions of the Virginia Freedom of Information Act (§ [2.2-3700](#) et seq.), except for the following:

1. Examination questions, papers, booklets, and answer sheets, which may be disclosed at the discretion of the board administering or causing to be administered such examinations.
2. Applications for admission to examinations or for licensure, certification, registration, or permitting and the scoring records maintained by any board or by the Departments on individuals or applicants. However, this material may be made available during normal working hours for copying by the subject individual or applicant at his expense at the office of the Department or board that possesses the material.
3. Records of active investigations being conducted by the Departments or any board.

1979, c. 408, § 54-1.41; 1982, c. 207; 1988, c. 765; 1993, c. 499; 2017, c. [423](#).

Code of Virginia  
Title 55.1. Property and Conveyances  
Subtitle IV. Common Interest Communities  
Chapter 18. Property Owners' Association Act  
Article 1. General Provisions  
Article 3. Operation and Management of Association

**§ 55.1-1807. Statement of lot owner rights**

Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the association according to and subject to the provisions of § [55.1-1815](#), including records of all financial transactions;
2. The right to cast a vote on any matter requiring a vote by the association's membership in proportion to the lot owner's ownership interest, unless the declaration provides otherwise;
3. The right to have notice of any meeting of the board of directors, to make a record of any such meeting by audio or visual means, and to participate in any such meeting in accordance with the provisions of subsection G of § [55.1-1815](#) and § [55.1-1816](#);
4. The right to have (i) notice of any proceeding conducted by the board of directors or other tribunal specified in the declaration against the lot owner to enforce any rule or regulation of the association and (ii) the opportunity to be heard and represented by counsel at such proceeding, as provided in § [55.1-1819](#), and the right of due process in the conduct of that hearing; and
5. The right to serve on the board of directors if duly elected and a member in good standing of the association, unless the declaration provides otherwise.

The rights enumerated in this section shall be enforceable by any such lot owner pursuant to the provisions of § [55.1-1828](#).

2015, c. [286](#), § 55-509.3:2; 2018, c. [663](#); 2019, c. [712](#).

**§ 55.1-1815. Access to association records; association meetings; notice**

A. The association shall keep detailed records of receipts and expenditures affecting the operation and administration of the association. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C and so long as the request is for a proper purpose related to his membership in the association, all books and records kept by or on behalf of the association shall be available for examination and copying by a member in good standing or his authorized agent, including:

1. The association's membership list and addresses, which shall not be used for purposes of pecuniary gain or commercial solicitation; and
2. The actual salary of the six highest compensated employees of the association earning over \$75,000 and aggregate salary information of all other employees of the association; however, individual salary information shall not be available for examination and copying during the declarant control period.

Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.



C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the association documents or rules and regulations promulgated pursuant to § [55.1-1819](#);
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the board of directors held in accordance with subsection C of § [55.1-1816](#);
8. Documentation, correspondence, or management or board reports compiled for or on behalf of the association or the board by its agents or committees for consideration by the board in executive session; or
9. Individual lot owner or member files, other than those of the requesting lot owner, including any individual lot owner's or member's files kept by or on behalf of the association.

D. Books and records kept by or on behalf of an association shall be withheld from inspection and copying in their entirety only to the extent that an exclusion from disclosure under subsection C applies to the entire content of such books and records. Otherwise, only those portions of the books and records containing information subject to an exclusion under subsection C may be withheld or redacted, and all portions of the books and records that are not so excluded shall be available for examination and copying, provided that the requesting member shall be responsible to the association for paying or reimbursing the association for any reasonable costs incurred by the association in responding to the request for the books and records and review for redaction of the same.

E. Prior to providing copies of any books and records to a member in good standing under this section, the association may impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs of such materials and labor. Charges may be imposed only in accordance with a cost schedule adopted by the board of directors in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all members in good standing, and (iii) be provided to such requesting member at the time the request is made.

F. Notwithstanding the provisions of subsections B and C, all books and records of the association, including individual salary information for all employees and payments to independent contractors, shall be available for examination and copying upon request by a member of the board of directors in the discharge of his duties as a director.

G. Meetings of the association shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 14 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting, send to each member notice of the time, place, and purposes of such meeting. In the event of cancellation of any annual meeting of the association at which directors are elected, the seven-day notice of any subsequent meeting scheduled to elect such directors shall include a statement that the meeting is scheduled for the purpose of the election of directors.

Notice shall be sent by United States mail to all members at the address of their respective lots unless the member has provided to such officer or his agent an address other than the address of the member's lot. In lieu of sending such notice by United States mail, notice may instead be (i) hand delivered by the officer or his agent, provided that the officer or his agent certifies in writing that notice was delivered to the member, or (ii) sent to the member by electronic mail, provided

that the member has elected to receive such notice by electronic mail and, in the event that such electronic mail is returned as undeliverable, notice is subsequently sent by United States mail. Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (a) within 60 days from the conclusion of the meeting to which such minutes appertain or (b) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

H. Unless expressly prohibited by the governing documents, a member may vote at a meeting of the association in person, by proxy, or by absentee ballot. Such voting may take place by electronic means, provided that the board of directors has adopted guidelines for such voting by electronic means. Members voting by absentee ballot or proxy shall be deemed to be present at the meeting for all purposes.

1989, c. 679, § 55-510; 1991, c. 667; 1992, cc. 69, 71; 1993, cc. 365, 827; 1999, cc. [594](#), [654](#), [1029](#); 2000, cc. [905](#), [1008](#); 2001, c. [419](#); 2003, c. [442](#); 2004, c. [193](#); 2007, c. [675](#); 2008, cc. [851](#), [871](#); 2009, c. [665](#); 2011, c. [361](#); 2013, c. [275](#); 2014, c. [207](#); 2018, c. [663](#); 2019, cc. [368](#), [712](#); 2020, c. [592](#); 2021, Sp. Sess. I, cc. [9](#), [494](#).

### § 55.1-1816. Meetings of the board of directors

A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § [55.1-1815](#).

B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

A lot owner may make a request to be notified on a continual basis of any such meetings. Such request shall be made at least once a year in writing and include the lot owner's name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any lot owner requesting notice (i) by first-class mail or email in the case of meetings of the board of directors or (ii) by email in the case of meetings of any subcommittee or other committee of the board of directors.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the association's board of directors or any subcommittee or other committee of the board of directors conducting the meeting.

Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of an association's board of directors or subcommittee or other committee of the board of directors for a meeting shall be made available for inspection by the membership of the association at the same time such documents are furnished to the members of the board of directors or any subcommittee or committee of the board of directors.

Any member may record any portion of a meeting that is required to be open. The board of directors or subcommittee or other committee of the board of directors conducting the meeting may adopt rules (a) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (b) requiring the member recording the meeting to provide notice that the meeting is being recorded.

Except for the election of officers, voting by secret or written ballot in an open meeting shall be a violation of this chapter.

C. The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations adopted pursuant to such declaration for which a member or his family members, tenants, guests, or other invitees are responsible; or (iv) discuss and consider the personal liability of members to the association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the

motion and the stated purpose for the executive session shall be included in the minutes. The board of directors shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the board of directors or subcommittee or other committee of the board of directors, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion, or other action, which shall have its substance reasonably identified in the open meeting. The requirements of this section shall not require the disclosure of information in violation of law.

D. Subject to reasonable rules adopted by the board of directors, the board of directors shall provide a designated period during each meeting to allow members an opportunity to comment on any matter relating to the association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the board of directors may limit the comments of members to the topics listed on the meeting agenda.

1999, c. [1029](#), § 55-510.1; 2000, c. [905](#); 2001, c. [715](#); 2003, c. [404](#); 2004, c. [333](#); 2005, c. [353](#); 2019, c. [712](#); 2021, Sp. Sess. I, cc. [9](#), [494](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

## Code of Virginia

## Title 55.1. Property and Conveyances

## Subtitle IV. Common Interest Communities

## Chapter 19. Virginia Condominium Act

## Article 2. Creation, Alteration, and Termination of Condominiums

## Article 3. Management of Condominium

**§ 55.1-1939. Statement of unit owner rights**

Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the unit owners' association according to and subject to the provisions of § [55.1-1945](#), including records of all financial transactions;
2. The right to cast a vote on any matter requiring a vote by the unit owners' association membership in proportion to the unit owner's ownership interest, except to the extent that the condominium instruments provide otherwise;
3. The right to have notice of any meeting of the executive board, to make a record of such meetings by audio or visual means, and to participate in such meeting in accordance with the provisions of § [55.1-1949](#);
4. The right to have (i) notice of any proceeding conducted by the executive board or other tribunal specified in the condominium instruments against the unit owner to enforce any rule or regulation of the unit owners' association and (ii) the opportunity to be heard and represented by counsel at the proceeding, as provided in § [55.1-1959](#), and the right of due process in the conduct of that hearing; and
5. The right to serve on the executive board if duly elected and a member in good standing of the unit owners' association, except to the extent that the condominium instruments provide otherwise.

The rights enumerated in this section shall be enforceable by any unit owner pursuant to the provisions of § [55.1-1915](#).

2015, c. [286](#), § 55-79.72:3; 2019, c. [712](#).

**§ 55.1-1945. Books, minutes, and records; inspection**

A. The declarant, managing agent, unit owners' association, or person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the books and records of the unit owners' association or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive board held pursuant to subsection C of § [55.1-1949](#);
8. Documentation, correspondence or management or executive board reports compiled for or on behalf of the unit owners' association or the executive board by its agents or committees for consideration by the executive board in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

D. Books and records kept by or on behalf of a unit owners' association shall be withheld from examination and copying in their entirety only to the extent that an exclusion from disclosure under subsection C applies to the entire content of such books and records. Otherwise, only those portions of the books and records containing information subject to an exclusion under subsection C may be withheld or redacted, and all portions of the books and records that are not so excluded shall be available for examination and copying, provided that the requesting member shall be responsible to the association for paying or reimbursing the association for any reasonable costs incurred by the association in responding to the request for the books and records and review for redaction of the same.

E. Prior to providing copies of any books and records, the unit owners' association may impose and collect a charge, not to exceed the reasonable costs of materials and labor, incurred to provide such copies. Charges may be imposed only in accordance with a cost schedule adopted by the executive board in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all unit owners in good standing, and (iii) be provided to such requesting unit owner at the time the request is made.

1980, c. 738, § 55-79.74:1; 1985, c. 75; 1989, c. 57; 1990, c. 662; 1992, c. 72; 1994, c. [463](#); 1999, c. [594](#); 2000, cc. [906](#), [919](#); 2001, c. [419](#); 2011, cc. [334](#), [361](#), [605](#); 2014, c. [207](#); 2018, c. [663](#); 2019, c. [712](#); 2020, c. [592](#).

#### **§ 55.1-1949. Meetings of unit owners' association and executive board**

A. 1. Meetings of the unit owners' association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 21 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting, send to each unit owner notice of the time, place, and purposes of such meeting. In the event of cancellation of any annual meeting of the unit owners' association at which directors are elected, the seven-day notice of any subsequent meeting scheduled to elect such directors shall include a statement that the meeting is scheduled for the purpose of the election of directors.

2. Notice shall be sent by United States mail to all unit owners of record at the address of their respective units, unless the unit owner has provided to such officer or his agent an address other than the address of the unit, or notice may be hand delivered by the officer or his agent, provided that the officer or his agent certifies in writing that notice was delivered to the person of the unit owner.

3. In lieu of delivering notice as specified in subdivision 2, such officer or his agent may send notice by electronic means if consented to by the unit owner to whom the notice is given, provided that the officer or his agent certifies in writing that notice was sent and, if such electronic mail was returned as undeliverable, notice was subsequently sent by United States mail.

B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § [55.1-1945](#).

2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

A unit owner may make a request to be notified on a continual basis of any such meetings, which request shall be made at least once a year in writing and include the unit owners' name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any unit owner requesting notice (i) by first-class mail or email in the case of meetings of the executive board or (ii) by email in the case of meetings of any subcommittee or other committee of the executive board or of a subcommittee or other committee of the unit owners' association.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the (i) executive board or any subcommittee or other committee of such board or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.

3. Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of the executive board or subcommittee or other committee of the executive board for a meeting shall be made available for inspection by the membership of the unit owners' association at the same time such documents are furnished to the members of the executive board.

4. Any unit owner may record any portion of a meeting required to be open. The executive board or subcommittee or other committee of the executive board conducting the meeting may adopt rules (i) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (ii) requiring the unit owner recording the meeting to provide notice that the meeting is being recorded.

5. Voting by secret or written ballot in an open meeting is a violation of this chapter except for the election of officers.

C. The executive board or any subcommittee or other committee of the executive board may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation, and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant to such condominium instruments for which a unit owner, his family members, tenants, guests, or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The executive board shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the executive board or subcommittee or other committee of the executive board, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion, or other action, which shall have its substance reasonably identified in the open meeting. The requirements of this section do not require the disclosure of information in violation of law.

D. Subject to reasonable rules adopted by the executive board, the executive board shall provide a designated period during each meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the executive board may limit the comments of unit owners to the topics listed on the meeting agenda.

1974, c. 416, § 55-79.75; 1978, c. 363; 1989, c. 58; 1990, c. 662; 1992, c. 72; 2000, c. [906](#); 2001, c. [715](#); 2003, cc. [404](#), [405](#), [442](#); 2005, c. [353](#); 2007, c. [675](#); 2013, c. [275](#); 2019, c. [712](#); 2021, Sp. Sess. I, cc. [9](#), [494](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board opinion.  
DRAFT AGENDA

# VIRGINIA ACTS OF ASSEMBLY -- 2022 SESSION

## CHAPTER 244

*An Act to direct the Common Interest Community Board to review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision; report.*

[S 693]

Approved April 8, 2022

### **Be it enacted by the General Assembly of Virginia:**

**1.** § 1. *That the Common Interest Community Board (the Board) shall review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia. In conducting its review, the Board shall (i) solicit and consider public comments; (ii) identify pertinent statutory and regulatory amendments necessary to allow for the submission of audio and video recordings in accordance with the provisions of this act; (iii) identify any impediments to the submission of audio and video recordings, including information technology limitations and compliance with the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) and other public records laws; and (iv) consider whether allowing the submission of audio and video recordings pursuant to the provisions of this act would assist the Common Interest Community Ombudsman in the performance of his duties with respect to any notice of final adverse decision.*

*The Board shall report its findings and any legislative, regulatory, policy, or budgetary recommendations to the Secretary of Labor and the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology on or before November 1, 2022.*



22104187D

**SENATE BILL NO. 693**

Offered January 20, 2022

A *BILL to amend and reenact § 54.1-2354.4 of the Code of Virginia, relating to common interest communities; association complaint procedures.*

Patron—Petersen

Referred to Committee on General Laws and Technology

**Be it enacted by the General Assembly of Virginia:**

**1. That § 54.1-2354.4 of the Code of Virginia is amended and reenacted as follows:**

**§ 54.1-2354.4. Association complaint procedures; final adverse decisions.**

A. The Board shall establish by regulation a requirement that each association shall establish reasonable procedures for the resolution of written complaints from the members of the association and other citizens. Each association shall adhere to the written procedures established pursuant to this subsection when resolving association member and citizen complaints. The procedures shall include the following:

1. A record of each complaint shall be maintained for no less than one year after the association acts upon the complaint.

2. Such association shall provide complaint forms or written procedures to be given to persons who wish to register written complaints. The forms or procedures shall include the address and telephone number of the association or its common interest community manager to which complaints shall be directed and the mailing address, telephone number, and electronic mailing address of the Office. The forms and written procedures shall include a clear and understandable description of the complainant's right to give notice of adverse decisions pursuant to this section.

B. A complainant may give notice to the Board of any final adverse decision in accordance with regulations promulgated by the Board. The notice shall be filed within 30 days of the final adverse decision, shall be in writing on forms prescribed by the Board, shall include copies of all records pertinent to the decision, *including any video or audio recordings*, and shall be accompanied by a \$25 filing fee. The fee shall be collected by the Director and paid directly into the state treasury and credited to the Common Interest Community Management Information Fund pursuant to § 54.1-2354.2. The Board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the member. The Director shall provide a copy of the written notice to the association that made the final adverse decision.

C. The Director or his designee may request additional information concerning any notice of final adverse decision from the association that made the final adverse decision. The association shall provide such information to the Director within a reasonable time upon request. If the Director upon review determines that the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board, the Director may, in his sole discretion, provide the complainant and the association with information concerning such laws or regulations governing common interest communities or interpretations thereof by the Board. The determination of whether the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board shall be a matter within the sole discretion of the Director, whose decision is final and not subject to further review. The determination of the Director shall not be binding upon the complainant or the association that made the final adverse decision.

INTRODUCED

SB693

## Department of Planning and Budget 2022 Fiscal Impact Statement

**1. Bill Number:** SB693

House of Origin     Introduced     Substitute     Engrossed  
 Second House     In Committee     Substitute     Enrolled

**2. Patron:** Petersen

**3. Committee:** Passed Senate

**4. Title:** Common interest communities; association complaint procedures.

**5. Summary:** Clarifies that audio and video recordings are considered records and shall be included with any final adverse decision provided by a complainant to the Common Interest Community Board.

**6. Budget Amendment Necessary:** Yes. Item 369, as Introduced.

**7. Fiscal Impact Estimates:** Preliminary.

**7a. Expenditure Impact:**

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>
2023	\$122,883	1	09222	\$117,883	1	02590
2024	\$115,625	1	09222	\$115,625	1	02590
2025	\$115,625	1	09222	\$115,625	1	02590
2026	\$115,625	1	09222	\$115,625	1	02590
2027	\$115,625	1	09222	\$115,625	1	02590
2028	\$115,625	1	09222	\$115,625	1	02590

**8. Fiscal Implications:** *This revised fiscal impact statement reflects updated impact estimates from the Department of Professional and Occupational Regulation (DPOR)*

This bill increases the administrative responsibilities of DPOR and the Office of the Common Interest Community Ombudsman by requiring that audio and video recordings be considered records as provided by a complainant when giving notice of a final adverse decision. Based on current volumes of complaints, DPOR estimates that approximately 50 complaints a year will include audio/video recordings of board and other meetings, interactions with board members, managers, and others, along with accompanying phone call records. DPOR estimates up to 3,000 hours a year of audio and video recordings will need to be reviewed from both the complaint perspective and to comply with the Freedom of Information Act (FOIA), and that additional nongeneral fund appropriation and positions will be required.

According to DPOR, due to privacy issues and potential liability resulting from the recordings becoming public record, especially recordings that could include private meetings

among private citizens, some of whom cannot be recorded due to their federal security positions, and other scenarios that the departments anticipates could compromise information security, many of the recordings may include information that will be required to be redacted. DPOR anticipates needing one pay band 4 classified position to allow for the review of recordings by the Ombudsman's Office. DPOR also anticipates needing one pay band 4 classified IT Specialist to review and potentially edit the recordings.

Based on the mid-point for the band 4 salary range, DPOR estimates that additional nongeneral fund appropriation in the amount of \$192,216 in FY2023 (assuming 23 pay periods) and \$201,700 annually beginning in FY2024, will be required for salary and benefits. Additionally, in FY2023, DPOR anticipates needing to purchase furniture and equipment for the new positions at an estimated one-time cost of \$14,000. Other operating costs beginning in FY2023 and recurring in future years include telephone, employee development, computer operating support, and supplies. These costs are estimated at \$29,550 each year. One position each would be required in Fund 02590 and 09222.

According to DPOR, the agency will need to establish a secure portal for submitting the audio or video recordings and add electronic storage capabilities to retain the recordings according to record retention policies and applicable privacy requirements. DOLI estimates the one-time cost of establishing the portal and additional electronic storage to be approximately \$5,000 in FY2023.

