



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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February 15, 2024

David Williams  
Colonial Beach, Virginia  
Request received via email

*The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your email of April 24, 2023.*

Dear Mr. Williams:

You have requested an advisory opinion on whether a custodian of record complied with the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) (FOIA) regarding a request you made for an Excel copy of your town's budget.

### Factual Background

As background information, you serve as a council member in the Town of Colonial Beach and requested an Excel copy of the town's budget for fiscal year 2024 "to do a more thorough review for the citizens that count on [you] to be fiscally responsible with their tax dollars." You have provided copies of emails and correspondence that document the following exchange of communications between you and the town manager.

You stated that you attended a meeting on April 4, 2023, with Colonial Beach's town manager, mayor, and chief financial officer (CFO) to get a budget overview. At the end of that meeting, you stated that "you requested an [E]xcel version of the proposed budget" and that the town manager said "you can have a [PDF] version." You again stated that you would like an "[E]xcel copy," but the town manager refused your request saying "something about it being proprietary." You stated that "for the sake of transparency I'd like the [E]xcel version." You said that the "conversation basically ended there."

You stated that the town council received a PDF version of the budget on April 5, 2023. You provided our office with a copy of an email that you sent to the town manager on April 7, 2023, in which you again requested "an [E]xcel document version of the budget." In the email, you further inquired about the reason why the "council was only allowed to have the [PDF] version" since it was your understanding that she previously stated that it "was for proprietary reasons." You requested that the town manager "reconsider sending

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[you] the [E]xcel version," and if she would not provide it, you asked "can you explain the reason as I'm not sure I understand?" You stated that you "received no answer" to your inquiries. You noted that in your email "you incorrectly referenced the town meeting on 4/3 in error with the correct date being 4/4/23."

On April 18, 2023, the town manager emailed all of the council members a link to a shared file site that, according to you, had "a completely locked down [E]xcel version of the budget" for fiscal year 2024. You stated that the version of the budget provided in the shared link "could not be downloaded, saved, [sorted] or searched so basically no better than [the PDF] version." The email from the town manager contained the following message:

At the request of a councilmember, I am sharing the Excel version of the FY24 proposed budget for your review. PDFs of the line-item budget were sent to your email by the CFO on 4/5.

On April 20, 2023, you emailed the town manager again requesting her to provide a "regular [E]xcel version of the report that is not completely locked down or is only viewable on a shared site," and you stated that your "request is authorized under Virginia [C]ode 2.2-3704 which allows a requester to receive the document in a readily available format of his or her choosing." The town manager's reply email to you on April 24, 2023, stated that:

As the Chief Executive Officer appointed by the Town of Colonial Beach, I have provided all documentation required to fulfill this request in accordance with the Virginia FOIA [C]ode section you referenced below and others. Information related to this request was provided to you in various formats, including paper on 4/4, electronically PDF on 4/5, and electronically Excel as you requested on 4/18, and is publicly available on the Town's website. Given that I take direction from the council as a body, and I have satisfied all requirements under FOIA, should a majority of the council wish to discuss this further, I'd be willing to discuss it further in a closed session on May 3rd as part of my performance evaluation, as this seems to be a question most related to this topic. Otherwise, this will be my last written correspondence regarding this matter.

I am blind copying all the council for their awareness.

You stated in an email to our office that:

Per a discussion you had with a fellow council member we agreed it would be worth pursuing an official opinion on this potential FOIA violation considering a requestor is allowed to request a document in a readily available format and this format is indeed readily available since it was presented to myself and the Mayor on 4/4/23.

Analysis

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"In considering any records request, the initial step is to determine whether the records sought are public records subject to FOIA."<sup>1</sup> Section 2.2-3701 of the Code of Virginia defines "public records" as:

[A]ll 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.

In general, a "public record" is all writings and recordings in various types of formats that have been "prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business." Therefore, a copy of the town's budget for fiscal year 2024, in accordance with § 2.2-3701, would qualify as a public record under FOIA.