**9. Specific Agency or Political Subdivisions Affected:** Department of Professional and Occupational Regulation.

**10. Technical Amendment Necessary:** No.

**11. Other Comments:** None.

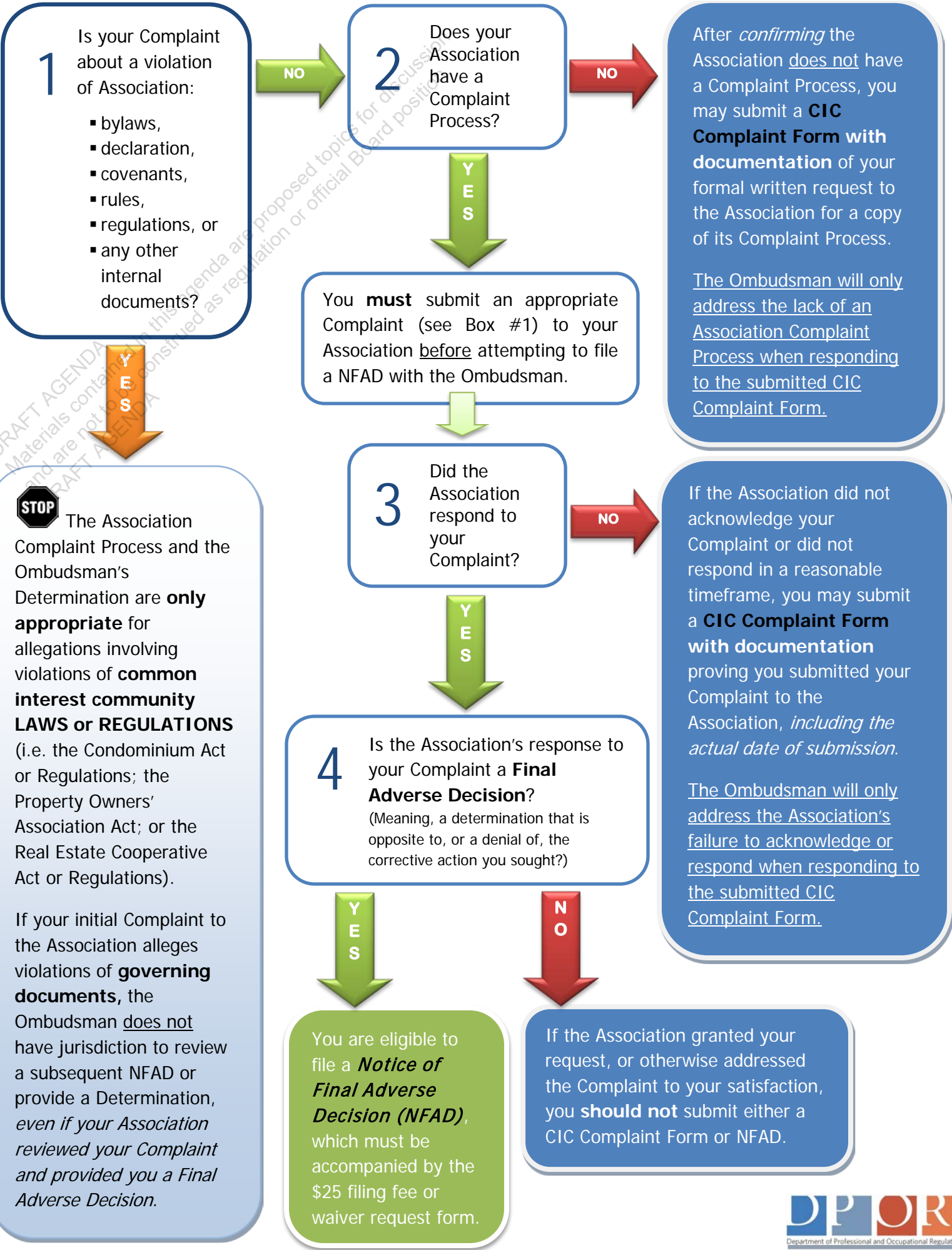
## Background on Creation of CIC Ombudsman Office

In April 2008, the General Assembly passed, and the Governor approved, [Chapter 815](#) of the 2008 Acts of Assembly. This legislation established the Common Interest Community Board, established a licensure requirement for common interest community managers, and made other significant changes to common interest community statutes. The legislation also created the Office of the Common Interest Community Ombudsman (“CICO”).

The legislation, which was a recommendation of the Virginia Housing Commission, sought to address the significant number of constituent complaints received by legislators regarding homeowners’ associations by establishing a state entity with the authority to resolve such complaints. The CICO replaced the Community Association Liaison.

The CICO would be required to be a licensed attorney. Among the CICO’s duties was to “[a]ssist members in understanding rights and the processes available to them according to the laws and regulations governing common interest communities...” and “...assist members in understanding the rights and processes available under the laws and regulations governing common interest communities and provide referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members...”

In addition, the legislation charged the new board to establish a requirement for associations to develop a complaint procedure for association members and other citizens to resolve complaints, and created a mechanism for association members to file notices of final adverse decision with the Department in order to receive a final determination. The CICO would be responsible for receiving notices of final adverse determination. The legislation authorizes the Director of the Department, or his designee, to determine whether the final adverse decision of may be in conflict with laws or regulations governing common interest communities or interpretations by the Common Interest Community Board of the same. The determination is not binding upon the complainant or the association that made the final adverse decision.



## Notices of Final Adverse Determination (NFAD)<sup>1</sup>

Reporting Period <sup>2</sup>	2017-2018	2018-2019	2019-2020	2020-2021
<b>NFADs Received</b>	32	33	35	63
<b>NFADs by Topic (% of Total Complaints)</b>	<ul style="list-style-type: none"> <li>• Books &amp; Records (41%)</li> <li>• Meeting Notice (13%)</li> <li>• Assessments (13%)</li> <li>• Distribution of Information (10%)</li> <li>• Adoption/Enforcement of Rules (5%)</li> <li>• Association Charges (5%)</li> <li>• Complaint Process (5%)</li> <li>• Reserves (≈3%)</li> <li>• Fidelity Bond (≈3%)</li> <li>• Disclosure Packet (≈3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (21%)</li> <li>• Books &amp; Records (21%)</li> <li>• Resale/Disclosure (9%)</li> <li>• Right to Vote (6%)</li> <li>• Distribution of Information (6%)</li> <li>• Executive Session (6%)</li> <li>• Due Process (6%)</li> <li>• Reserves (6%)</li> <li>• Open Forum (3%)</li> <li>• Association Charges (3%)</li> <li>• Annual Report (3%)</li> <li>• Violation of Declaration (3%)</li> <li>• Minutes (3%)</li> <li>• Agenda Packet (3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (32%)</li> <li>• Books &amp; Records (18%)</li> <li>• Communication (13%)</li> <li>• Executive Session (11%)</li> <li>• Agenda Packets (8%)</li> <li>• Work Sessions/Informal Meetings (5%)</li> <li>• Reserve Study (≈3%)</li> <li>• Disclosure Packet (≈3%)</li> <li>• Complaint Procedure (≈3%)</li> <li>• Association Charges (≈3%)</li> <li>• Pesticide Application (≈3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (25%)</li> <li>• Books &amp; Records (25%)</li> <li>• Communication (16%)</li> <li>• Reserves/Budget (13%)</li> <li>• Use of Technology (4%)</li> <li>• Pesticide Application (4%)</li> <li>• Resale/Disclosure (4%)</li> <li>• Upkeep of Condominium (2%)</li> <li>• Compliance w/ Governing Documents (2%)</li> <li>• Association Charges (2%)</li> <li>• Member Meetings (2%)</li> <li>• Right to Serve on Board (1%)</li> </ul>

<sup>1</sup> Information obtained from CIC Ombudsman Annual Reports for [2017-2018](#), [2018-2019](#), [2019-2020](#), and [2020-2021](#).

<sup>2</sup> Reporting periods are as follows: 2017-2018 (11/26/17 to 11/25/18); 2018-2019 (11/26/18 to 11/25/19); 2019-2020 (11/27/19 to 11/26/20); and 2020-2021 (11/27/20 to 11/26/21)

### CICO Determinations<sup>3</sup>

Period <sup>4</sup>	2017-2018	2018-2019	2019-2020	2020-2021
<b>Determinations Issued</b>	27	42	17	33
<b>Topic Areas (# Cases w/ Issue)</b>	<ul style="list-style-type: none"> <li>• Meetings &amp; Minutes (10)</li> <li>• Notice &amp; Access (10)</li> <li>• Books &amp; Records (8)</li> <li>• Governing Documents (5)</li> <li>• Assessments &amp; Dues (4)</li> <li>• Budget &amp; Reserves (4)</li> <li>• Elections (4)</li> <li>• Governance &amp; Management (4)</li> <li>• Common Areas (3)</li> <li>• Communication Methods (3)</li> <li>• Complaint Procedure (2)</li> <li>• Due Process (2)</li> <li>• Rules &amp; Regulations (2)</li> <li>• Architectural (1)</li> <li>• Bond &amp; Insurance (1)</li> <li>• Disclosure Packet (1)</li> <li>• “Homeowners Bill of Rights” (1)</li> <li>• Maximum Allowable Fees (1)</li> <li>• Ombudsman Regulations (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Books &amp; Records (15)</li> <li>• Meetings &amp; Minutes (14)</li> <li>• Notice &amp; Access (12)</li> <li>• Governance &amp; Management (9)</li> <li>• Governing Documents (9)</li> <li>• Communication Methods (6)</li> <li>• Assessments &amp; Dues (3)</li> <li>• Budget &amp; Reserves (3)</li> <li>• Due Process (3)</li> <li>• Maintenance &amp; Repairs (3)</li> <li>• Association Charges (2)</li> <li>• Disclosure Packet (2)</li> <li>• CIC Board Regulations (1)</li> <li>• Complaint Procedure (1)</li> <li>• Resale Certificate (1)</li> <li>• Voting (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice &amp; Access (10)</li> <li>• Meetings &amp; Minutes (8)</li> <li>• Books &amp; Records (7)</li> <li>• Governance &amp; Management (5)</li> <li>• Complaint Procedure (5)</li> <li>• Communication Methods (4)</li> <li>• Architectural Standards (2)</li> <li>• Association Charges (2)</li> <li>• Budget &amp; Reserves (2)</li> <li>• Disclosure Packet (2)</li> <li>• Assessments &amp; Dues (1)</li> <li>• Capital Components (1)</li> <li>• Common Areas (1)</li> <li>• Insurance (1)</li> <li>• Rules &amp; Regulations (1)</li> <li>• Statement of Owner Rights (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Books &amp; Records (14)</li> <li>• Meetings &amp; Minutes (13)</li> <li>• Notice &amp; Access (13)</li> <li>• Budget &amp; Reserves (6)</li> <li>• Complaint Procedure (6)</li> <li>• Distribution of Information (5)</li> <li>• Communication Methods (4)</li> <li>• Resale Certificate (3)</li> <li>• Due Process (2)</li> <li>• Non-Stock Corp. Act – Action w/o Meeting (2)</li> <li>• Pesticide (2)</li> <li>• Recording (2)</li> <li>• Reserve Study (2)</li> <li>• Agenda Packet (1)</li> <li>• Maintenance &amp; Repairs (1)</li> <li>• Ombudsman Regulations (1)</li> </ul>

<sup>3</sup> Information derived from website for Office of Common Interest Community Ombudsman (<https://www.dpor.virginia.gov/CIC-Ombudsman>).

<sup>4</sup> Period is Virginia state fiscal year (July 1 to June 30).

### File Report

2022-01153

Section: Disciplinary

Priority: 0

#### Main Complainant

**STEPHEN EISENBERG**

Home : 601 NORTH FAIRFAX STREET  
UNIT #307

ALEXANDRIA, VA 22314

Email/Internet Address: stephen.eisenberg@comcast.net

Current  Licensee  Mailing

Location of Offense  Job Site

#### File Summary:

First Violation Contract

Date Of Offense: 00/00/0000

Docketed: 12/02/2021

Criminal Action

Compensation Amount:

Closed: 01/24/2022

Investigator: HEATHER GILLESPIE

Region: Northern Virginia

Stage: Common Interest Community Ombudsman

Status: Closed

License Type: CIC Associations

Class: Consumer complaint

Findings: Closed by Staff - Other





# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin  
Governor

January 21, 2022

G. Bryan Slater  
Secretary of Labor

Demetrios J. Melis  
Director

**Complainant:** Stephen Eisenberg  
**Association:** The Oronoco Association  
**File Number:** 2022-01153

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*The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.*

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## Complaint

The Complainant submitted a complaint to the Association dated September 13, 2021. The Association provided a response to the association complaint dated November 23, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 2, 2021.

## Authority

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §54.1-2354.4 (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, "applicable laws and regulations" pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered.

This Determination is final and not subject to further review.

### Determination

Additional documents were included with the NFAD that were not, according to the Association, included with the original complaint submitted to the Association. Several memorandums were also included that were not part of the original complaint as evidenced by their date. None of these additional documents or memorandums will be considered for this Determination. The Regulations that govern the complaint process do not provide for the submission of additional documents outside those set forth in the Regulations and this office has never utilized such additional documents since it provides an unfair advantage to the party that submitted them.

The Complainant has alleged that the Association is in violation of §55.1-1949(B)(1)<sup>1</sup> of the Condominium Act. The Complainant alleges that the executive board communicated through informal meetings, casual discussions, and similar activities rather than holding formal and properly called Board meetings.

The Complainant also alleges that the Association improperly withheld association records from unit owners when it denied him documents pertaining to a forensic audit examination. This request was denied via email by one board member on May 25, 2020 and another, also by email, on September 21, 2021. A failure to provide

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<sup>1</sup> B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

access to or copies of association books and records may be a violation of 55.1-1945<sup>2</sup> of the Condominium Act.

The Complainant requested that the Association hold a formal meeting to consider and grant him his request. He further requested that if he is not provided the documents, the Association adhere to its association complaint procedure and provide an in-person hearing rather than a virtual one and that a neutral, professionally qualified recorder take minutes. The Complainant also asks that the Board recuse itself from the

<sup>2</sup> A. The declarant, managing agent, unit owners' association, or person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the books and records of the unit owners' association or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive board held pursuant to subsection C of § 55.1-1029;
8. Documentation, correspondence or management or executive board reports compiled for or on behalf of the unit owners' association or the executive board by its agents or committees for consideration by the executive board in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

hearing due to conflicts of interest and that unit owners be appointed to review the matter instead. Finally, the Complainant asks that the Board cease communicating among themselves outside of meetings, and that meetings be formally carried out as required by law and policy. He specifically asks that the Board not use work sessions or other informal gatherings to circumvent open meeting requirements, and that duties of the Board be carried out by the Board and not individual directors.

The Association responded to the complaint by noting that the documents requested were not a forensic audit but instead were a work product of a billing review. The Association wrote that there was a dispute between the Association and the Declarant at the time the documents were requested, and the arbitrator was considering "the issue of attorneys' fees, as well as their reasonableness." The Association said, "The work product was withheld from the Declarant based upon the work-product privilege. Thus, the requested documents were properly withheld under Virginia Code §55.1-1945(C)(3)." The Association further wrote that both parties to the dispute have recently asked for dismissal and the Board of Directors announced the requested documents will be transferred to the Association's managing agent and will be available for inspection.

Regarding the allegation that the Board of Directors has met improperly, the Association stated that "the Board of Directors has regularly and continuously made all of its decisions at open Board of Directors meetings noticed and scheduled in accordance with Virginia Code §55.1-1949." The Association noted that the individual Board member responses to the Complainant's emails regarding the requested documents were simply "restating positions repeatedly discussed by the Board of Directors in open meetings and decisions made by the Board of Directors in open meetings."

It appears that the Association intends to make, or has already made, the requested documents available to the Complainant and all other owners in good standing. Determining whether the Association should have done so sooner, or even a year ago when the documents were originally requested is not something this office can do, since the Association has claimed an exclusion under §55.1-1945(C)(3). This office cannot determine what is or is not appropriate for exclusion under this statute. Determining what constitutes privileged information or work product does not fall under common interest community law. Therefore, this office can only accept an association's conclusion that a document or documents fall under the named exclusion.

As for the allegation that the Board was not holding meetings in accordance with the requirements under §55.1-1949, there is not sufficient evidence for this office to determine that such a violation of the law has occurred. The Association has countered the allegation by saying that all meetings have complied with the law and that the information passed on in emails was a result of decisions made in properly noticed meetings. I would note that association boards do not operate in a vacuum and there are times when board members will gather, communicate or otherwise share information, but they are not necessarily discussing or transacting the business of the association and thus not in violation of the law.

As to the requests from the Complainant, it appears a formal meeting was held to review his complaint. Requesting an in-person meeting over a virtual or electronic meeting is not a legal issue, but instead a preference and a decision that is up to the Association. Asking that a neutral, professionally qualified recorder take minutes is not required by common interest community law, nor is there a requirement under common interest community law that unit owners review complaints rather than executive boards. As for a cessation in communication outside of meetings among the executive board members, such a request is not required by law. What is required is that executive boards provide notice of all board meetings, to include committee and sub-committee meetings. Executive board members will always have the right to communicate outside a meeting if they are not discussing or transacting the business of the association. Executive boards may also have the right to make decisions outside of meetings if done so in a way that comports with the association's governing documents and any applicable law.

#### Required Actions

If the Association has not provided the Complainant the documents he requested, I would ask that they do so within the next fourteen days, to the extent provided under the applicable law.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
The Oronoco Association

2022 -  
01153

1/21/22

December 1, 2021

Department of Professional and Occupational Regulation  
Office of the Common Interest Community Ombudsman  
9960 Maryland Drive, Suite 400  
Richmond, Virginia 23233-1485

SUBJECT: Complaint Submission

Dear Madam or Sir:

Enclosed herewith is a Common Interest Community (CIC) Complaint Form accompanied by a check in the amount of \$25.00 and a Notice of Final Determination of Complaint (Decision) (n.b. although the Decision is dated November 23, 2021, it was first received by the complainant on November 29, 2021 by email, not certified mail) from an action taken by the board of directors (Board) of The Oronoco Condominium Association (Association) located at 601 North Fairfax Street, Alexandria, Virginia 22314.

Additionally, enclosed to amplify the circumstances supporting this application for review are three memoranda. The first provides a factual statement providing the context of the situation and the Board's actions. The second is a statement of legal points and authorities supporting the complaint's positions (Exhibit #8). The third memorandum provides an analysis of statements made in the Decision (Exhibit #11).

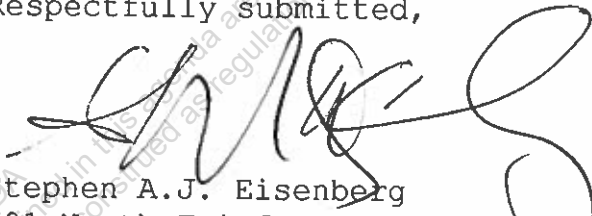
The grievant alleges that the Board wrongfully denied a request by the complainant for a document contained within the records of the Association to which he contends he was rightfully entitled to view.

Further, the complainant alleges that on divers occasions the Board did not adhere to law or Association policy in carrying out its duties and responsibilities. Notably, in one instance among others, the Board denied the right of the complainant, one established by Association policy, to have a neutral body of unit owners hear the complainant's grievance and adjudicate his rights.

The complainant by virtue of the Board's action has denied his right to have access to the Association document he has requested or alternatively, in its Decision has left the complainant in an ambiguous position with regard to whether he is in fact barred from access to the document he seeks.

Thank you for your consideration of this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Eisenberg', written in a cursive style.

Stephen A.J. Eisenberg  
601 North Fairfax Street #307  
Alexandria, Virginia 22314-2078

Enclosures  
as



Department of Professional and Occupational Regulation  
 Department of Professional and Occupational Regulation  
 9960 Mayland Drive, Suite 400  
 Richmond, VA 23233-1485  
[cicbudsman@dpor.virginia.gov](mailto:cicbudsman@dpor.virginia.gov)  
[www.dpor.virginia.gov](http://www.dpor.virginia.gov)

Office Use Only	
<input checked="" type="checkbox"/>	\$25 Received
Staff Initials	<i>JS</i>

12/2/21  
 Rec'd

Office of the Common Interest Community Ombudsman  
**NOTICE OF FINAL ADVERSE DECISION**  
 Fee \$25.00\*

**NOTE:** The Department cannot guarantee anonymity. By law, all Notices of Final Adverse Decision received by the Department are subject to public disclosure once a case is closed. Anonymous Notices of Final Adverse Decision will not be accepted.

**SECTION I - REQUIRED INFORMATION**

COMPLAINANT INFORMATION

Name Stephen Eisenberg

Mailing Address 601 North Fairfax Street Unit #307

Alexandria VA 22314-2078  
 City State Zip Code

Telephone Numbers 703.685.9646 n/a n/a  
 Home Business Cell

Email Address stephen.eisenberg@comcast.net

City/County City of Alexandria

Date of Final Adverse Decision 11/23/21; rec'd 11/29/21

ASSOCIATION INFORMATION

Association Name The Oronoco Association

Contact Name Lowell Jacoby, Secretary of the Board of Directors

Address 601 North Fairfax Street  
Unit # 607

Alexandria VA 22314  
 City State Zip Code

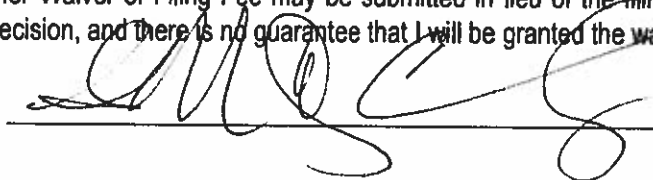
Telephone Numbers n/a 571-332-3205 (H)703-519-5286  
 Business Cell Other

Email Address jacobyle@aol.com

Management Company\* Theoharis Management, LLC  
 \* if applicable

**SECTION II - SIGNATURE**

I understand that this Notice of Final Adverse Decision will not be complete until I have submitted all required documents and the filing fee. A Request for Waiver of Filing Fee may be submitted in lieu of the filing fee, but this will delay review of my Notice of Final Adverse Decision, and there is no guarantee that I will be granted the waiver.

Signature  Date 12/1/2021

\* A Complainant must submit a \$25 filing fee or a completed Waiver of Filing Fee Request Form.



**THE ORONOCO CONDOMINIUM UNIT OWNERS ASSOCIATION**

November 23, 2021

VIA CERTIFIED MAIL/  
RETURN RECEIPT REQUESTED & EMAIL

Stephen Eisenberg, Esquire  
601 North Fairfax Street  
Unit #307  
Alexandria, Virginia 22314

Re: The Oronoco Condominium  
License No. 0517060281  
Notice of Final Determination of Complaint

Dear Mr. Eisenberg:

The Board of Directors of The Oronoco Condominium Unit Owners Association (the "Association") is in receipt of a written complaint dated September 13, 2021. The Board of Directors promptly acknowledged receipt of the complaint, and on September 15, 2021, requested that you provide additional information relating to your complaint. Upon receiving your further submissions, the Board of Directors took up the complaint at its September 27, 2021 Board of Directors meeting, to which you were provided notice (acknowledged by you on September 22, 2021), but you opted not to attend. On October 1, 2021, the Board of Directors provided you two options with respect to your complaint: (a) decide the merits of the complaint on the papers, or (b) provide you the opportunity to discuss the merits of your complaint at the next Board of Directors meeting. On October 6, 2021, you elected to discuss the merits of the complaint with the Board of Directors. Accordingly, on October 6, 2021, the Board of Directors agreed to reschedule the hearing on your complaints to its next regularly scheduled Board of Directors meeting. On November 12, 2021, the Board of Directors notified you that the complaint would be discussed at the Board of Directors November 22, 2021 meeting. On November 18, 2021, you advised the Board of Directors that you would not be attending the November 22, 2021 meeting. On November 19, 2021, you advised the Board of Directors that it should proceed to base its decision on your written submissions. Accordingly, the complaint was considered at the November 22, 2021 Board of Directors meeting. This will provide you with the Board of Directors' final determination regarding the complaint.

Your complaint can be broken into two distinct parts:

First, you contend the Board of Directors violated Va. Code §55.1-1945 by not providing you "forensic audit" documents concerning legal fees incurred in a pending matter between the Association and The Oronoco Condominium's Declarant. This was a renewal of a request dating

back to May, 2020. In your complaint you write ...[o]n May 28, 2020 I requested the subject document. The request was denied. At the time of the denial I was advised that upon conclusion of the ADR [the dispute between the Association and the Declarant] the report would be furnished to me. We are for all intents and purposes there, accordingly, I hereby renew my request for the subject document." The Board of Directors rejected this request because the ADR was not completed.

Second, you assert that the Board of Directors met through informal communications as opposed to open Board of Directors meetings. We will address both portions of your complaint herein.

With respect to access to books and records, the requested document was not a "forensic audit," but was, in fact, the work product of a billing review by an independent outside entity. At the time of the request, the dispute by and between the Association and the Declarant was ongoing, and the issue of attorneys' fees, as well as their reasonableness, was before the arbitrator. This work product was withheld from the Declarant based upon the work-product privilege. Thus, the requested documents were properly withheld under Virginia Code §55.1-1945 (C)(3). However, since both parties have very recently asked for dismissal, the work product privilege is no longer applicable. Accordingly, the Board of Directors announced at its November 22, 2021, meeting that these documents, including the product of that review, will be transferred on/about November 29, 2021 to the Association's Managing Agent as Books and Records of the Association and will be available for inspection by owners in good standing. Unfortunately, since you elected not to attend the Board of Directors meeting you may not be aware of this fact. Accordingly, the Board of Directors concludes that it did not violate the Virginia Condominium Act with respect to this issue.

With respect to Board meetings, the Board of Directors has regularly and continuously made all of its decisions at open Board of Directors meetings noticed and scheduled in accordance with Virginia Code §55.1-1949. The Board members may have communicated Board of Directors decisions, made at an open meeting, through electronic means. However, the Board has always made its decisions in accordance with the aforementioned statute. On the two occasions cited in your complaint, individual Directors responded to e-mails by simply restating positions repeatedly discussed by the Board of Directors in open meetings and decisions made by the Board of Directors in open meetings. Accordingly, the Board of Directors concludes that it did not violate the Virginia Condominium Act with respect to this issue.

We believe the foregoing fully addresses all of the issues you raised, all of which have been thoroughly discussed and considered by the Board of Directors. Please note that you have the right to file a Notice of Adverse Decision ("Notice") with the Virginia Common Interest Community Board to the extent that your claims relate to applicable laws and regulations if you disagree with the Association's decision. As noted on the Association's complaint form, the Notice must be filed within thirty (30) days of the date of this decision, and must be in writing on forms provided by the Common Interest Community Ombudsman ("Ombudsman"), and shall include any copies of supporting documents, correspondence and other materials related to the decision, and shall be accompanied by a \$25.00 filing fee. The Ombudsman may be contacted at:

Office of the Common Interest Community Ombudsman  
Department of Professional and Occupational Regulation  
9960 Mayland Drive, Suite 400  
Richmond, VA 23233  
Telephone No. (804) 367-2941  
E-Mail: [CICombudsman@dpor.virginia.gov](mailto:CICombudsman@dpor.virginia.gov)

Very Truly Yours,



C. David Welch, President

12047554

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board position.  
DRAFT AGENDA

**MEMORANDUM**

**DATE:** December 1, 2021

**TO:** Common Interest Community Ombudsman

**FROM:** Stephen A. Eisenberg  
Complainant

**SUBJECT:** Complaint Background, Context, Analysis

The matter described below is one that manifests action by a board of directors to improperly withhold information from the complainant and members of a condominium association and deprive them of a 'right to know'.

The complainant's grievance involves a lack of board transparency, a failure to adhere to law and policy and simply put, presents a case of 'stonewalling' information from those who funded a forensic study. Imperatively, Oronoco condominium owners should and are legally entitled to have assessments and findings in the forensic audit sought available to them.

This complaint (Exhibit 1) is presented to the Office of the Common Interest Community Ombudsman ("CICO") seeking its action to have the document declared to have been one that should have been released when initially requested and have it specifically ordered released to the complainant.

The document in question is a forensic accounting/analysis audit report of legal fees (the "Report") obtained by the Oronoco (the "Oronoco") Condominium (Unit Owners Association (the "Association"). The fees were expended by individual unit owners during an alternative dispute resolution arbitration involving the Oronoco's developer and the Association. The arbitration sought to resolve responsibility for construction defects in the building of the condominium.

The Report and allied documents were requested by the complainant (Exhibit 2 is the formal written document request submitted after informal requests were made and denied) to individual directors on three occasions. In all instances, the documents that were requested have been wrongfully withheld by the Association's three directors, to wit *seriatim*: Janet Vasek, Jake Jacoby and David Welsh, individuals to whom the requests were made. (Exhibits 3-5)

In connection with the refusals to release the documents in question the Association board of directors (the "Board") violated the Code of Virginia, §55.1-1949.B.1 by taking actions without having properly called meetings pursuant to law (Exhibit 6). Moreover, it is alleged the Board relied on purported legal confidentiality privileges that were without foundation or merit.

Further, such actions *de facto/de jure* by the board of directors to produce the document requested thereafter failed to follow the Association's Internal Complaint Policy (the "Policy") (Exhibit 7) by not immediately thereafter appointing a neutral "Reviewing Entity" as each director having made a decision for the board of directors regarding release had a conflict of interest relating to the request.

This memorandum has two objectives. First, to provide the full background and context concerning the basis under which and why the reports were contracted for. In short, how did we get to where we are. Second, to oppose and counter any suggestion, thought or belief that there is a legitimate legal basis in a professional privilege to withhold the documents from any Association member.

First, the background. As a result of a belief that the Oronoco was adversely impacted by innumerable construction defects, the Association entered into a mediation process with the developer. By early 2017, this action terminated. Thereafter in 2017, the Association and the developer entered into an alternative dispute resolution, an arbitration hearing. The arbitration has concluded with the parties agreeing to a settlement.

During the course of these two alternative dispute resolution actions, the owners of Oronoco units divided into two groups. One group was solely under the umbrella of defects raised by the Association. The other group, beyond being represented by the Association additionally pursued individual claims against the developer. The latter group came to be known as the 'claimants.

Importantly, lawyers from the same law firm represented the two Oronoco groups pursuing claims of defects during the course of the arbitration. In this connection, legal bills were rendered to each group separately. These legal invoices came under discussion by various owners.

Indeed, many owners represented by the Association questioned and felt quite uncomfortable regarding how the allocation of the legal fees was being apportioned between the owner parties. These questions became more intense and individuals more aggravated and disturbed as requests to see legal invoices and payments made were repeatedly denied by the board of directors.

At some point two or so years ago, being aware of the consternation being suffered by owners who were uncomfortable with the legal invoice allocation process the Complainant made an informal personal suggestion to Janet Vasek, then a member of the board of directors' finance committee.

The Complainant's casual, 'off-the-cuff' suggestion to her was one it was thought that would clear the air and calm down all owners regarding the fairness of the payment of the legal bills as between the two groups of owners, i.e., those solely represented by the Association and the individual claimants. The Complainant suggested that a forensic accounting audit be conducted by an independent outside professional firm specializing in such actions and the owners be apprised of the outcome of it.

Sometime thereafter Janet Vasak, 'out of the blue', requested that the Complainant come to a finance committee meeting that was being held to discuss the suggestion of the legal fee audit. The Complainant's advice was sought regarding how to go about securing a firm that had professional qualifications to conduct a forensic accounting audit as had been earlier suggested. The Complaint offered his views.

The complainant was not aware thereafter of further action on the initiative until May of 2020 when the thought crossed the Complainant's mind regarding the audit's status. On May 25, 2020 Mrs. Vasek stated she would not provide me with any information regarding the audit. In her refusal to release the Report she spoke for the Board (Exhibit 3)

On June 3, 2020 Lowell, 'Jake' Jacoby, the Board's secretary communicating on behalf of the Board denied the Complaint's request for the Report itself basing the denial on the premise that it could withhold the document from release as it being privileged based on the view that "[t]he books and records that you seek are protected by the attorney-client privilege or the attorney work product doctrine." (Exhibit 4)

Thereafter, on September 8, 2021 David Welch once again denied the Complainant's request for the forensic accounting report. He did so summarily, dismissively and without any rationale albeit presumably communicating on behalf of the Board as its chairman. (Exhibit 5)

In all three instances of the denial of requests for the Report there is no record of any Board meeting being called and action taken at such in connection with the requests as required by the Code of Virginia, §55.1-1949.B.1 although in each case the director withholding the Report was communicating for the Board. (Exhibit 6)

In the case of the legal privileges invoked by Jake Jacoby there would appear to be no basis for withholding the documents. (Exhibits 4 & 8). The Report was clearly not prepared in the course of "litigation", which arbitration, an alternative dispute resolution proceeding, does not encompass.

Further, as explained above, the audit was prepared at the request of and paid for by the Association as an independent review of legal charges assessed against the Association for the law firm's professional services rendered. It was wholly unrelated to the Association counsel's involvement with or derived from its 'work-product' in representing the Association.

Indeed, the audit for all intents and purposes was potentially designed and carried out to run against the law firm's interests. The 'bottom line' was resolving the issue of were legal fee charges being correctly charged to proper parties.

The audit had nothing at all to do with the conduct of the arbitration itself or arise out of the Association's relationship to the law firm. It was the Association seeking to assess the propriety of the charges it was paying as against amounts those individual claimants were paying with an aim to "pour oil on troubled waters".

Apropos the second set of observations, regarding the withholding of the Report requested, specifically the presumptive basis for such denials of the request for such, it is submitted that there is no legitimate basis for claiming the privileges sought to be applied to the release of them. Pursuant to the Code of Virginia, §55.1-1945.B. all books and records of the Association may be inspected by an owner with the exception of those stated in §55.1-1945.C.

In the instant matter of the Report, it is reiterated that documents did not arise out of the attorney-client privilege; were not an outgrowth of the Association counsel's work-product, and were completely unrelated to counsels' efforts nor related to litigation or probable litigation.

Notably, not only was there no active litigation, but there could not be at any "pending litigation". The reason for the latter is that agreements between every condominium owner and the developer provided that alternative dispute resolution was the sole means for resolving disputes between the parties.

Critically and to the contrary, the report represents financial records of the Association, which are available to Oronoco owners without limitation. As stated in the Code of Virginia "all books and records kept by or on behalf of the unit owners'

association...shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation."

In connection with 'denials' of the requests on the divers occasions such requests were made, one make evaluate the 'denials' in two ways. Either they arose from the express actions and statements of the three directors. Alternatively, such denials were *de facto* actions. That is, the acts of the directors being found null and void based on the lack of properly called and conducted meetings thereby in effect evolving into withholdings of the documents or refusals to deliver/release such.

Finally, and indeed most interestingly, the board of directors at its November 22, 2021 meeting considered and voted on the complaint's requested action elements. It did not approve release of the requested document to the complainant, but neither did it refer the complaint pursuant to the Association's Policy to a neutral Reviewing Entity.

Moreover, it failed to communicate a Notice of Final Adverse Decision by withholding information regarding its denial action to the complainant for a period of seven (7) days. In lieu, Jake Jacoby stated the complainant would be notified of the board's action "...within the prescribed time period."

When inquiry was made whether the board was relying on section 2.2(e) of the Policy as the "prescribed time period", an inappropriate standard as it being the one for receipt of a complaint not an action notification, the initial complaint having been delivered in this case on September 13, 2021, Jake Jacoby stated he did not know the legal upon which the board was acting. (Exhibits 1 & 10)

Critically, in failing to meet the express and unambiguous mandate of the Policy entitling the complainant to have a full hearing before an impartial unit owner constituted "Reviewing Entity" with all of the attendant rights and privileges associated therewith to include, among others, the opportunity to "[i]ntroduce evidence, testimony and witnesses..." (Exhibit #7 Article 3), the complainant has been deprived of eliciting information to support this submission to the CICO.

In short, once again the board of directors apparently disregarded the definitive Policy process for addressing the request for document release.



The Board has decided that the document requested would be released with all other legal fee billing documents for condominium owner review. Nonetheless, it has left unstated whether having denied the complaint's multiple requests as well as his complaint pursuant to the Association's procedures whether this barred him from obtaining the document sought.

At bottom, this has been an inexcusable period for the Oronoco community when its representatives consistently acted at cross purposes against those they were elected to serve as their fiduciaries and agents. Why are those who funded the professional services rendered, the Oronoco condominium owners, being denied the benefits of their rights to wit: outcomes and knowledge of which they should be apprised?

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
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**EXHIBIT 1**

stephen.eisenberg@comcast.net

9/13/2021 4:03 PM

## Submission of Complaint UP Oronoco Internal Complaint Policy

To David Welch <cdavidwelch@gmail.com> • Jake Jacoby <jacobyle@aol.com> •  
janetvasak@gmail.com <janetvasak@gmail.com>

David/Jake/Janet:

My concerns expressed in the appended complaint are submitted for your consideration and resolution pursuant to the Oronoco Condominium Unit Owners Association Internal Complaint Policy. Attached as appendices to this communication are documents amplifying the concerns.

Under the circumstances, pursuant to section 1.1(b) of the foregoing policy, as warranted and expressed in the complaint's desired action, a Reviewing Entity composed of unit owners is requested to be appointed as the adjudicating body due to each director's conflict of interest raised by the complaint.

Further, the following procedural due process hearing protocols are requested to support an adjudicative hearing: a professional, neutral recorder of hearing minutes be appointed and a requirement that all proceedings be in-person as distinguished from virtually conducted hearings.

Your time, consideration and action is most sincerely appreciated.

V/r

Steve

- 
- 21-09-13-complaint w-addendum.PDF (358 KB)
  - 21-09-08-renewed request for forensic accounting report and materials.pdf (122 KB)
  - 20-05-28-original information document request-adr legal fee forensic evaluation.pdf (86 KB)
  - 21-09-13-welch denial-saje document request.pdf (117 KB)

Exhibit 1

**ORONOCO CONDOMINIUM  
UNIT OWNERS ASSOCIATION**  
601 N. Fairfax Street  
Alexandria, Virginia 22314

**INTERNAL COMPLAINT FORM**

**COMPLAINING PARTY** (The Party Filing the Complaint)

Complaining Party's Name: Stephen Eisenberg

Mailing Address: 601 North Fairfax Street #302

Alexandria, VA 22314-2078

Condominium Address: \_\_\_\_\_  
(if different) \_\_\_\_\_

Home Phone: 703.685.9846 Other Phone: \_\_\_\_\_

Email Address: stephen.eisenberg@comcast.net

Are you a unit owner at Oronoco? Yes  No

**NATURE OF COMPLAINT**

**YOUR COMPLAINT INVOLVES:** (Check as appropriate)

The authority of the Association/Board of Directors, under any law or regulation, to:

- Require any person to take action, or not to take any action, involving a unit
- Require any person to pay a fee, charge, or assessment
- Spend Association funds
- Alter or add to common elements

The failure of the Association/Board of Directors, when required by law or regulation, to:

- Properly conduct an election
- Give adequate notice of a meeting or other action
- Properly conduct a meeting
- Maintain or audit books and records
- Allow inspection of books and records
- Properly adopt a budget or rule

Circumstances and specifics regarding the above allegation:

Please name the conditions or events that you believe to be a violation of law or regulations. List the names, dates, times, places, events and reasons leading to this formal complaint and any informal attempts at resolving the complaint. Also please cite, to the greatest extent practicable, the law or regulation you believe was violated. Use additional sheets of paper if necessary and include additional documentation, if appropriate. Please type or write legibly in black or blue ink.

SEE ADDENDUM

**DESIRED ACTION:**

Please state what actions you think will resolve your complaint:

*see Appendix*

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**ADDENDUM  
ORONOCO CONDOMINIUM  
UNIT OWNERS ASSOCIATION  
INTERNAL COMPLAINT FORM**

**Circumstances and specifics regarding the above allegation:**

On information and belief, the Complainant alleges that the board of directors (the "Board") has violated on various and divers occasions § 55.1-1949 B.1. of the Virginia Condominium Act (the "Act"). Additionally, the Board has improperly withheld Oronoco Condominium Association (the "Association") records from unit owners, which should have been released to the requestors.

Specifically, the Board's conduct in purporting to formally act on and resolve requests and take actions within its duties and responsibilities as established by rules and policies for the Association and its owners has been improper based upon, illustratively and without limitation, the Board members communicating through: informal meetings, casual discussions and similar activities (the "Actions") in lieu of having held the aforementioned communications addressing such Actions by adhering to protocols requiring formally and properly called Board meetings pursuant to the Act and the Association's bylaws.

Particularly, it is asserted that the following unauthorized actions that have been taken, inconsistent with law or rule, are alleged to have occurred:

The Board substantively and procedurally wrongly denied, as a matter of law and director individual authority, two requests by the Complainant for all documents pertaining to a forensic audit examination obtained by the Board concerning alternative dispute resolution ("ADR") legal fee assessments, to wit:

- \* On May 25, 2020, Janet Vasek, a director, purportedly acting on behalf of the Board denying a document request on its behalf advised the Complainant that "The Board's position is that matters regarding legal fees and expenses won't be discussed until that phase of the arbitration has concluded and the arbitrator has rendered a decision."

I hereby certify that the statements made on this form and in any attached documents are true and complete to the best of my knowledge, information and belief. I authorize notices under the Internal Complaint Procedure to be sent by electronic mail to the electronic mail address provided in this form.

  
Signature

2/13/2021  
Date

If, after the Reviewing Entity's consideration and review of the Complaint, the Reviewing Entity issues a final decision adverse to the Complainant, you have the right to file a notice of final adverse decision with the Common Interest Community Board ("CICB") in accordance with the regulation promulgated by the CICB. The notice shall be filed within 30 days of the date of the final adverse decision, shall be in writing on forms provided by the Office of the Common Interest Community Ombudsman ("Ombudsman"), shall include copies of any supporting documents, correspondence and other materials related to the decision, and shall be accompanied by a \$25.00 filing fee, payable to the Treasurer of Virginia. The Ombudsman may be contacted at:

Office of the Common Interest Community Ombudsman  
Department of Professional and Occupational Regulation  
9960 Mayland Drive, Suite 400  
Richmond, Virginia 23233  
804/367-2941  
CICombudsman@dpor.virginia.gov

\* On September 13, 2021, David Welch, a director, purportedly acting on behalf of the Board refused the Complainant's request for the ADR forensic examination documents by withholding release of the requested documents.

**Desired action:**

1. The Board hold a formal meeting IAW the Act's provisions to consider and grant the Complainant's request to immediately release and deliver to him the forensic audit examination assessment, its findings, invoices for such and other associated documents as have been sought. Said meeting and action to be taken within three weeks from the date of the complaint and, if not so completed, then fulfilling Request #2.

2. Should the Board not release the documents as have been requested as described above and delineated on the attachments hereto, that the Association's Internal Complaint Policy (the "Policy"), § 1.1 (b) be strictly adhered to by the Board through its appointment of a Reviewing Authority and that the hearing held by such body be supported by procedural due process elements, to wit: conducting an open in-person hearing as contrasted to a virtual proceeding and that a neutral, professionally qualified recorder take the minutes of the hearing.

Specifically, and in connection with the foregoing, the Board recuse itself from any aspect of the hearing process as a whole as well as through its individual board members: David Welch, Jake Jacoby and Janet Vasek, based on the nature of the issues contemplated and raised by the Complainant and their involvement therein, i.e., the conflicts of interest that permeate the process. In lieu of the foregoing, the Board appoint "unit owners to serve as members of the Reviewing Entity" pursuant to the Policy, § 1.1 (b).

3. The Board cease and desist from any communications by and between themselves outside of Board meetings and that such Board meetings be formerly called, supported by all of the attendant obligations and duties due and entitled to by Oronoco owners pursuant to law and policy, e.g., being provided with: notice of board meetings; the agenda and supporting documents; an opportunity to be heard on initiatives and the like.

Particularly, as required by the Act that the Board "...not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements...."

Further, that duties and obligations of the Board be carried out by the Board and not by directors, persons who have no inherent authority to act for the Board in an individual capacity.

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**EXHIBIT 2**

stephen.eisenberg@comcast.net

5/28/2020 5:20 AM

## Information/Document Request-ADR Legal Fee Forensic Evaluation

To David Welch <dewrich@tch.com> • Jake Jacoby <jacobyte@sol.com> • janetvasak@gmail.com

David/Jake/Janet: I request all documents and information contained in the records of the Oronoco Condominium Association or otherwise held by its officials concerning the subject evaluation and assessment. Further, request is specifically made that such documents be made available to me five business days from the date of this communication as provided for by the Code of Virginia.

The object of the request is for a proper purpose related to my membership in the Oronoco Association and not for pecuniary gain or commercial solicitation. Specifically, I wish to learn whether legal assessment payments and charges made for the alternative dispute resolution concerning the Oronoco were properly disbursed and allocated. Notably, I am advised this information is to be released to Oronoco owners by the board of directors in the future.

In connection with the foregoing, and not by way of limitation or exclusion, the following information and/or documents in whatsoever form such may be maintained are requested, to include illustratively: interim correspondence, email communications, and memoranda:

- Communications related to the search for a forensic accounting firm or like professional to undertake the initiative to include descriptions of the service sought, pricing elements and other considerations related to a request for a proposal.
- The product and results of such ADR legal fee forensic evaluation, that is the observations and findings of those professionals conducting the examination.
- All invoices submitted by the professionals who conducted the forensic examination and accounting documents reflecting disbursements made to pay such professional charges.

Further, if such foregoing information sought is withheld from me based on an assertion that such information is not releasable to Association members pursuant to a claim by the board of directors that it may be withheld pursuant to the Code of Virginia as being related to "pending or probable litigation", it is requested that the process be described by which such determination and/or decision was acted on by the board of directors. Additionally, it is requested that any documentation associated with such denial decision be provided to the undersigned or advice given as to where it is filed for unit owner perusal.

Thank you for your consideration.

V/x

Steve

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**EXHIBIT 3**

## ADR Legal Fee Forensic Evaluation

To Janet Vasak <janetvasak@gmail.com>

Janet: Your answer to my request is not responsive. In this connection I simply inquired what the status of the initiative is.

In furtherance of my original inquiry I renew my request and further seek an answer to the questions of whether such an initiative was carried out and, if so, was a report irrespective of its form, oral or written, rendered to the board of directors, the finance committee or any other ad hoc committee or individual.

Thank you.

Steve

On May 25, 2020 at 2:17 PM Janet Vasak <janetvasak@gmail.com> wrote:

Steve—

The Board's position is that matters regarding legal fees and expenses won't be discussed until that phase of the arbitration has concluded and the arbitrator has rendered a decision. We are committed to saving money for our Oronoco owners.

—Janet

On May 25, 2020, at 5:47 AM, [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net) wrote:

Janet: I would appreciate an update regarding the subject initiative.

Many thanks...Steve

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**EXHIBIT 4**

stephen.eisenberg@comcast.net

6/8/2020 4:59 AM

## Fwd: Reply/Preservation of Claims To Response To Request For Documents

To: Herb Rosenblum <herbert@hrtlawpc.com> • Alan Rosenblatt <arosenblatt@comcast.net> • Joseph Resende <jr.1one@verizon.net>

Fyi

----- Original Message -----

From: Stephen Eisenberg <stephen.eisenberg@comcast.net>  
To: David Welch <davidwelch@small.com>, Jake Jacoby <jacobyj@adl.com>, Janhavasak@gmail.com  
Date: June 6, 2020 at 4:58 AM  
Subject: Reply/Preservation of Claims To Response To Request For Documents

David/Jake/Janet: Thank you for your consideration of my "Information/Document Request-ADR Legal Fee Forensic Evaluation" inquiry dated May 28, 2020.

The following matters are presented without amplification and lodged to preserve issues in contention and my objections for the record in connection with your response below verbatim.

\* The inquiry regarding an "update" of an initiative concerning a "ADR legal fee forensic evaluation" was not directed to the board of directors. The initial inquiry to Janet was to her in an individual capacity as a person who was in a position to be informed of the matter in question irrespective of whether it was as a director, former finance committee member or otherwise. Her answer, whether nonresponsive or not, was provided without any procedural or substantive authoritative basis related to a board of director action.

\* The documents requested are not related to "pending litigation".

\* "[T]he "legal fee forensic audit" prepared as a result of the Alternative Dispute Resolution (Arbitration) by and between the Association and, among others, the Declarant" was not focused or directed towards the Arbitration, as claimed, i.e. it was neither related to the Arbitration nor "legal counsel" representing the Association and accordingly is objected to.

\* "The books and records that you seek are protected by the attorney-client privilege or the attorney work product doctrine" is legally and factually incorrect and without a legally supported basis. There are no privileges associated with the request for production of the records in question.

\* Objection is made to the board's view/belief that "...you also ask for responses to certain questions. The Association is unaware of any obligation to respond to those questions under Virginia Code §55.1-1945 or any other provision of the Condominium Act." The board of directors has responsibilities and obligations pursuant to law and its fiduciary duties to respond fully to such inquiries.

\* Objection is made to the view/position that "requested books and records related to this denial decision...would be communications between the Board and counsel which are subject to the attorney-client privilege..." There is no attorney-client privilege associated with the requested documents.

V/r

Steve

----- Original Message -----

From: Board of Directors <board@buildinglink.com>  
To: Stephen AJ Eisenberg <stephen.eisenberg@comcast.net>  
Date: June 3, 2020 at 10:01 AM  
Subject: Oronoco Condominium - Response To Request For Documents

Steve,

As you know, we received your request for "all documents and information" relating to the "legal fee forensic audit" prepared as a result of the Alternative Dispute Resolution (Arbitration) by and between the Association and, among others, the Declarant. As you know, the Arbitration between the Association and the Declarant is still pending. You found our response to the request to be "unresponsive."

Virginia Code §55.1-1945 (C)(5) (the "Condominium Act") states that Association books and records may be withheld for inspection and copying by a unit owner if they concern: communications with legal counsel that relate to, among other things, pending litigation, or that are protected by the attorney-client privilege or attorney work product doctrine.

The books and records that you seek are protected by the attorney-client privilege or the attorney work product doctrine.

Therefore, the Association has once again consulted counsel as to the applicability of these provisions. On advice of counsel, we cannot produce those documents as it may result in a waiver of that privilege and potentially require disclosure of that information to the opposing party.

In your request, you also ask for responses to certain questions. The Association is unaware of any obligation to respond to those questions under Virginia Code §55.1-1945 or any other provision of the Condominium Act. If you are aware of any such requirement, in the statute, we are prepared to review such authority.

Finally, you have requested books and records related to this denial decision. The only communications possibly responsive to this request would be communications between the Board and counsel which are subject to the attorney-client privilege and exempt from disclosure under the aforementioned statute.

In sum, this closes for us this back-and-forth until the conclusion of the matter.

Thank you for your time and understanding.

*The Board of Directors*

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**EXHIBIT 5**

stephen.eisenberg@comcast.net

9/8/2021 9:56 AM

## Supplementary Documentation-Document Request-ADR Legal Fee Forensic Evaluation

To: David Welch <davidwelch@gmail.com>

• 05-28-20-information document request-adr legal fee forensic evaluation.pdf (86 KB)

David: In amplification of the request I made below in order to provide you with the specifics of my original request presented, I provide for your consideration the original of the 2020 request, which I incorporate by reference to this renewed request.

Steve

----- Original Message -----

From: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)

To: C. David Welch

Date: 09/08/2021 8:34 AM

Subject: Re: Document Request-ADR Legal Fee Forensic Evaluation

David: Does this near to say that when the settlement agreement is executed you will meet my request and provide me with the document?

Steve

On 09/08/2021 8:07 AM C. David Welch <[davidwelch@gmail.com](mailto:davidwelch@gmail.com)> wrote

Thanks, Steve.

We aren't at the end of the matter, as the arbitration is paused for now, so we've a way to go yet.

But thanks for the reminder of your interest.

On Tue, Sep 7, 2021 at 3:51 PM <[stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)> wrote:

David: On May 28, 2020 I requested the subject document. The request was denied. At the time of the denial I was advised that upon conclusion of the ADR the report would be furnished to me.

We are for all intents and purposes there, accordingly, I hereby renew my request for the subject document by this communication.

Thank you.

Steve

-----  
**David Welch**

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## Re: Document Request-ADR Legal Fee Forensic Evaluation

To C. David Welch <cdavidwelch@gmail.com>

David: Noted...Steve

On 09/13/2021 10:04 AM C. David Welch <cdavidwelch@gmail.com> wrote:

Steve, the arbitration is paused. When the matter concludes, whether by arbitration or executed settlement, we will address the request.

On Sep 8, 2021, at 8:34 AM, [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net) wrote:

David: Does this mean to say that when the settlement agreement is executed you will meet my request and provide me with the document?

Steve

On 09/08/2021 8:07 AM C. David Welch <cdavidwelch@gmail.com> wrote:

Thanks, Steve.

We aren't at the end of the matter, as the arbitration is paused for now, so we've a way to go yet.

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We are for all intents and purposes there, accordingly, I hereby renew my request for the subject document by this communication.

Thank you.

Steve

--

**David Welch**



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**EXHIBIT 6**

stephen.eisenberg@comcast.net

10/6/2021 9:32 AM

## BOD Meeting/Action-SAJE Complaint

To: jacobvyle@aol.com <jacobvyle@aol.com>

----- Original Message -----

From: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)

To: [jacobvyle@aol.com](mailto:jacobvyle@aol.com)

Date: 10/06/2021 9:30 AM

Subject: Re: Fwd: BOD Meeting/Action-SAJE Complaint

Jake: Since it is clear from your communications that you/the directors are being represented by counsel and I am an attorney licensed in the Commonwealth of Virginia, pursuant to the state bar's professional standards of conduct I wish to communicate with your counsel directly regarding this matter.

Please have him/her contact me.

Steve

----- Original Message -----

From: [jacobvyle@aol.com](mailto:jacobvyle@aol.com)

To: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)

Cc: [cdaxv@weitch@gmail.com](mailto:cdaxv@weitch@gmail.com), [janelvasak@gmail.com](mailto:janelvasak@gmail.com)

Date: 10/06/2021 9:05 AM

Subject: Fwd: BOD Meeting/Action-SAJE Complaint

Dear Steve,

The Board's interpretation of your response (below) is that you chose to proceed with a hearing of your complaint at a Board meeting, rather than to have the Board render a decision based upon your written complaint.

Accordingly, the Board will schedule a hearing of your complaint at the next Regular Meeting of the Board of Directors. If the meeting is virtual, a dial-in number will be provided as has been the case with all virtual Board meetings since the beginning of the Pandemic, to include the September 27, 2021 meeting.

You will receive notice by e-mail when a date and time for the meeting is set. That e-mail will request that you acknowledge receipt of the notice and that you confirm your participation.

To ensure delivery of this e-mail, please acknowledge receipt.

Jake Jacoby, Secretary

From: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)

To: [jacobvyle@aol.com](mailto:jacobvyle@aol.com), [cdaxv@weitch@gmail.com](mailto:cdaxv@weitch@gmail.com), [janelvasak@gmail.com](mailto:janelvasak@gmail.com)

Sent: 10/3/2021 11:08:45 AM Eastern Standard Time

Subject: BOD Meeting/Action-SAJE Complaint

Jake: Please accept, as ever, my gratitude for the consideration and actions that have been taken by the board concerning the complaint I submitted.

Suffice it to state, it is my sincerest desire to quickly resolve this matter as easily and congenially as possible. It is not my wish nor desire to embarrass anyone; expose to public knowledge the Onococo community's trials and tribulations; create dissension or, trigger the expenditure of needless legal fees and hearing costs.

Prior to providing the board with my thoughts/suggestions concerning 'the way forward', it is important that I clarify some misapprehensions that are manifest in your communication to me, set forth below.

\* Yes, I acknowledged (see attached) that the board would consider my complaint in the September 27, 2021 directors meeting. Indeed, as the agenda and your note communicated, my complaint was to be considered in an "executive session". Nonetheless, by your note and the published agenda there was no invitation extended to me either expressly or inferentially to attend the executive session nor was I invited the opportunity to submit any matters to the board in advance at that time for its consideration.

I would further observe that in the history of board meetings, no one has ever attended an executive session without such an invitation. The only such individuals that come to mind who have attended an executive session are the board of directors' advisory committee for the ADR settlement, and in that case, the individuals were conferred with the position of special officers of the board or an equivalent status and, I will presume, were specifically requested to attend the meeting for their views.

Consequently, there was no reason for me to assume or believe I should have attended the executive session or prepared/submitted particular matters for the board's consideration.

\* Beyond the foregoing view that my participation was not invited, as the board is well aware, it has been my documented position within the complaint that 'action' denying my request for the forensic accounting report I had requested had been taken, whether *de jure* or *de facto*. Consequently, I was of the understanding that the board of directors was going to act on the requests that I had previously formally made within the complaint, i.e. review previous action and grant the request or appoint a neutral

"Reviewing Entity" as required by the board's complaint policy.

\* You state that I did not advise the board that I would not attend the board meeting, by which you suggests I had an obligation to do so. Of course, I had no such responsibility. As you are well aware and it is well known there is no such policy or requirement to advise the board, if an individual will attend its meetings. Owners simply show up as they are authorized to do so and wish as has been the practice since the establishment of the board of directors. Moreover, a request was never submitted to me for response inquiring whether I would be attending the meeting on September 27th.

\* The cryptic phone calls made to my residence by John Theoharis at approximately 2000, a point late in the evening on September 27th and at a time when I was unavailable, were simply out of order, unclear and unfair. The messages left provided no insight concerning what the reason was for my presence nor what was expected from me. It is disingenuous to believe that under the circumstances, at such a late-night point, attempting to have an unprepared individual attend and present a thoughtful, cogent position is a proper, useful way by which to obtain insights to evaluate a request on an important issue to a deliberative body.

You state that " The Board can proceed with rendering a decision based upon your written complaint. Alternatively, your complaint can be heard at the next regular Board meeting, when that is scheduled." Notably, in either situation, the board is obligated to hold a meeting to formally act. As I expressed at the outset, it is my desire to resolve this matter expeditiously and without any untoward impact.

Please accept my apologies; I am certainly not happy to be an Oronoco 'gadfly' with my document request. I know the board has far more important Oronoco issues to address. Most certainly, I would be pleased to have an opportunity to discuss my request with the board and answer questions/address concerns at its convenience.

Consequently, I would prefer various suggestions for your consideration so as to amicably advance resolution.

First, since a board meeting has to be held, the chair should call one at a mutually convenient date and time to address the complaint. The meeting would be called similar to ones held by the board when it wished to discuss the ADR. This is a procedure with which the board has great familiarity. That is,

announce a board meeting for a given date that would immediately go into executive session to consider "a complaint". Since I do not use Zoom I would request that, if this approach is taken, the meeting be held through a conference call.

Second, appoint me to a position with status similar to the one of the individuals on the 'settlement committee' thereby giving me entry to the report without any concern for waiving a perceived legal privilege as being cloaked with the requirement to maintain all 'client' confidences. For the record, and as I have previously stated, in my view there are no legal privileges associated with the report I am requesting.

Third, recognizing my professional assessment that there are no legal privileges associated with the report I have sought, take action nonetheless to conditionally waive any privileges the board believes apply to it and let me review the report within an appropriate environment.

I raise the question again, what is of concern to the directors? This assessment was originally suggested by me to Janet Vasak to 'clear the air' for the Oronoco community apropos ongoing contentious concerns held and expressed by many regarding the equitable division of legal fees. No doubt, if there has been a misallocation issue of legal fees, I would expect the matter has been resolved at this point. Thus, 'no harm, no foul'; take a 'stand-up' position on release.

I didn't set out to make a 'mountain out of a mole hill'. I am frankly taken aback by the reaction to my request by the directors. Let's close this out quickly without any consternation, fuss and remain as good neighbors we are.

Steve

----- Original Message -----  
From: jacobv@aal.com  
To: stephen.sisberg@comcast.net, scharnwelch@gmail.com, janetvasak@gmail.com  
Date: 10/01/2021 9:46 AM  
Subject Re: BOD Communication

Steve,

Despite your written acknowledgement that your complaint was scheduled to be heard at the Monday evening (September 27, 2021) Board meeting, you did not attend the meeting. (The meeting and its agenda was also separately announced to you, as it was to all owners). Furthermore, you did not notify the Board in advance of the meeting that you would not be in attendance. Rather than proceed on the basis of your written complaint alone, the Board adjourned after we failed to reach you by phone.

Given these developments, there are two options. The Board can proceed with rendering a decision based upon your written complaint. Alternatively, your complaint can be heard at the next regular Board meeting, when that is scheduled. Our Counsel has advised that either option is available and proper. Please note that all regular business of the Board was conducted on Monday evening (September 27, 2021).

Before taking any further steps, the Board offers you the opportunity to specify your preference.

Please acknowledge receipt of this e-mail and advise the Board with respect to your choice.

Jake Jacoby, Secretary

In a message dated 9/28/2021 3:15:53 AM Eastern Standard Time, [elgibben.eisenberg@comcast.net](mailto:elgibben.eisenberg@comcast.net) writes:

David/Jake/Janet: I regret I was unavailable to communicate with you last evening.

To the the extent that you desire to speak with me, I will be available after noon today at a mutually convenient time.

Steve

- 21-09-22-bod notice-complaint placed on mtg agenda.pdf (166 KB)

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stephen.eisenberg@comcast.net

9/22/2021 3:45 PM

## Re: Reply-BOD Re: Submission of Complaint UP Oronoco Internal Complaint Policy

To: jacobyle@aol.com Copy cdaavidwelch@gmail.com • janetvasak@gmail.com

Jake: Thank you very much! I noted the same on the meeting agenda I just received.

The board's attention and action is very sincerely appreciated.

Steve

On 09/22/2021 3:25 PM jacobyle@aol.com wrote:

Steve, this acknowledges receipt of your complaint dated September 16, 2021 e-mail (with attachments). In accordance with the terms of the Resolution and Virginia law you complaint will be heard in Executive Session of the September 27, 2021 Board of Directors meeting and the Board will provide an answer no later than 7 (seven) days afterward.

Jake Jacoby, Secretary

From: stephen.eisenberg@comcast.net

To: jacobyle@aol.com, janetvasak@gmail.com, cdaavidwelch@gmail.com

Sent: 9/16/2021 9:10:00 AM Eastern Standard Time

Subject: Reply-BOD Re: Submission of Complaint UP Oronoco Internal Complaint Policy

Jake: In response to your inquiry, I was denied the documents requested on May 25, 2020 and Sept 13 2021 by two individual directors, Janet Vasak and David Welch. From their communications it was inferentially drawn from the statements they conveyed that they were either individually acting/speaking for the board of directors or just for themselves and attributing the same to the board.

I have no knowledge nor am I aware of any facts that any board of directors meeting was properly called to session in either instance pursuant to the requirements of the Code of Virginia and the Oronoco Association's Bylaws at which said request could have been properly discussed and acted upon, the result of such board meeting thereafter communicated to me in the two instances.

Hence, I conclude that any of the foregoing decisions by the board of directors that was communicated to me could have only been reached in the informal manners prohibited by the Code of

Virginia's quoted provision. That is, the three of you either spoke to each other without a formally called board meeting or alternatively Janet and David made the decisions independently on their own, without authority, and then attributed them to the board of directors.

I would appreciate your advice regarding on whose behalf Janet and David were speaking for, to wit: officially for the board of directors or in their capacity as an individual director in their communications to me.

Certainly, if you can provide me with proof of such meetings addressing my two requests and showing action on them at such that creates a different context for my action, which I would be pleased to consider. Your advice regarding the latter is welcomed.

I would note that the apparent lapse of appropriate formal meetings by the board of directors to take actions as raised seems not to be singular. The board of directors advised the Oronoco community that on August 30, 2021 it entered into an agreement and settlement with EYA. Yet there are no posted board of director meeting minutes dated after January 18, 2021 showing such action. If such a meeting of the board of directors to take action on the arbitration settlement took place please provide me with such document.

Further, I would observe that on June 3, 2020 you communicated with me, speaking for the board of directors, and stated a number of legal bases why the board would not release the requested audit report. I would request that you provide me with the date of said meeting at which such matters were discussed and the positions expressed in your email were taken by the board of directors.

Moreover, on September 15, 2021 you made the inquiries below clearly representing the board of directors in the communication. Did this action arise from a properly called meeting in which my complaint was discussed and you thereafter acted on a board decision?

Should the board of directors deny my request for the documents sought please provide me with the specific reasons and legal basis for such action.

Lastly, please provide me with the board of directors' reasons, concerns and fears for not releasing the information requested. What information contained in the documents is so sensitive that it is being withheld from disclosure to unit owners? Why is the information being 'stonewalled'?

As to your request at the conclusion of your note, below, to wit: "Please acknowledge receipt of this e-mail in response to your Complaint." I do not understand what you desire accomplished.

Steve

----- Original Message -----

From: jacobyle@aol.com  
To: stephen.eisenberg@comcast.net  
Cc: davidwetch@gmail.com, janetvasak@gmail.com  
Date: 09/15/2021 1:03 PM  
Subject: Submission of Complaint UP Oronoco Internal Complaint Policy

Dear Steve,

On behalf of the Board, with respect to your Complaint dated September 13, 2021, you assert that the Board has not adhered "to protocols requiring formally and properly called Board meetings pursuant to the Act and the Association's bylaws." Paragraph 2 of your Complaint alleges "improper" actions "by communicating through informal meetings; casual discussions and similar activities (the "Actions")..."

Please explain and provide the specifics that inform your statements so that the Board may fully evaluate your complaint. If you do not have such specifics, please confirm that to us. For the avoidance of any doubt, this is a response of the Board seeking additional information as needed to consider your complaint, with advice of counsel.

Please acknowledge receipt of this e-mail in response to your Complaint.

Jake Jacoby, Secretary

From: stephen.eisenberg@comcast.net  
To: davidwetch@gmail.com, jacobyle@aol.com, janetvasak@gmail.com  
Sent: 9/13/2021 4:03:07 PM Eastern Standard Time  
Subject: Submission of Complaint UP Oronoco Internal Complaint Policy

David/Jake/Janet:

My concerns expressed in the appended complaint are submitted for your consideration and resolution pursuant to the Oronoco Condominium Unit Owners Association Internal Complaint Policy. Attached as appendices to this communication are documents amplifying the concerns.

Under the circumstances, pursuant to section 1.1(b) of the foregoing policy, as warranted and expressed in the complainant's desired action, a Reviewing Entity composed of unit owners is requested to be appointed as the

adjudicating body due to each director's conflict of interest raised by the complaint.

Further, the following procedural due process hearing protocols are requested to support an adjudicative hearing: a professional, neutral recorder of hearing minutes be appointed and a requirement that all proceedings be in-person as distinguished from virtually conducted hearings.

Your time, consideration and action is most sincerely appreciated.

V/r

Steve

DRAFT AGENDA  
Materials containing the above proposed topics for discussion  
and are not to be used for any registration or official Board position.  
DRAFT AGENDA

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board position.  
DRAFT AGENDA

**EXHIBIT 7**

**ORONOCCO CONDOMINIUM  
UNIT OWNERS ASSOCIATION**

RESOLUTION NO. \_\_\_\_\_

**INTERNAL COMPLAINT POLICY**

*Establishing guidelines and procedures for the registration and resolution of written complaints to the Association Board of Directors.*

WHEREAS, Section 4.1 of The Oronoco Condominium Bylaws ("Bylaws") provides that the Board of Directors ("Board") is the executive and administrative entity designated to act for the Oronoco Condominium Unit Owners Association ("Association") in governing the condominium, and is an "executive organ" within the meaning of the Virginia Condominium Act ("Act");

WHEREAS, Section 4.1 of the Bylaws further provides that the affairs and business of the Association shall be managed by the Board;

WHEREAS, Section 4.1(F) of the Bylaws provides that the Board shall have the power and duty to adopt and amend rules and regulations respecting the use of the Condominium and the Common Elements; provided, however, that such rules and regulations shall not conflict with the Act or the Condominium Instruments and further provided that such rules and regulations shall not adversely impact the rights of Mortgagees under the Act or the Condominium Instruments;

WHEREAS, Section 55-530.E of the Code of Virginia provides that all condominium, cooperative, and property owners' associations shall establish reasonable procedures for resolution of written complaints from owners or residents and other citizens;

WHEREAS, Section 18VAC48-70-10 of the Common Interest Community Ombudsman Regulations defines *association complaints* as a written complaint filed by a member of the association or citizen concerning a matter regarding the action, inaction, or decision by the governing board, managing agent or association inconsistent with applicable laws and regulations;

WHEREAS, Section 55-530.E.1 of the Code of Virginia provides that a record of each complaint shall be maintained for no less than one year after the association acts upon the complaint;

WHEREAS, Section 55-530.E.2 of the Code of Virginia provides that all associations shall provide complaint forms or written procedures to be given to persons who wish to register complaints with the Association and such forms or procedures shall include certain specific information; and,

WHEREAS, for the benefit and protection of the Association, the Board deems it necessary and desirable to establish a procedure for the registration and resolution of complaints by unit owners and citizens;

NOW, THEREFORE, BE IT RESOLVED THAT the Board hereby establishes the following internal complaint procedure for use in the event a dispute arises between the Association and a unit owner or citizen.

**ARTICLE 1**

**Internal Complaint Reviewing Entity**

**Section 1.1 Internal Complaint Reviewing Entity.**

- (a) The Board shall serve as the Internal Complaint Reviewing Entity ("Reviewing Entity"). The Board shall elect a Board member to serve as the Reviewing Entity Chair.
- (b) If the Board, or any member of the Board, cannot serve as members of the Reviewing Entity as a result of a conflict of interest or recusal, the Board may appoint unit owners to serve as members of the Reviewing Entity.
- (c) If a complaint is filed by a member of the Board, the complaining member must recuse himself from acting as a member of the Reviewing Entity.

**Section 1.2 Meetings and Hearings.**

- (a) The Reviewing Entity shall hold regular meetings and hearings as necessary. Meetings of the Reviewing Entity may be called by the Chair of the Reviewing Entity and by a majority of the members of the Reviewing Entity.
- (b) All Reviewing Entity meetings shall be open to members of the Association. The Reviewing Entity may meet in executive session to discuss matters before the Reviewing Entity pursuant to Section 55-79.75.C of the Act. Any vote of the Reviewing Entity shall be taken in an open meeting.
- (c) A majority of the members of the Reviewing Entity present at any meeting shall constitute a quorum.
- (d) A simple majority vote of Reviewing Entity Members while a quorum is present shall constitute a decision of the Reviewing Entity.
- (e) A copy of all minutes, rules, regulations and policy statements of the Reviewing Entity shall be filed with the records of the Association and shall be maintained by the Association as a permanent public record. The Association shall make copies thereof available, except as may be withheld from review by Section 55-79.74:1.C of the Act, to any interested member of the Association at a reasonable cost and shall make such minutes, rules, regulations and policy statements available to members for copying.



(f) All Reviewing Entity meetings shall be conducted generally in accordance with Robert's Rules of Order.

(g) All Reviewing Entity hearings shall be conducted in the manner set forth below.

**ARTICLE 2**  
**Registration of Complaints with**  
**the Reviewing Entity**

**Section 2.1 Actions Prior to Initiation of Formal Internal Complaint Procedures.**

(a) Any unit owner, officer of the Association, Board Member or citizen has the authority to address the Board to request that the Association correct any act or omission by the Board or the Association ("Respondent"), which appears to be in violation of the Act or regulations. Such requests should be made to the Board before the Internal Complaint Procedure is initiated.

(b) Upon such request, the Board shall consider the request in either open or executive session, as appropriate, and specifically address the request, either in person, or in writing, at or prior to the next meeting of the Board. If the Board fails to address the request in a timely manner, the sole remedy of the unit owner, officer of the Association, Board Member or citizen shall be the initiation of the Internal Complaint Procedure as set forth below.

**Section 2.2 Written Complaint.**

(a) If the actions described in Section 2.1 prove unsuccessful, or the Board fails to address the unit owner, officer of the Association, Board Member or citizen's request specifically, the Internal Complaint Procedure shall be initiated upon filing a written complaint ("Complaint") with the Reviewing Entity, signed by any unit owner, officer of the Association, Board Member or citizen ("Complainant"). The Association shall provide Complaint forms substantially similar to the form attached hereto as Exhibit I.

(b) The Complaint shall constitute a written statement of charges which shall set forth, in ordinary and concise language, the acts or omissions with which the Respondent is charged.

(c) The Complaint shall identify, to the greatest extent practicable, the specific provisions of the Act or regulations which the Board or Association is alleged to have violated and shall contain basic supporting facts. Where possible, and if appropriate, supporting documentation showing the date and description of the violation shall be provided.

(d) The Complaint must be as specific as possible as to times, dates, places, acts or omissions and persons involved.

(e) The Association shall provide written acknowledgment of receipt of the Complaint to the Complainant within seven days of receipt. Such acknowledgment may be hand

delivered, mailed by registered or certified mail, return receipt requested, or sent by electronic means provided the sender retains proof of electronic delivery.

(f) A record of each Complaint shall be maintained for one year after the Reviewing Entity acts upon the Complaint. For the purposes of this subsection, "acts upon" shall mean dismisses the Complaint or conducts a hearing and makes a decision regarding the Complaint.

**Section 2.3 Notice of Complaint.**

(a) Upon receipt of a Complaint, the Reviewing Entity shall review the Complaint to determine whether the Complaint concerns a potential violation of the Act or regulations. The Reviewing Entity may request additional information from the Complainant and may consult with Association legal counsel.

(b) If the Reviewing Entity determines the Complaint concerns a potential violation of the Act or regulations, the Reviewing Entity shall notify the Complainant and Association legal counsel in writing that a potential violation has been noted, including a copy of the Complaint, along with the time, date, place and nature of the potential violation.

(c) If the Reviewing Entity determines that a violation of the Act or regulation has not occurred, has been corrected, or the Complaint is invalid for any reason, the Reviewing Entity shall respond in writing to the Complainant dismissing the Complaint and explaining the reasons for dismissal.

(d) If the violation is not remedied to the satisfaction of the Reviewing Entity within thirty days of the Notice of Violation, the Reviewing Entity will schedule the Complaint for a hearing, at the next meeting of the Reviewing Entity, scheduled ten days or more from the end of the thirty-day period.

**Section 2.4 Notice of Hearing.**

(a) Upon scheduling the Complaint for a hearing, the Reviewing Entity shall provide Notice of Hearing to the Complainant at least fourteen days prior to the hearing by hand-delivery or certified mail, return receipt requested. Notice may also be sent by electronic mail upon authorization by the Complainant.

(b) The Complainant may request a continuance of the hearing for any reason. Continuance may be authorized at the sole discretion of the Reviewing Entity and shall be given only for good cause.

**Section 2.5 Amended and Supplemental Complaints.**

At any time prior to the hearing date, the Complainant may file an amended or supplemental Complaint. All parties shall be notified of any amendments or supplements in the manner provided in this Resolution.

**ARTICLE 3**  
**Hearing before the Reviewing Entity**

**Section 3.1 Hearing.**

- (a) The Reviewing Entity Chair shall serve as hearing officer and preside over the hearing, unless otherwise determined by the Reviewing Entity. Association legal counsel may attend the hearing on behalf of the Respondent at the request of the Reviewing Entity. The Complainant may be represented by legal counsel at the hearing.
- (b) At the beginning of the hearing, the hearing officer shall explain the rules by which the hearing will be conducted. The Reviewing Entity may determine the manner in which the hearing will be conducted, so long as the rights set forth in this Resolution are protected. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Generally, any relevant information shall be admitted if it is information upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statute which might make the admission of such information improper.
- (c) Neither the Complainant nor the Respondent need be in attendance at the hearing, but neither may be prohibited from attending the hearing. Depending upon the circumstances of the hearing, the Reviewing Entity may conduct the hearing in executive session.
- (d) The Complainant and the Respondent may, but need not:
- (1) Make an opening statement;
  - (2) Introduce evidence, testimony and witnesses;
  - (3) Cross-examine opposing witnesses;
  - (4) Rebut evidence and testimony; and
  - (5) Make a closing statement.

The Complainant and the Respondent may be called and questioned, by the Reviewing Entity.

**Section 3.2 Decisions.**

- (a) To be effective, a decision of the Reviewing Entity shall be by simple majority vote. The Reviewing Entity is encouraged to discuss the matter with Association legal counsel and the managing agent and may rely upon the expertise and opinion of either in reaching a decision. The Notice of Final Decision shall be dated and hand delivered or mailed by certified mail, return receipt requested, to the Complainant and Association legal counsel within seven days of the hearing.
- (b) If the final decision of the Reviewing Entity is adverse to the Complainant, the Complainant may give written notice of the adverse decision to the Common Interest

Community Board within thirty days of the decision date. Notice of an adverse decision to the Common Interest Community Board shall include copies of all records pertinent to the decision by the Reviewing Entity and shall be accompanied by a \$25.00 filing fee, payable to the Treasurer of Virginia.

(c) If the final decision of the Reviewing Entity is adverse to the Respondent, the Reviewing Entity shall make recommendations of acceptable methods for addressing the violation. Upon receipt of the Reviewing Entity's decision, the Respondent shall address the violation within twenty-five days of the decision, unless the corrective action may be completed in less time or requires additional time to address.

(d) If, after consideration of all relevant factors, or upon the advice of Association legal counsel, the Board fails to address the violation within twenty-five days of the Reviewing Entity's decision, the Complainant may give notice to the Common Interest Community Board as if an adverse decision was entered against the Complainant.

**ARTICLE 4**  
**General Provisions**

**Section 4.1 Proceedings.**

This Resolution is intended to assure that all Complaints are considered and, if necessary, acted upon to comply with the Act and regulations, and to serve as a guideline for the resolution of such complaints.

**Section 4.2 Implementation.**

The Reviewing Entity may determine the specific manner in which the provisions of this Resolution are to be implemented, provided that internal complaints are resolved.

**Section 4.3 Severability.**

Any inadvertent omission or failure to conduct proceedings in exact conformity with this Resolution shall not invalidate the results of such proceedings, so long as a prudent and reasonable attempt has been made to effect the general steps set forth in this Resolution.

**Section 4.4 Definitions.**

- (a) "Adverse decision" or "final adverse decision" means the final determination issued by the Reviewing Entity that is opposite of, or does not provide for, either wholly or in part, the cure or corrective action sought by the Complainant. All avenues for internal appeal under this Resolution must be exhausted prior to a decision being deemed final.
- (b) "Complaint" means a written complaint filed by a unit owner or citizen pursuant to this Resolution concerning a matter regarding the action, inaction, or decision by the Board, the Association managing agent, or the Association inconsistent with applicable laws and regulations.

**Exhibit 1**

**ORONOCO CONDOMINIUM  
UNIT OWNERS ASSOCIATION**  
601 N. Fairfax Street  
Alexandria, Virginia 22314

**INTERNAL COMPLAINT FORM**

**COMPLAINING PARTY** (The Party Filing the Complaint)

Complaining Party's Name: \_\_\_\_\_  
Mailing Address: \_\_\_\_\_  
Condominium Address: \_\_\_\_\_  
(if different) \_\_\_\_\_  
Home Phone: \_\_\_\_\_ Other Phone: \_\_\_\_\_

Email Address: \_\_\_\_\_

Are you a unit owner at Oronoco? Yes  No

**NATURE OF COMPLAINT**

**YOUR COMPLAINT INVOLVES:** (Check as appropriate)

The authority of the Association/Board of Directors, under any law or regulation, to:

- Require any person to take action, or not to take any action, involving a unit
- Require any person to pay a fee, charge, or assessment
- Spend Association funds
- Alter or add to common elements

The failure of the Association/Board of Directors, when required by law or regulation, to:

- Properly conduct an election
- Give adequate notice of a meeting or other action
- Properly conduct a meeting
- Maintain or audit books and records
- Allow inspection of books and records
- Properly adopt a budget or rule

Circumstances and specifics regarding the above allegation:

Please name the conditions or events that you believe to be a violation of law or regulations. List the names, dates, times, places, events and reasons leading to this formal complaint and any informal attempts at resolving the complaint. Also please cite, to the greatest extent practicable, the law or regulation you believe was violated. Use additional sheets of paper if necessary and include additional documentation, if appropriate. Please type or write legibly in black or blue ink.

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

**DESIRED ACTION:**

Please state what actions you think will resolve your complaint:

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

I hereby certify that the statements made on this form and in any attached documents are true and complete to the best of my knowledge, information and belief. I authorize notices under the Internal Complaint Procedure to be sent by electronic mail to the electronic mail address provided in this form.

\_\_\_\_\_  
Signature \_\_\_\_\_ Date \_\_\_\_\_

If, after the Reviewing Entity's consideration and review of the Complaint, the Reviewing Entity issues a final decision adverse to the Complainant, you have the right to file a notice of final adverse decision with the Common Interest Community Board ("CICB") in accordance with the regulation promulgated by the CICB. The notice shall be filed within 30 days of the date of the final adverse decision, shall be in writing on forms provided by the Office of the Common Interest Community Ombudsman ("Ombudsman"), shall include copies of any supporting documents, correspondence and other materials related to the decision, and shall be accompanied by a \$25.00 filing fee, payable to the Treasurer of Virginia. The Ombudsman may be contacted at:

Office of the Common Interest Community Ombudsman  
Department of Professional and Occupational Regulation  
9960 Mayland Drive, Suite 400  
Richmond, Virginia 23233  
804/367-2941  
CICOmbudsman@dpor.virginia.gov

**ORONOCO CONDOMINIUM  
UNIT OWNERS ASSOCIATION**

**RESOLUTIONS ACTION RECORDED**

Resolution Type: \_\_\_\_\_ No. \_\_\_\_\_  
Pertaining to: Internal Complaints  
Duty adopted at a meeting of the Board of Directors held: \_\_\_\_\_  
Motion by: \_\_\_\_\_ Seconded by: \_\_\_\_\_

	YES	NO	ABSTAIN	ABSENT
President	_____	_____	_____	_____
Vice President	_____	_____	_____	_____
Secretary	_____	_____	_____	_____
Treasurer	_____	_____	_____	_____
Director	_____	_____	_____	_____

ATTEST: \_\_\_\_\_ Date \_\_\_\_\_  
Secretary \_\_\_\_\_ Date \_\_\_\_\_  
Resolution effective: \_\_\_\_\_, 20\_\_

#101870

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board position.  
DRAFT AGENDA

**EXHIBIT 8**

**MEMORANDUM**

**DATE:** December 1, 2021  
**TO:** Common Interest Community Ombudsman  
**FROM:** Stephen A. Eisenberg  
Complainant  
**SUBJECT:** Legal Principles/Concepts/Definitions

In responding to a request for the documents stated in the complaint Jake Jacoby stated on behalf of the board of directors in an email dated June 3, 2020 that "[t]he books and records that you seek are protected by the attorney-client privilege or the attorney work product (sic) doctrine." (Exhibit 4)

Although not stated, but an essential element for consideration as well as a theory that may be advanced is the question of whether the documents arise out of litigation or pending litigation. This factor will be considered below.

Further it may be reasonably advanced in counter to such claimed privileges that they have been neutralized by the application of the principle of waiver. Notably, at this juncture the board of directors has indicated that the document sought is available for review.

The purpose of this memorandum is to discuss the three theories of permissible bases for withholding the document thought and explain why they are not controlling in the instant situation as well as to explain the application of waiver to them.

Critically, it is noted and underscored that there are insufficient facts available to the complainant to definitively establish the claimed bases for the legal theories thus serving as the predicates for countering their inapplicability.

Put simply, background information of how the initiative that brought about the forensic analysis of the legal fees (the "Analysis") is not available to unit owners. No public explanation has been made nor factual information published for the benefit of unit owners. The background circumstances for the initiative is generally surmised.

## **Attorney-Client Privilege**

Facts: The action to obtain Analysis was undertaken by the board of directors' finance committee. Critically, the design, purpose and objective of the initiative for the Analysis was to solely serve the interests of the unit owners to assuage their emotions regarding legal fee billing. The engagement had no purpose nor objective other than to be a part of or an element of the arbitration proceeding, the legal engagement.

Moreover, there appears to be no board of directors' record of approval of such action. Further, it is assumed that whether it was the finance committee or the board that engaged a contract with the professionals that carried out the Analysis, it was solely and independently with that professional organization. It was from one of the foregoing entities that the Analysis was produced and delivered to the board of directors or finance. There was no relationship between the Oronoco's engaging entity and the condominium's outside counsel.

Finally, it would appear that the engaging entity on behalf of the condominium owners was not the 'juridical' entity of the Association per se. As noted above, it was a group of individuals, either the finance committee or the board of directors acting on behalf of the ownership.

In short, there was no action that implicated a relationship between the formal owners Association and the law firm representing the Association in the course of the arbitration proceedings.

Law: Thomas E. Spahn, Esquire, a highly regarded Virginia attorney who is recognized as an expert in legal ethics has laid out the detailed elements creating the subject of the attorney-client privilege in his treatise A Practitioner's Summary Guide To The Attorney-Client Privilege And The Work Product Doctrine. He specifically states:

2.7 Key Elements of the Privilege The attorney-client privilege rests on: • Intimacy of the attorney-client relationship. • Confidentiality within that intimate relationship. • Communications within that intimate relationship.

2.8 Types of Privileged Communications The attorney-client privilege can protect two types of communications from clients to their lawyers, and two types of communications going the other way. Clients: • Give their lawyers facts the lawyers need in order to give legal advice. • Ask for legal advice. Lawyers: • Ask their clients for facts the lawyers need. • Give legal advice.

Discussion: As explained, there are no facts to suggest that the Association's law firm had any relationship to the Analysis. Indeed, to the contrary, the purpose of the Analysis was to assess the propriety of legal fee charges relating to the arbitration and their apportionment between Oronoco unit owners.

### **Work-Product Doctrine**

Facts: Importantly, the board of directors outside law firm neither instigated, had any role in engaging the professionals that conducted the Analysis nor had any need for it. At bottom, the Analysis had no relationship to the firm's representation of the Association or the arbitration action it was involved in. In fact, the focus of the engagement was to assess the propriety of legal fee charges assessed by the firm. This analysis could be viewed as adverse to the interests of the law firm.

Law:

[https://www.law.cornell.edu/wex/attorney\\_work\\_product\\_privilege](https://www.law.cornell.edu/wex/attorney_work_product_privilege)

The work product doctrine states that an adverse party generally may not discover or compel disclosure of written or oral materials prepared by or for an attorney in the course of legal representation, especially in preparation for litigation. However, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, an adverse party may discover or compel disclosure of work product upon a showing of "substantial need" and "undue hardship."

*Hickman v. Taylor*

The Supreme Court recognized the work product doctrine in Hickman v. Taylor, 329 U.S. 495 (1947). The Court clarified that the work product doctrine is a rebuttable presumption.



Specifically, the Court clarified that there is a presumption that an adverse party may not have access to materials prepared by a party's lawyers in anticipation of litigation. The Court maintained that this presumption may be overcome when a party has relevant and non-privileged facts which would be essential to the preparation of the adverse party's case.

Discussion: At bottom, the documents sought were not "by or for an attorney in the course of legal representation, especially in preparation for litigation" nor "in the course of legal representation" and consequently cannot be brought under the privilege umbrella in this instance as protected by the work-product doctrine.

Moreover, and most importantly "litigation" was not involved as the professional service being rendered to the Association. As noted, an arbitration was the representation that was the relationship between the parties and clearly arbitration is not a litigation action.

Consequently, the work-product doctrine is not applicable nor implicated in the instant relationship to forestall the release of the requested documents by the complainant.

### **Litigation/Pending Litigation**

Facts: It may be advanced or suggested that the various proceedings that the Oronoco Association was involved in was 'litigation'. This is not correct. The Association pursuant to the terms of its written agreement with the condominium's developer was required to resolve all claims through alternative dispute resolution processes. Thus, beyond a initial mediation action, most funds were expended in an arbitration. No other proceeding was involved.

Law: Alternative dispute resolution procedures and specifically arbitration is not "litigation". The following authorities repeatedly underscore the aforementioned principle.

- Black's Law Dictionary (9<sup>th</sup> edition) defines "litigation" as "1. The process of carrying on a lawsuit...2. A lawsuit itself...."

- <https://www.merriam-webster.com/legal/alternative%20dispute%20resolution>
- <https://www.dol.gov/general/topic/labor-relations/adr>
- [https://ww2.nycourts.gov/ip/adr/What\\_Is\\_ADR.shtml](https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml)

Discussion: Clearly, a non-litigation process, an alternative dispute resolution process, arbitration, was involved with the disagreement and claims that the Oronoco Association had with the building's developer that existed, not "litigation".

### **Waiver**

Facts: Over the period of the arbitration process individual unit owners requested access to review the legal bills, the financials underpinning the proceedings on various occasions. The board of directors on every occasion denied such requests on the basis that these were legally privileged documents.

When the arbitration was finally settled, the board of directors advised condominium owners that all financial records would be made available to them. Accordingly, this would include the Analysis of such legal fee records. (Exhibit 9 and the Decision) That is, the board has stated that the forensic audit of legal fee billings document would be released with all other legal fee billing documents for condominium owner review.

Law:

See generally:

[https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1235&context=faculty\\_publications](https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1235&context=faculty_publications)

<https://legal-dictionary.thefreedictionary.com/waiver>

Discussion: Setting aside the viability of any legal privilege or legal principle, it is a matter of clear fact that such privileges have been neutralized and given up by the board of directors through its action to exercise its

authority to make all financial records open to condominium owners.

The board of directors has 'waived' any claimed legal privileges by advising the Oronoco condominium owners that it was releasing all of legal billing invoices previously claimed to be privileged for individuals to review. By this action it waived any privilege claim related to forensic audit documents that cover the same materials, to wit: legal bills.

DRAFT AGENDA  
Materials contained in this agenda are for discussion  
and are not to be construed as resolutions of the board position.  
DRAFT AGENDA

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board position.  
DRAFT AGENDA

**EXHIBIT 9**

stephen.eisenberg@comcast.net

11/22/2021 5:13 PM

Thanks

From: Herbert Rosenblum  
Sent: Friday, October 29, 2021 2:27 PM  
To: [had@quintocundo.com](mailto:had@quintocundo.com)  
Subject: Thanks

Dear BOD,

Again I thank you for bringing our arbitration to a closure. I think the settlement you reached was excellent in light of the Arbitrator's prior rulings.

I appreciate and applaud your efforts in doing so.

I was again pleased to hear that the bills from WTP would be available for our review.

I ask that the billing and posting be available to those who wish to view same. It is important that we be provided detailed itemization by attorney, project

and time expended on each activity. This is customary in the profession. Also please advise WTP not to delete, modify or in any way change anything that they have

that relates to bills, billings or costs that were charged to the UOA and that were in any way paid by the UOA in whole or in part. They should maintain all copies of all such

documents, computer data, inputs and all iterations of same.

Please notify WTP of this request and obtain such assurances before the final billing is resolved.

Basically the block billing that we saw earlier in the arbitration is not helpful in any review of bills.

I also respectfully suggest that several newer owners in our community are partners in large law firms and are probably most capable to assisting the BOD if it has any

questions before finalizing a final payment to WTP or a new retainer agreement. I ask that you consider asking for their assistance. I think they would be a valuable resource.

Thanks again.

HERBERT S. ROSENBLUM

ATTORNEY AND COUNSELOR AT LAW

A Professional Corporation

526 King Street, Suite 211

Alexandria, Virginia 22314

Mailing Address:

Post Office Box 58

Alexandria, Virginia 22313-0058

Telephone: 703-684-0050

Facsimile: 703-684-0072

E-Mail: [HerbertRosenblum.com](mailto:HerbertRosenblum.com)

stephen.eisenberg@comcast.net

10/08/2021 11:08 AM

## SAJE Counsel Communication Request

NFRC: Jake Jacoby misconstrues the message regarding communications with counsel. The purpose of the request was simply in recognition of and deference to the Virginia State Bar Rules of Professional Conduct, Rule 4.2. Indeed, Jacoby specifically states below that the board of directors is being represented by and following the advice of counsel.

Jacob's message states that "...it has limited engagements with counsel to only those instances where it was judged to be absolutely required to ensure strict compliance with applicable statutes and regulations." The challenges raised by the complainant (SAJE) belie the foregoing statement and indicate the board deviated from the Code of Virginia in its decisions regarding the requested document.

Notably, the "unit owner complaint" referred to in the message stands on its own merits in law and fact. Nothing more needs to be accomplished or stated in relation to acting on it. At this point, the board of directors appears to be attempting to cure the defects in earlier actions to refuse the document release.

Stephen Eisenberg

Original Message  
From: jacobye@aol.com  
To: stephen.eisenberg@comcast.net  
Cc: edavidwelch@gmail.com, jacobyrasak@gmail.com  
Date: 10/08/2021 7:18 AM  
Subject: Re: Fwd: BOD Meeting/Action-SAJE Complaint

Dear Steve,

The Board has acted on advice of counsel with respect to your complaint and follow-on correspondence in keeping with our standard practice for situations where statutory or regulatory implications are involved. Examples include your previous demand for external inspectors of elections and your complaint concerning access to invoices which you subsequently did not pursue.

The Board is mindful of its responsibility to be good stewards of Association funds. Accordingly, it has limited engagements with counsel to only those instances where it was judged to be absolutely required to ensure strict compliance with applicable statutes and regulations. In your recent correspondence you stated a desire to minimize legal costs. The Board concurs. Your request for direct discussion with counsel would increase legal costs, which is an issue of intimate importance to the Board representing all owners, and directly contrary to good stewardship.

In your view, you lodged a unit owner complaint and the Board has responded appropriately by offering the opportunity for you to present your complaint at the next scheduled Regular Meeting of the Board. Per our previous correspondence on this matter, you will be notified when that meeting is scheduled.

Jake Jacoby, Secretary

In a message dated 10/06/2021 9:30:19 AM Eastern Standard Time, stephen.eisenberg@comcast.net writes:

Jake: Since it is clear from your communications that you/the directors are being represented by counsel and I am an attorney licensed in the Commonwealth of Virginia, pursuant to the state bar's professional standards of conduct I wish to communicate with your counsel directly regarding this matter.

Please have him/her contact me.

Steve

On 10/06/2021 9:05 AM jacobye@aol.com wrote:

Dear Steve,

The Board's interpretation of your response (below) is that you chose to proceed with a hearing of your complaint at a Board meeting, rather than to have the Board render a decision based upon your written complaint.

Accordingly, the Board will schedule a hearing of your complaint at the next Regular Meeting of the Board of Directors. If the meeting is virtual, a dial-in number will be provided as has been the case with all virtual Board meetings since the beginning of the Pandemic, to include the September 27, 2021 meeting.

You will receive notice by e-mail when a date and time for the meeting is set. That e-mail will request that you acknowledge receipt of the notice and that you confirm your participation.

To ensure delivery of this e-mail, please acknowledge receipt

Jake Jacoby, Secretary

From: stephen.eisenberg@comcast.net  
To: jacobye@aol.com, edavidwelch@gmail.com, jacobyrasak@gmail.com  
Sent: 10/03/2021 11:08:45 AM Eastern Standard Time  
Subject: BOD Meeting/Action-SAJE Complaint

Jake: Please accept, as ever, my gratitude for the consideration and actions that have been taken by the board concerning the complaint I submitted.

Suffice it to state, it is my sincerest desire to quickly resolve this matter as easily and congenially as possible. It is not my wish nor desire to embarrass anyone; expose to public knowledge the Oronoco community's 'tribulations and tribulations'; create dissension or, trigger the expenditure of needless legal fees and hearing costs.

Prior to providing the board with my thoughts/suggestions concerning 'the way forward', it is important that I

clarify some misapprehensions that are manifest in your communication to me, set forth below.

\* Yes, I acknowledged (See attached) that the board would consider my complaint in the September 27, 2021 directors meeting. Indeed, as the agenda and your note communicated, my complaint was to be considered in an "executive session". Nonetheless, by your note and the published agenda there was no invitation extended to me either expressly or inferentially to attend the executive session nor was I invited the opportunity to submit any matters to the board in advance at that time for its consideration.

I would further observe that in the history of board meetings, no one has ever attended an executive session without such an invitation. The only such individuals that come to mind who have attended an executive session are the board of directors' advisory committee for the AFR settlement, and in that case, the individuals were conferred with the position of special officers of the board or an equivalent status and, I will presume, were specifically requested to attend the meeting for their views.

Consequently, there was no reason for me to assume or believe I should have attended the executive session or prepared/submitted particular matters for the board's consideration.

\* Beyond the foregoing view that my participation was not invited, as the board is well aware, it has been my documented position within the complaint that 'action' denying my request for the forensic accounting report I had requested had been taken, whether de jure or de facto. Consequently, I was of the understanding that the board of directors was going to act on the requests that I had previously formally made within the complaint, i.e. review previous action and grant the request or appoint a neutral "Reviewing Entity" as required by the board's complaint policy.

\* You state that I did not advise the board that I would not attend the board meeting, by which you suggests I had an obligation to do so. Of course, I had no such responsibility. As you are well aware and it is well known there is no such policy or requirement to advise the board, if an individual will attend its meetings. Owners simply show up as they are authorized to do so and wish as has been the practice since the

establishment of the board of directors. Moreover, a request was never submitted to me for response inquiring whether I would be attending the meeting on September 27th.

\* The cryptic phone calls made to my residence by John Theoharis at approximately 2000, a point late in the evening on September 27th and at a time when I was unavailable, were simply out of order, unclear and unfair. The messages left provided no insight concerning what the reason was for my presence nor what was expected from me. It is disingenuous to believe that under the circumstances, at such a late-night point, attempting to have an unprepared individual attend and present a thoughtful, cogent position is a proper, useful way by which to obtain insights to evaluate a request on an important issue to a deliberative body.

You state that "The Board can proceed with rendering a decision based upon your written complaint. Alternatively, your complaint can be heard at the next regular Board meeting, when that is scheduled." Notably, in either situation, the board is obligated to hold a meeting to formally act. As I expressed at the outset, it is my desire to resolve this matter expeditiously and without any untoward impact.

Please accept my apologies; I am certainly not happy to be an Oronoco 'gadfly' with my document request. I know the board has far more important Oronoco issues to address. Most certainly, I would be pleased to have an opportunity to discuss my request with the board and answer questions/address concerns at its convenience.

Consequently, I would offer various suggestions for your consideration so as to amicably advance resolution.

First, since a board meeting has to be held, the chair should call one at a mutually convenient date and time to address the complaint. The meeting would be called similar to ones held by the board when it wished to discuss the ADR. This is a procedure with which the board has great familiarity. That is, announce a board meeting for a given date that would immediately go into executive session to consider "a complaint". Since I do not use Zoom I would request that, if this approach is taken, the meeting be held through a conference call.

Second, appoint me to a position with status similar to the one of the individuals on the 'settlement committee', thereby giving me entree to the report without any concern for waiving a perceived legal privilege as being cloaked with the requirement to maintain all 'client' confidentialities. For the record, and as I have previously stated, in my view there are no legal privileges associated with the report I am requesting.

Third, recognizing my professional assessment that there are no legal privileges associated with the report I have sought, take action nonetheless to conditionally waive any privileges the board believes apply to it and let me review the report within an appropriate environment.

I raise the question again, what is of concern to the directors? This assessment was originally suggested by me to Janet Vasak to 'clear the air' for the Oronoco community apropos ongoing contentious concerns held and expressed by many regarding the equitable division of legal fees. No doubt, if there has been a misallocation issue of legal fees, I would expect the matter has been resolved at this point. Thus, 'no harm, no foul'; take a 'stand-up' position on release.

I didn't set out to make a 'mountain out of a mole hill'. I am frankly taken aback by the reaction to my request by the directors. Let's close this out quickly without any consternation, fuss and remain as good neighbors we are.

Steve

----- Original Message -----  
From: [jacobyle@aol.com](mailto:jacobyle@aol.com)  
To: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net), [cdavidweich@gmail.com](mailto:cdavidweich@gmail.com), [janetvasak@gmail.com](mailto:janetvasak@gmail.com)  
Date: 10/01/2021 9:48 AM  
Subject: Re: BOD Communication

Steve,

Despite your written acknowledgement that your complaint was scheduled to be heard at the Monday evening (September 27, 2021) Board meeting, you did not attend the meeting. (The meeting and its agenda was also separately announced to you, as it was to all owners). Furthermore, you did not notify the Board in advance of the meeting that you would not be in attendance. Rather than proceed on the basis of your written complaint alone, the Board adjourned after we failed to reach you by phone.

Given these developments, there are two options. The Board can proceed with rendering a decision based upon your written complaint. Alternatively, your complaint can be heard at the next regular Board meeting, when that is scheduled. Our Counsel has advised that either

option is available and proper. Please note that all regular business of the Board was conducted on Monday evening (September 27, 2021).

Before taking any further steps, the Board offers you the opportunity to specify your preference.

Please acknowledge receipt of this e-mail and advise the Board with respect to your choice.

Jake Jacoby, Secretary

In a message dated 9/28/2021 3:15:53 AM Eastern Standard Time, [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net) writes:

David/Jake/Janet: I regret I was unavailable to communicate with you last evening

To the the extent that you desire to speak with me, I will be available ~~after~~ noon today at a mutually convenient time.

Steve

DRAFT AGENDA  
Materials contain information that is proposed for discussion and are not to be construed as regulation or Official Board position.



stephen.eisenberg@comcast.net

## RE: Complaint Hearing

To: Jake Jacoby <jacobyj@aol.com> Copy: Erik Bolog <ebolog@wpiplaw.com> •  
David Welch <davidwelch@gmail.com> • Janet Vasak <janetvasak@gmail.com> • Janet Vasak <janetvasak@gmail.com>

Jake: That is correct.

Thank you.

Steve

On 11/19/2021 6:59 AM Jake Jacoby <jacobyj@aol.com> wrote:

Steve, to avoid any confusion and ensure that I understand your request. Am I correct that you are asking for the Board to act on your written complaint in your absence at the Monday Board meeting? Jake.

Sent from Mail for Windows

From: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)  
Sent: Thursday, November 18, 2021 11:07 AM  
To: Jake Jacoby  
Cc: Bolog, Erik; David Welch; [Janet Vasak@gmail.com](mailto:janetvasak@gmail.com)  
Subject: Complaint Hearing

Jake: Thank you for the opportunity to attend the board of director's meeting. I will not be present at the session. In this connection, I reserve all legal rights concerning the complaint filed and actions taken therewith.

The complaint I filed fully meets the Association's Internal Complaint Policy requirements by clearly stating my concerns in relation to the document requests made and the relief I desire. I stand by the matters presented therein, i.e. the record, as well as explicated through innumerable missives provided to the board of directors regarding the document request over the last year and a half.

I would appreciate at your earliest advice concerning the board's action regarding the complaint and specifically whether it is the board's final decision/action regarding my request for all documents associated with the Association's legal fee forensic accounting audit, the subject of the complaint.

Please accept my gratitude for your considerations.

Steve

----- Original Message -----

From: [jacobyj@aol.com](mailto:jacobyj@aol.com)  
To: [stephen.eisenberg@comcast.net](mailto:stephen.eisenberg@comcast.net)  
Cc: E. David Welch, Janet Vasak <[janetvasak@gmail.com](mailto:janetvasak@gmail.com)>  
Date: 11/12/2021 3:47 PM  
Subject: Complaint Hearing

Steve, the Board of Directors plans to hold a Regular Meeting on the evening of November 22 at 7 PM. Your complaint will be heard in open session during the Old Business portion of the agenda.

Since the meeting will be virtual, please be available to present your complaint either by phone or Zoom.

Please acknowledge receipt of this e-mail by "Reply All."

Jake Jacoby, Secretary

Sent from Mail for Windows

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official board position.  
DRAFT AGENDA

Board of Directors <notify@buildinglink.com>

11/15/2021 10:24 PM

## Oronoco Condominium - Board of Directors Meeting on November 22, 2021 at 7:00 pm

To: Stephen AJ Eisenberg <stephen.eisenberg@comcast.net>

Dear Oronoco Owners,

The Board of Directors will meet on November 22, 2021 at 7 PM. The meeting will be virtual. The link for the meeting will be provided in an e-mail from the Managing Agent as the date for the meeting approaches.

The Board anticipates the end of the arbitration prior to the meeting, bringing the long saga to a close and opening a new period for our building and community. As you will see from the meeting agenda, there is a lot to cover and we hope that everyone will participate. The news is good and we would like to share it before the holidays.

The Agenda for the Board meeting is:

- Call to Order
- Election of Officers of the Association
- Approval of Minutes
- President's Update and Arbitration Close-out
- Approval of 2020 Audit
- Approval of 2022 Association Budget
- Approval of New Committee Chairs and Members
- Old Business:
  - Owner Complaint (Postponed from Previous Meeting)
  - Security Update

### - New Business:

- Initiation of Balconies Project
- Remediation Planning
- Holiday Contributions for Oronoco Staff
- Open Forum
- Adjournment

### **The Board of Directors**

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DRAFT AGENDA

**EXHIBIT 10**

stephen.eisenberg@comcast.net

11/24/2021 9:39 AM

## Decision-Board of Directors Complaint Action

To: Erik Bolog <ebolog@wplaw.com> Copy Jake Jacoby <jacobylj@aol.com> ,  
janetvasak@gmail.com <janetvasak@gmail.com> , David Welch <davidwelch@gmail.com>

Erik: Eyi...Steve

----- Original Message -----

From: stephen.eisenberg@comcast.net  
To: Jake Jacoby <jacobylj@aol.com>  
Date: 11/24/2021 9:37 AM  
Subject: RE: Decision-Board of Directors Complaint Action

Jake: Understand...Steve

On 11/24/2021 9:31 AM Jake Jacoby <jacobylj@aol.com> wrote:

Steve, I'm a layman relying on advice of counsel. I have nothing to add and am ending this dialogue.  
Jake.

Sent from Mail for Windows

From: stephen.eisenberg@comcast.net  
Sent: Wednesday, November 24, 2021 9:10 AM  
To: Jake Jacoby  
Subject: RE: Decision-Board of Directors Complaint Action

Jake: Thank you!

My question is did you rely on 2.2(e) below for that timeframe?

With appreciation....Steve

On 11/24/2021 8:54 AM Jake Jacoby <jacobylj@aol.com> wrote:

Steve, seven days. That includes Thanksgiving and the weekend. Jake.

Sent from Mail for Windows

From: stephen.eisenberg@comcast.net  
Sent: Wednesday, November 24, 2021 7:34 AM  
To: Jake Jacoby

Cc: David Welch: janetvasak@gmail.com; Bolog, Erik  
Subject: RE: Decision-Board of Directors Complaint Action

Jake: What "prescribed time period" are you referring to? I note there is a time period referred to in the Internal Complaint Policy, 2.2 (e). Is that the timeframe you are relying on?

Thank you.

Steve

On 11/24/2021 7:15 AM Jake Jacoby <jacobylj@aol.com> wrote:

Steve, the formal communication will be provided within the prescribed time period. Jake.

Sent from Mail for Windows

From: stephen.eisenberg@comcast.net  
Sent: Wednesday, November 24, 2021 5:18 AM  
To: Jake Jacoby  
Cc: Bolog, Erik; David Welch: janetvasak@gmail.com  
Subject: Decision-Board of Directors Complaint Action

Jake: I would be most appreciative, if you would advise me when I can expect to be provided with a formal communication regarding the action taken at the board meeting Monday evening concerning the requests made in my complaint and the release of the forensic audit of the arbitration WTP legal fees.

As ever, thank you for your consideration and advice.

Steve

DRAFT AGENDA  
Materials containing the agenda are proposed topics for discussion and are not to be considered as regulation or official Board position.  
DRAFT AGENDA

DRAFT AGENDA  
Materials contained in this agenda are proposed topics for discussion  
and are not to be construed as regulation or official Board position.  
DRAFT AGENDA

**EXHIBIT 11**

# THE ORONOCO CONDOMINIUM UNIT OWNERS ASSOCIATION

November 23, 2021

VIA CERTIFIED MAIL/  
RETURN RECEIPT REQUESTED & EMAIL

Stephen Eisenberg, Esquire  
601 North Fairfax Street  
Unit #307  
Alexandria, Virginia 22314

Re: The Oronoco Condominium  
License No. 0517060281  
Notice of Final Determination of Complaint

Dear Mr. Eisenberg:

The Board of Directors of The Oronoco Condominium Unit Owners Association (the "Association") is in receipt of a written complaint dated September 13, 2021. The Board of Directors promptly acknowledged receipt of the complaint, and on September 15, 2021, requested that you provide additional information relating to your complaint. Upon receiving your further submissions, the Board of Directors took up the complaint at its September 27, 2021 Board of Directors meeting, to which you were provided notice (acknowledged by you on September 22, 2021), but you opted not to attend. On October 1, 2021, the Board of Directors provided you two options with respect to your complaint: (a) decide the merits of the complaint on the papers, or (b) provide you the opportunity to discuss the merits of your complaint at the next Board of Directors meeting. On October 6, 2021, you elected to discuss the merits of the complaint with the Board of Directors. Accordingly, on October 6, 2021, the Board of Directors agreed to reschedule the hearing on your complaints to its next regularly scheduled Board of Directors meeting. On November 12, 2021, the Board of Directors notified you that the complaint would be discussed at the Board of Directors November 22, 2021 meeting. On November 18, 2021, you advised the Board of Directors that you would not be attending the November 22, 2021 meeting. On November 19, 2021, you advised the Board of Directors that it should proceed to base its decision on your written submissions. Accordingly, the complaint was considered at the November 22, 2021 Board of Directors meeting. This will provide you with the Board of Directors' final determination regarding the complaint.

Your complaint can be broken into two distinct parts:

First, you contend the Board of Directors violated Va. Code §55.1-1945 by not providing you "forensic audit" documents concerning legal fees incurred in a pending matter between the Association and The Oronoco Condominium's Declarant. This was a renewal of a request dating

back to May, 2020. In your complaint you write ...[o]n May 28, 2020 I requested the subject document. The request was denied. At the time of the denial I was advised that upon conclusion of the ADR [the dispute between the Association and the Declarant] the report would be furnished to me. We are for all intents and purposes there, accordingly, I hereby renew my request for the subject document." The Board of Directors rejected this request because the ADR was not completed.

Second, you assert that the Board of Directors met through informal communications as opposed to open Board of Directors meetings. We will address both portions of your complaint herein.

With respect to access to books and records, the requested document was not a "forensic audit," but was, in fact, the work product of a billing review by an independent outside entity. At the time of the request, the dispute by and between the Association and the Declarant was ongoing, and the issue of attorneys' fees, as well as their reasonableness, was before the arbitrator. This work product was withheld from the Declarant based upon the work-product privilege. Thus, the requested documents were properly withheld under Virginia Code §55.1-1945 (C)(3). However, since both parties have very recently asked for dismissal, the work product privilege is no longer applicable. Accordingly, the Board of Directors announced at its November 22, 2021, meeting that these documents, including the product of that review, will be transferred on/about November 29, 2021 to the Association's Managing Agent as Books and Records of the Association and will be available for inspection by owners in good standing. Unfortunately, since you elected not to attend the Board of Directors meeting you may not be aware of this fact. Accordingly, the Board of Directors concludes that it did not violate the Virginia Condominium Act with respect to this issue.

5

With respect to Board meetings, the Board of Directors has regularly and continuously made all of its decisions at open Board of Directors meetings noticed and scheduled in accordance with Virginia Code §55.1-1949. The Board members may have communicated Board of Directors decisions, made at an open meeting, through electronic means. However, the Board has always made its decisions in accordance with the aforementioned statute. On the two occasions cited in your complaint, individual Directors responded to e-mails by simply restating the Board of Directors in open meetings. Accordingly, the Board of Directors concludes that it did not violate the Virginia Condominium Act with respect to this issue.

6

We believe the foregoing fully addresses all of the issues you raised, all of which have been thoroughly discussed and considered by the Board of Directors. Please note that you have the right to file a Notice of Adverse Decision ("Notice") with the Virginia Common Interest Community Board to the extent that your claims relate to applicable laws and regulations if you disagree with the Association's decision. As noted on the Association's complaint form, the Notice must be filed within thirty (30) days of the date of this decision, and must be in writing on forms provided by the Common Interest Community Ombudsman ("Ombudsman"), and shall include any copies of supporting documents, correspondence and other materials related to the decision, and shall be accompanied by a \$25.00 filing fee. The Ombudsman may be contacted at:

Office of the Common Interest Community Ombudsman  
Department of Professional and Occupational Regulation  
9960 Mayland Drive, Suite 400  
Richmond, VA 23233  
Telephone No. (804) 367-2941  
E-Mail: [CICombudsman@dpor.virginia.gov](mailto:CICombudsman@dpor.virginia.gov)

Very Truly Yours,



C. David Welch, President

12047554



**MEMORANDUM**

**DATE:** December 1, 2021  
**TO:** Common Interest Community Ombudsman  
**FROM:** Stephen A. J. Eisenberg  
Complainant  
**SUBJECT:** Analysis-Notice of Final Determination of Complaint

Matters raised by the Notice of Final Determination of Complaint (the "Notice") are addressed as raised in the document by the adjacent numbers to the points.

Critically, it must be recognized that by the actions/positions taken by the board of directors and stated in the document the Board attempts to overcome its improper and wrongful actions.

Specifically, it attempts to neutralize the Complainant's multiple denials over a period of time of the right of the Complainant to the document, which remains a matter of impropriety sought for correction.

It seeks to neutralize its complete disregard to the right of the Complainant to a neutral body review of its actions established by policy and requested by grievant in its complaint as well as other communications by grievant by not appointing such a body to review its actions, ones for which it has taken and it has a conflict of interest.

It seeks to ignore and set aside the multiple actions taken by the Board of directors outside of the legal protocols required by law for it to hold and act at a meeting, which deprived unit owners their right to attend and witness the Board's proceedings.

And, the Notice does not represent factually the decision of the Board at its November 22, 2021 meeting in which it denied once again the request for the document.

It is all of the above considerations and concerns that the grievant seeks the CICB to review and take such action as warranted to bring about the remediation of The Oronoco board of directors conduct past and in the future.

This is not the novel '1984' where the board of directors by its action can rewrite the history of its improper actions. It is these improprieties the Complainant seeks to have corrected by the CICB.

At bottom and as explained below, the Notice misconstrues and misstates facts and conclusions regarding the history and actions taken regarding this matter.

# 1 See Exhibit #6 which provides full background information on the fact that the Complainant did not appear at the Board's executive session. The "notice" given was in fact no "notice". It did not contain an invitation for the Complainant to attend the executive session expressly or inferentially.

#2 See Exhibit #6 in which the Board expressed an "interpretation" for which there was simply no basis to draw such a conclusion in any communications by the Complainant.

#3 See Exhibit #6 for which there is no "election" to "to discuss the merits of the complaint".

#4 The Complainant was never offered an opportunity to conveniently schedule another board of directors meeting or "agreed" to the same. The Board decided on the date of the meeting without the complaint's input or knowledge.

#5 See Exhibit #8 which generally discusses application of the work-product doctrine. The Notice states that the billing review was conducted by an "independent outside entity". There is no reference to a relationship to the Association's law firm and its acquisition of the evaluation. As discussed in the Complaint Background, Context, Analysis Memorandum (the "Memorandum") the purpose was to benefit Oronoco condominium owners, not the law firm.

Notably, the Notice states that the professional evaluation related to the question of legal fees between parties being adjudicated in the arbitration. This had no relation to the assessment the Complainant requested, which it has been explained dealt with the fairness of apportionment of legal fees between the Oronoco owners, i.e. those under the umbrella of the Association only and those who had separate claims.

Critically, as explained in the legal analysis memorandum (Exhibit #8) the work-product doctrine is inapplicable in the instant matter for the reasoning as follows:

Moreover, and most importantly "litigation" was not involved as the professional service being rendered to the Association. As noted, an arbitration was the representation that was the relationship between the parties and clearly arbitration is not a litigation action.

Consequently, the work-product doctrine is not applicable nor implicated in the instant relationship to forestall the release of the requested documents by the complainant.

Finally, and most interestingly Jake Jacoby took the position in denying Complaint's request that "[t]he books and records that you seek are protected by the attorney-client privilege or the attorney work product doctrine." In the Notice, the attorney-client relationship is not relied on; it is absent from reliance.

There cannot be the dependance on the work-product doctrine without the invocation and existence of the attorney-client privilege. There must be the professional relationship for the doctrine to be applied. One privilege demands the presence of the other. Summarily, in this case the professional relationship was unrelated to the acquisition of the forensic legal fee audit.

#6 See the Memorandum generally. There is no support in any Board document for the assertion that board of director meetings were held to address and decide action on the Complainant's document requests. Further, there is no support that there has ever been a discussion in a properly called Board meeting to discuss the handling and releasability of the document requested.



Gillespie, Heather &lt;heather.gillespie@dpor.virginia.gov&gt;

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**Notice of Final Adverse Decision - Stephen Eisenberg**

1 message

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**Gillespie, Heather** <heather.gillespie@dpor.virginia.gov>  
To: jacobyle@aol.com

Tue, Dec 7, 2021 at 12:37 PM

Good afternoon. My office recently received a Notice of Final Adverse Decision from Mr. Eisenberg in relation to a complaint he submitted to Oronoco Condominium. I have attached a letter from my office and a copy of the NFAD as required by law and regulation. You are not required to take any action at this time, but I would ask you to review the NFAD and let me know if it has additional information that was not provided as part of the original complaint or the association's response to the complaint.

Thank you and please let me know if you have any questions.

Heather

**Heather S. Gillespie**

Common Interest Community Ombudsman

Department of Professional &amp; Occupational Regulation

9960 Mayland Drive, Suite 400

Richmond, VA 23233

Phone (804) 367-0373

[www.dpor.virginia.gov/cic-ombudsman](http://www.dpor.virginia.gov/cic-ombudsman)

Governmental email is generally subject to disclosure pursuant to the Virginia Freedom of Information Act. However, if you have received this message in error, please notify the Sender and delete the message as well as all attachments.

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**2 attachments** **Scanned Letter to Association.pdf**  
295K **2022-01153 Eisenberg, Stephen Complaint.pdf**  
3051K



Gillespie, Heather &lt;heather.gillespie@dpor.virginia.gov&gt;

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## Acknowledgement

1 message

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**Gillespie, Heather** <heather.gillespie@dpor.virginia.gov>

Tue, Dec 7, 2021 at 12:39 PM

To: stephen.eisenberg@comcast.net

Please see the attached letter which provides formal acknowledgement of receipt of your Notice of Final Adverse Decision.

Thank you,

Heather

**Heather S. Gillespie**

Common Interest Community Ombudsman

Department of Professional & Occupational Regulation

9960 Mayland Drive, Suite 400

Richmond, VA 23233

Phone (804) 367-0373

[www.dpor.virginia.gov/cic-ombudsman](http://www.dpor.virginia.gov/cic-ombudsman)

Governmental email is generally subject to disclosure pursuant to the Virginia Freedom of Information Act. However, if you have received this message in error, please notify the Sender and delete the message as well as all attachments.

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**Acknowledgement.pdf**  
214K



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam  
Governor

December 6, 2021

Mary Broz-Vaughan  
Director

**VIA ELECTRONIC MAIL**

Board of Directors  
The Oronoco Condominium Unit Owners Association  
601 North Fairfax Street, Unit 607  
Alexandria, VA 22314  
[jacobyle@aol.com](mailto:jacobyle@aol.com)

**Re: The Oronoco Condominium Unit Owners Association  
File No. 2022-01153**

Attached, please find a copy of a Notice of Final Adverse Decision recently received by this office. We are providing this copy pursuant to the requirement set forth in 18 VAC 48-70-110 of The Common Interest Community Ombudsman Regulations.

Please alert my office if there is any discrepancy between the complaint submitted to the Association and the Notice of Final Adverse Decision received by this office. We base the determination provided by my office only on the actual Complaint submitted to the Association and not a later or different version of that Complaint. Apart from any possible discrepancy, no response is necessary or expected.

Once we make a determination as to the allegations contained in the Notice of Final Adverse Decision, both the Complainant and the Association will receive a copy of that Determination.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Heather Gillespie".

Heather Gillespie  
Common Interest Community Ombudsman



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Ralph S. Northam  
Governor

Mary Broz-Vaughan  
Director

December 6, 2021

**VIA ELECTRONIC MAIL**

Stephen Eisenberg  
601 North Fairfax Street, Unit #07  
Alexandria, VA 22314  
stephen.eisenberg@comcast.net

**Re: The Oronoco Condominium Unit Owners Association  
File No. 2022-01153**

Dear Mr. Eisenberg:

The Office of the Common Interest Community Ombudsman is in receipt of your Notice of Final Adverse Decision. After the Notice of Final Adverse Decision has been reviewed, this office will decide if a determination is appropriate, based on the subject matter of the Notice of Final Adverse Decision, and if so, such determination will be sent to you by mail.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Heather Gillespie'.

Heather Gillespie  
Common Interest Community Ombudsman

## Information on DPOR System Capacity to Receive Audio and Video Recordings

**Receiving of Files:** The Department is able to receive digital audio and video recordings through a VITA-approved secure portal. The Department currently uses the Box ([www.box.com](http://www.box.com)) file sharing platform on a limited basis. The Department plans to transition to using the Microsoft SharePoint platform in the near future. Either of these portals may receive digital files up to 250 GB (250,000 MB) in size. For reference, the file size of one (1) hour of full HD (1080p resolution) video is 1.2 GB to 1.4 GB<sup>1</sup>.

Common Name	Pixel Size	Also Known As	File Size for 1 hour of video
720p	1280 x 720	HD or "HD Ready"*	800 - 900MB
1080p	1920 x 1080	FHD or "Full HD"	1.2 - 1.4GB
2K	2048 x 1080	Digital Cinema (DCI)	2.8 - 3GB
4K	3840 x 2160	UHDTV1	20 - 22GB
8K	7680 x 4320	UHDTV2	36 - 38GB

Video File Size Chart

In order for an individual to submit a digital file to the Department through the file sharing platform, the individual would be required to request the Department provide the individual with a link to the platform. A staff member would provide the requesting external party with a link that would permit access to the platform to upload files only. External parties would not have the ability to download files from the platform. The staff member providing access to the external party would be the sole party able to download the files from the platform. The email of the external party that uploads files to the platform could not be shared.

The Department has limited ability to receive digital audio and video recordings through email. The Department's email vendor allows receipt of email file attachments up to 25 MB per email.

The Department is able to receive digital audio and video recordings stored on tangible media such as recordable DVD/CD or flash drive. Most of the personal computers issued to Department staff are laptop computers and can accept flash drives. However, most of these laptops do not contain a DVD/CD drive. The Department may need to procure one or more external DVD drives in order for staff to be able to accept submissions by DVD/CD.

The Department may not be able to receive audio and video recordings that are stored on analog media (e.g. tape) due to lack of available equipment to playback such media.

### Playback/Storage/Archiving:

<sup>1</sup> <https://www.filecatalyst.com/blog/how-big-are-movie-files/> (Accessed 7/25/22).



The Department uses laptop computers with a Microsoft Windows operating system. The default media player for these systems is Windows Media Player. Windows Media Player is able to support the following file formats<sup>2</sup>:

Windows Media formats (.asf, .wma, .wmv, .wm)	Audio Visual Interleave (.avi)	Audio Interchange File Format (.aif, .aifc, .aiff)
Windows Media Metafiles (.asx, .wax, .wvx, .wmx, wpl)	Moving Pictures Experts Group (.mpg, .mpeg, .m1v, .mp2, .mp3, .mpa, .mpe, .m3u)	Sun Microsystems and NeXT (.au, .snd)
Microsoft Digital Video Recording (.dvr-ms)	Musical Instrument Digital Interface (.mid, .midi, .rmi)	Audio for Windows (.wav)
CD Audio Track (.cda)	Indeo Video Technology (.ivf)	QuickTime Movie file (.mov)
MP4 Audio file (.m4a)	MP4 Video file (.mp4, .m4v, .mp4v, .3g2, .3gp2, .3gp, .3gpp)	Windows audio file (.aac, .adt, .adts)
MPEG-2 TS Video file (.m2ts)	Free Lossless Audio Codec (.flac)	Windows Media Player Skins (.wmz, .wms)

The Department may not be able to playback files that are not supported by the Windows Media Player without additional modifications to the media player<sup>3</sup>.

The Department's electronic records are stored in a cloud-based network operated and maintained by VITA. Digital audio and video recordings submitted to the Department would be stored on this network. To the best knowledge, there are no limitations on the ability of the Department to store or archive these digital records.

<sup>2</sup> <https://support.microsoft.com/en-us/topic/file-types-supported-by-windows-media-player-32d9998e-dc8f-af54-7ba1-e996f74375d9> (Accessed 7/25/22).

<sup>3</sup> <https://support.microsoft.com/en-us/windows/codecs-faq-392483a0-b9ac-27c7-0f61-5a7f18d408af> (Accessed 7/25/22).

# ACCESS TO PUBLIC RECORDS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and §§ 2.2-3704 and 2.2-3704.01 of the Code of Virginia guide users on how to make or respond to a FOIA request for public records. This outline breaks down these procedural requirements and provides practical advice for adhering to FOIA when making or responding to a request. Further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act,” which can be found on our website.

### *What is a public record under FOIA?*

A “public record” is any writing or recording, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

### *Are draft or preliminary versions also considered public records?*

Yes. The definition of “public record” does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA.<sup>1</sup>

## II. MAKING A REQUEST FOR RECORDS

### *Who may request records under FOIA?*

- 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.

### *Must a request mention “FOIA” specifically?*

No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

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<sup>1</sup> FOIA Council Opinions AO-3-00, AO-05-09.



***Must a request be made in writing?***

No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Writing is recourse for both parties!<sup>2</sup>

***May a public body require a requester to fill out a request form?***

No. A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request.

**NOTE:** It is suggested that if the requester refuses to fill in the form or to put the request in writing, the public body should fill out its own form—remember, writing is recourse.<sup>3</sup>

***May a public body require a requester to provide his name and legal address?***

Yes. A public body may require a requester to provide his name and legal address before processing a FOIA request.

**NOTE:** This is a tool a public body *may* use, but FOIA does not mandate that public bodies get identification first.<sup>4</sup>

### **III. RESPONDING TO A REQUEST FOR RECORDS**

***How long does a public body have to respond to a request?***

A public body must respond within five working days of receipt of the request.

**NOTE:** Count the day **after** receipt as Day 1.<sup>5</sup>

**REMEMBER:** Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.<sup>6</sup>

***What are the permissible responses to a request?***

As of July 1, 2007, a public body must make one of the five responses allowed by FOIA:

1. Provide the requested records to the requester;
2. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with FOIA;
3. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with FOIA;

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<sup>2</sup> FOIA Council Opinion AO-07-11.

<sup>3</sup> FOIA Council Opinions AO-18-04, AO-07-11.

<sup>4</sup> FOIA Council Opinions AO-07-11, AO-05-18.

<sup>5</sup> FOIA Council Opinions AO-34-01, AO-47-01, AO-05-06, AO-02-08, AO-07-08, AO-07-11, AO-06-14, AO-01-17.

<sup>6</sup> FOIA Council Opinions AO-10-02, AO-12-03, AO-18-03, AO-01-08, AO-07-08, AO-01-17.



4. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body; or
5. It is not practically possible to provide the requested records **OR** to determine whether they are available within the five-work-day period, and the public body needs an additional seven work days, or in the case of a request for criminal investigative files pursuant to § 2.2-3706.1 an additional 60 work days, in which to provide one of the four preceding responses.<sup>7</sup>

### ***When does a response need to be in writing?***

If any part of the answer is “NO” (i.e., response 2 OR 3 above), the response **must**:

1. Be in writing;
2. Identify with reasonable particularity the subject matter of withheld records; **and**
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.

If the records are being entirely withheld (i.e., response 2) then the response must also identify with reasonable particularity the volume of the withheld records.

If the answer is “we cannot find it” or “it does not exist” (i.e., response 4 above), the response **must**:

1. Be in writing; **and**
2. **If** the public body knows that another public body has the records, it must provide contact information for the other public body.

If the answer is “we need more time” and the public body would like seven additional working days to respond (i.e., response 5 above), the response **must**:

1. Be in writing; **and**
2. Specify the conditions that make production of the records within the five-work-day period impossible.

### ***How does a public body respond if a record contains exempt and nonexempt information?***

Generally, if a record contains exempt and nonexempt information, the public body must release the record and delete or excise only the exempt portion of the record.

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<sup>7</sup> Prior to July 1, 2007, FOIA permitted four responses to a records request; See FOIA Council Opinions AO-1-00, AO-21-01, AO-12-03, AO-18-03, AO-16-04, AO-05-05, AO-05-06, AO-11-07, AO-12-07, AO-03-08, AO-07-08, AO-13-08, AO-01-09, AO-07-11, AO-02-12, AO-01-17.



### ***Must a public body create a record in response to a FOIA request?***

Generally, no public body is required to create a new record if the requested record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.<sup>8</sup>

### ***How much may a public body charge for producing records?***

A public body may make reasonable charges for its **actual cost incurred in accessing, duplicating, supplying, or searching for the requested records**. A public body may not charge extraneous or surplus fees unrelated to the production of the records.

**NOTE:** This means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees. Charges for copies must not exceed the actual cost of duplication.

A citizen may request that the public body estimate the cost of supplying the requested records in advance. The five-working-day period to respond is tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. As mentioned previously, further detailed guidance regarding charges for the production of records is provided in a separate document entitled “Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act.”<sup>9</sup>

### ***Can a public body require advance payment?***

When a public body determines in advance that the charges for supplying the requested records are **likely to exceed \$200**, it may require the requester to pay a deposit before proceeding with the request. This deposit may not exceed the amount of the advance determination, and the public body must credit it toward the final cost of supplying the records. If a public body asks for the advance deposit, the five-working-day period to respond to the request is tolled until the deposit is paid.<sup>10</sup>

### ***What can a public body do if a requester does not pay for records provided under FOIA?***

Before responding to a new request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

### ***Do these same requirements apply to a request for electronic records?***

Yes. Like all other records, regardless of format, a public body may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. And like other records, when electronic records or databases contain

<sup>8</sup> FOIA Council Opinions AO-11-00, AO-6-01, AO-11-01, AO-35-01, AO-49-01, AO-01-02, AO-03-02, AO-10-02, AO-11-03, AO-04-04, AO-10-04, AO-16-04, AO-05-05, AO-06-05, AO-09-07, AO-11-07, AO-07-08, AO-12-09, AO-07-11, AO-04-15.

<sup>9</sup> FOIA Council Opinions AO-1-00, AO-21-01, AO-25-01, AO-32-01, AO-39-01, AO-49-01, AO-05-02, AO-10-02, AO-14-02, AO-08-03, AO-20-03, AO-21-03, AO-01-04, AO-04-04, AO-16-04, AO-23-04, AO-06-05, AO-02-07, AO-09-07, AO-06-09, AO-07-11, AO-03-12, AO-05-13, AO-02-14, AO-04-15.

<sup>10</sup> FOIA Council Opinions AO-21-01, AO-14-02, AO-04-04, AO-16-04, AO-08-09, AO-07-11.



both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information. The excision of exempt fields from a database or the conversion of data from one available format to another is not considered the creation of a new record under FOIA.

A public body must provide electronic records in any medium identified by the requester if that medium is used by the public body in the regular course of business. If the public body has the capability, this includes the option of posting the records on a website or delivering the records to an email address. A public body is not required to produce records in a format not regularly used by the public body. However, a public body must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and the public body, including the payment of reasonable costs.<sup>11</sup>

DRAFT AGENDA  
Materials contained herein are for discussion purposes only and are not to be construed as an official Board position.  
DRAFT AGENDA

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<sup>11</sup> FOIA Council Opinions AO-11-00, AO-10-02, AO-11-02, AO-14-02, AO-21-03, AO-05-05, AO-08-09, AO-05-13.



**APPENDIX****Records Exemptions of General Applicability**

FOIA contains over 100 exemptions for records. Although many of these exemptions apply to specific agencies or to very content-specific records, there are several records exemptions of general applicability that may be used by virtually all public bodies. The records exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

**§ 2.2-3705.1 (1): Personnel.** Provides an exemption for:

Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access 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, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

**§ 2.2-3705.1 (2): Attorney-client privilege.** Provides an exemption for:

Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.

**§ 2.2-3705.1 (3): Attorney work product.** Provides an exemption for:

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 § 2.2-3711.

**§ 2.2-3705.1 (4): Tests and examinations.** Provides an exemption for:

Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.



As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

**§ 2.2-3705.1 (5): Closed meetings.** Provides an exemption for:

Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

**§ 2.2-3705.1 (6): Vendor proprietary information.** Provides an exemption for:

Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, "vendor proprietary information software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

**§ 2.2-3705.1 (7): Computer software.** Provides an exemption for:

Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

**§ 2.2-3705.1 (8): Cost estimates of real property.** Provides an exemption for:

Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

**§ 2.2-3705.1 (10): Certain personal information.** Provides an exemption for:

Personal contact information furnished to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, "personal contact information" means the information provided to the public body or any of its members for the purpose of receiving electronic communications from the public body or any of its





members and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device.

**§ 2.2-3705.1 (12): Contracts.** Provides an exemption for:

Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

**§ 2.2-3705.1 (13): Account Numbers.** Provides an exemption for:

Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

**§ 2.2-3705.2 (2): Security systems.** Provides an exemption for:

Documentation or other information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

**§ 2.2-3705.2 (14): Public safety; critical infrastructure, surveillance, etc.** Provides an exemption for:

Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

- a. Critical infrastructure information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;
- b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;



c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or

d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.

**§ 2.2-3705.4 (1): Scholastic Records.** Provides an exemption for:

Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.



**§ 2.2-3705.5 (1): Health.** Provides an exemption for:

Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § 16.1-338 or 54.1-2969, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

**§ 2.2-3705.6 (3): Economic development and retention.** Provides an exemption for:

Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

**§ 2.2-3705.6 (10): Prequalification to bid.** Provides an exemption for:

Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

**Virginia Freedom of Information Act  
Access to Public Records - Quick Reference**

**FOIA = Democracy In Action**

**POLICY = Openness over secrecy**

**What is a public record?**

Any type of record—electronic files, email, papers, letters, CD's, video or audio recordings, etc. If you're government and you have a record in the transaction of your public business, then it is a public record.

**Exception:** It is not a public record if it is not in the transaction of public business.

**Examples:** Letter from your insurance company, note from your spouse, invitation to a party, spam email, etc. are not public records.

**Who has access rights under Virginia FOIA?**

Citizens of Virginia & media representatives that broadcast or have circulation in Virginia.

**BUT** anyone can get a Virginia citizen to make a request on his or her behalf.

**How long do I have to respond to a request?**

FIVE (5) working days

**What responses are allowed under FOIA?**

Multiple choice:

- **YES:** Provide the records to the requester.
- **NO:** Identify the subject matter and volume of records being withheld, and cite the applicable exemption(s) in writing.
- **YES and NO:** Provide part of the records, but withhold portions that are exempt—Identify the subject matter of the records being withheld and cite the applicable exemption(s) in writing.
- **DO NOT HAVE IT:** Tell the requester in writing that the record cannot be found or does not exist. If you know someone else has the record, tell the requester.
- **NEED MORE TIME:** Tell the requester in writing you are invoking your right to seven (7) additional working days to respond. If the request is for criminal investigative files pursuant to § 2.23706.1, you may invoke your right to 60 additional working days to respond. If that is not enough time, work out a deal with the requester. If you cannot reach a deal, you may petition a court for more time.

**Do you have to provide the records for FREE?**

**NO:** You may charge, but charges must be **REASONABLE** and may not exceed **ACTUAL** costs for:

- **SEARCHING** for records (which includes exclusion review);
- **ACCESSING** records;
- **DUPLICATING** records; and
- **SUPPLYING** records.

You may **NOT** charge for secondary legal review, maintenance costs, or other general expenses. What is **REASONABLE**? Only a court can rule on what is reasonable, but if you think the charges will land you in front of a judge, it probably is not reasonable. The requester has a right to an **ESTIMATE** in advance. You may collect an **ADVANCE DEPOSIT** if the estimated charges will exceed \$200.

**Specific Questions? Call or email the FOIA Council:**

**804-698-1810**

**1-866-448-4100**

[foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov)

The Virginia Freedom of Information Advisory Council was created to issue opinions on the operation and application of the Freedom of Information Act (FOIA), to publish educational materials, and to provide training about FOIA. We are not a repository of any records, other than those created by this office.

Code of Virginia  
Title 54.1. Professions and Occupations  
Chapter 1. General Provisions

### **§ 54.1-108. Disclosure of official records.**

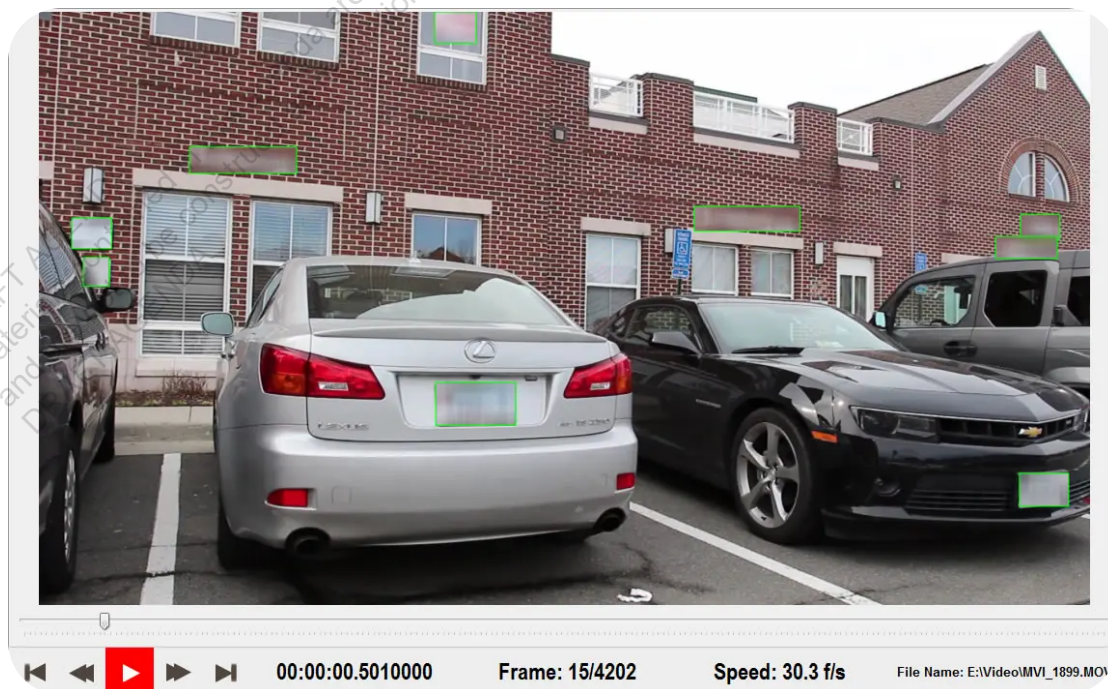
Official records of the Department of Professional and Occupational Regulation or the Department of Health Professions or any board named in this title shall be subject to the disclosure provisions of the Virginia Freedom of Information Act (§ [2.2-3700](#) et seq.), except for the following:

1. Examination questions, papers, booklets, and answer sheets, which may be disclosed at the discretion of the board administering or causing to be administered such examinations.
2. Applications for admission to examinations or for licensure, certification, registration, or permitting and the scoring records maintained by any board or by the Departments on individuals or applicants. However, this material may be made available during normal working hours for copying by the subject individual or applicant at his expense at the office of the Department or board that possesses the material.
3. Records of active investigations being conducted by the Departments or any board.

1979, c. 408, § 54-1.41; 1982, c. 207; 1988, c. 765; 1993, c. 499; 2017, c. [423](#).



# Freedom of Information Act (FOIA) and Video Redaction



DECEMBER 21, 2015 | 4 MINUTES READ

Unforeseen challenges arise as technologies advance and law enforcement agencies around the country collect more and more video evidence. From cruiser camera video to **body cameras** and surveillance videos, our servers are filling up with more data than we've ever had to manage before.

One major challenge we all potentially face is that of being presented with a Freedom of Information request that is so broad in scope as to make it practically impossible to comply, at least within a "reasonable amount of time" as required by law. We're all familiar with FOIA, or we should be. It's been the law of the land since 1966. Basically, law enforcement agencies must comply with FOIA requests just like everyone else, but with some notable exceptions.

- If the records could reasonably be expected to interfere with enforcement proceedings.

- If the records would deprive a person of a right to a fair trial or an impartial adjudication.
- If the records could reasonably be expected to constitute an unwarranted invasion of personal privacy.
- If the records could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.
- If the records would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.
- If the records could reasonably be expected to endanger the life or physical safety of any individual.

Imagine though, that your agency is presented with a FOIA request to produce all non-evidentiary body camera videos for the past 6 months? Aside from a legal challenge, what would you do? Sure, you can charge a reasonable fee for each video, but what if money is no object to the requestor?

Individual states are beginning to address these broad requests, particularly as they pertain to video recordings, recognizing the logistical nightmare that they can present to local government, all while trying to balance right to privacy issues with transparency in government. If yours state hasn't addressed it yet, there are a few simple steps you can take right now to protect yourself.

First of all, and perhaps most importantly, develop a policy that authorizes deletion (preferably automatic deletion) of non-evidentiary videos after a reasonable period of time. For most agencies, this means 30-90 days. If you've maintained the video for that long and nothing has come of it, it's time to make it go away. Keeping unneeded videos for any longer

is a recipe for disaster. Even worse is deleting videos without a policy in place. This screams cover-up and you'd be hard pressed to disprove it.

Second, have a policy that details exactly how these requests are to be handled within your agency. Everything from who does what to how much you'll charge for each page or disc. Having a plan in place will prevent panic when it happens to you.

Finally, be prepared. Have in your tool bag a software program that will allow quick and easy **video editing and redaction**. Redaction, or the **blurring of faces**, license plates, house numbers, etc..., is absolutely necessary in many cases, but can be a very time consuming, labor intensive process.

There are software programs on the market and available to you right now that will allow cropping, rotating, clipping, manual redaction, automatic redaction, audio redaction and more. Find the money in your budget and buy one, and become proficient in its use. Choose wisely though, and look for a program that offers **automatic facial and object tracking**. It will save you a LOT of time.

We always need to keep privacy concerns at the forefront, particularly those of innocent third parties and uninvolved bystanders, to include anything that might be considered private and sensitive in nature, such as medical information. The last thing you need is a lawsuit because an uninvolved and innocent person's face inadvertently ended up on a local news story, or because you failed to redact the audio portion of a graphic description of a **sexual assault**.



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## National Archives OGIS Operations

Due to the COVID 19 pandemic, we are experiencing delays in receiving postal mail. To ensure a more timely response to your inquiry, please contact us via email at [ogis@nara.gov](mailto:ogis@nara.gov).

Read more on how NARA is addressing COVID-19 (coronavirus) [www.archives.gov/coronavirus](http://www.archives.gov/coronavirus) .

# Best Practices for Video Redaction

## Best Practices for Video Redaction Technology Committee of the Chief FOIA Officers Council Video Redaction Working Group

July 29, 2021

### Introduction

FOIA programs must evolve and adapt to address requests for video records. Federal agencies create more video content today than ever before, whether that be in the form of law enforcement body camera footage, security footage of federal facilities, video conference meeting recordings, or training videos. If there's a Golden Rule of FOIA, it is that if the government produces a record, requesters will want it. The following are video redaction best practices to consider for your FOIA program.

### Video Redaction Best Practices

**Smart from the Start.** The time to consider video redaction is when your agency considers using video capture technology. Agencies must anticipate and plan for video redactions and identify the right tools, the right people, and the right budget to address requests for video records. Waiting for the first video request leaves an agency scrambling to find imperfect solutions on an accelerated schedule when facing statutory or court-ordered production schedules.

**Right Tool, Right Time.** Video redaction tools vary in complexity and ease of use. Finding the right one for your needs depends on: volume of video records requests; format, size, and content of records; budget; and personnel expertise. Some agencies might require full featured

video redaction software comparable to Hollywood post-production editing suites, while others may need a far simpler web- or cloud-based tool that may even be included in your video recording software package. Agencies must also consider upgrading hardware to support software tools and security concerns with cloud-based systems.

**Right People.** Finding the right person for the job is just as important as finding the right tool for the job. The right person for the job might depend on your budget, the volume of your requests, and the complexity of the records.

**FOIA Staff.** Your current FOIA staff may need training or new personnel to handle video redactions internally. Consider adding video redaction skills to position descriptions and performance plans. Agencies report that adding tech skills and talent to their teams allows them to have flexibility to stay ahead of the curve.

**Other Agency Personnel.** Many agencies may have personnel or program offices outside of the FOIA staff with existing video redaction skills and expertise. Engage with others in your agency who are using video creation tools to support your FOIA program. Some agencies have in-house video studios and professionals that can share resources, help redact, and assist in training your FOIA team. Some agencies might consider inviting personnel with video redaction skills to the FOIA office on temporary details to fill short-term or unexpected video redaction needs, especially when their FOIA teams are already acting at maximum productivity.

**Contractors.** Agencies report that for low-volume cases, bringing in contractors on an ad hoc basis might be beneficial. While a contractor might cost more in the short term, outsourcing this work may allow your agency to sidestep issues related to procuring video editing software and training or hiring agency personnel to make necessary redactions. This option can provide efficiencies with statutory or court-ordered time constraints.

**Right Method, Right Release.** Apply the right method of segregating exempt and releasable content from video records. Agencies can blur or black out portions of the screen, artificially modulate the voices of individuals who appear on screen, remove audio tracks, or remove sections of the record altogether. Consider the least obtrusive redaction option which allows maximum release of non-exempt content.

**Time Commitment.** Recognize that video redactions present significant time commitments. Video redaction often requires frame-by-frame review of video records and depending on the length and content of the video records and your agency's video redaction tools and personnel, video redaction can be a tedious and time-consuming process. At 30 frames per second, a five-minute video requires redacting 9,000 frames. A processor may need to redact multiple portions from -- and apply multiple exemptions to -- each frame.

**Communication is Key.** Communicate with the requester early and often regarding the special considerations processing video records demands. Set expectations for the requester so that they are aware how long it might take to process and consider working with the requester to narrow the scope of the request to expedite processing times. A requester may be willing to pinpoint a specific portion of the video or even accept screen shot stills of the video to get the records faster.

**Retention Schedules Rule.** Know what video records your agency creates or maintains and how long they are required to retain them. Video retention schedules can vary widely depending on how your agency uses the record. Closed circuit security footage may only need to be retained for 30 days, while certain law enforcement investigatory and certain telehealth records may need to be retained for as long as 75 years. Adhering to a retention schedule and being able to access those video files ensures that the requester community receives the records to which they are entitled. Consult your agency records management experts to determine what video records your agency creates and maintains and for how long. Agencies should also anticipate video retention, storage, and electronic reading room needs for video records collected and processed by the FOIA office.

## Conclusion

After decades of accepting government arguments about not having the tools or ability to redact video records, courts now acknowledge that “because [video] editing is routine and inexpensive, an agency cannot credibly claim that it lacks access to this technology.”<sup>[1]</sup> Courts have shifted the burden to the government to explain why teenagers can “insert cat faces over the visages of humans” in social media posts but government agencies cannot similarly redact its video records.<sup>[2]</sup> Other courts have concluded that it “would strain credulity” to believe that an agency could not redact video appropriately.<sup>[3]</sup> As a result, FOIA professionals must be able to respond to requests for emerging types of Federal records within the statutory mandates. Developing – or having access to – a video redaction component within your FOIA program should be a priority.

[1] *Stahl v. Dep't of Justice*, Case No. 19-cv-4142, 2021 WL 1163154, at \*16 (E.D. N.Y. 2021) [↗](#).

[2] *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020) [↗](#).

[3] *Stevens v. Dep't of Homeland Sec.*, Case No. 13-cv-3382, 2014 WL 5796429, at \*10 (N.D. Ill. Nov. 4, 2014) [↗](#).

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**FORMS AND**  
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