Subsection A of § 2.2-3704 provides, in relevant part, that:

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.

In review of the provided information, as a citizen of Virginia, you have the option to either inspect or obtain copies of the town's budget. In your email to our office, you acknowledge that even though you are a council member for the Town of Colonial Beach, you know that your rights under FOIA are no more or less than those of "average citizens." Our office concurs. In prior opinions, our office affirmed that when a government employee makes a FOIA request, "he is acting in his capacity as a citizen and is entitled to the same rights and protections as other citizens making the same request."<sup>2</sup> In addition, a government employee's "FOIA request should not be responded to any differently than other requests, and should be handled in the same routine manner."<sup>3</sup> FOIA "does not distinguish between a citizen of the Commonwealth and government employees."<sup>4</sup> In general, there is no provision in FOIA that "establishes additional, separate, or different rights for elected officials or public employees."<sup>5</sup> Thus, FOIA grants all citizens of the Commonwealth and applicable media representatives the same rights of access to public records and meetings regardless of whether a person is a private citizen, a government employee, or an elected or appointed government official.<sup>6</sup>

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<sup>1</sup> Freedom of Information Advisory Opinion 05 (2006).

<sup>2</sup> Freedom of Information Advisory Opinions 07 (2015), 02 (2014), and 15 (2003).

<sup>3</sup> Freedom of Information Advisory Opinion 15 (2003).

<sup>4</sup> *Id.*

<sup>5</sup> Freedom of Information Advisory Opinions 07 (2015) and 02 (2014).

<sup>6</sup> *See id.*

Subsection B of § 2.2-3704 provides that:

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.

In reviewing the provided information, it appears that the town manager did not deny your request for the record or cite to an applicable exclusion of law that would preclude, entirely or in part, the release of the requested record as required in subdivisions B 1 and B 2 of § 2.2-3704. You stated that the town manager made a general reference to "propriety" but did not provide, as required, a specific Code section authorizing the withholding of the records or justifying any exclusion under law.

Subsection D of § 2.2-3704 provides that "no public body shall be required to create a new record if the record does not already exist." Additionally, "a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body." The budget was obviously a record that existed as it had previously been provided on several occasions upon request. There does not appear to be a need for the town manager or other office personnel to "abstract or summarize" the requested information. The policy of FOIA set forth in subsection B of § 2.2-3700 provides that "[a]ll 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." In this instance, it seems that the town manager also did not to attempt to

enter into any sort of an agreement or understanding with you concerning the production of the requested record as allowed under FOIA.

Subsection G of § 2.2-3704 provides, in relevant part, that:

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. [Emphasis added].

In this matter, you clearly identified the public record and the medium you sought when you requested a copy of the town's budget in an unlocked Excel version. FOIA requires public bodies to provide "nonexempt records maintained in an electronic database in any tangible medium identified by a requester . . . if that medium is used by the public body in the regular course of business." In a prior opinion, our office concluded that "a requester may choose either to inspect or obtain copies of records in a specific format, but a public body is not required to provide the records in the requested format if it is not a format regularly used by the public body."<sup>7</sup> However, it appears that the town manager provided the budget record in a medium that she preferred — first as a PDF, then as a locked Excel file — but not in a medium requested by you (an unlocked Excel file).

A final determination on this issue depends on what medium the town's budget officers regularly use for these records. According to the provided information, it appears that an unlocked Excel version of the town's budget would be a medium used by the town manager's office in the regular course of business. Otherwise, the town manager, CFO, and office personnel would be unable to enter and remove data from the Excel spreadsheet or to update or revise any budgetary information throughout the drafting and approval process. Our office has previously opined that subsection G of § 2.2-3704 "requires that a public body provide a public record in a requested medium if regularly used in the course of business by the body."<sup>8</sup>

Thus, it becomes a matter of fact whether there was a violation of FOIA when the town manager denied your request for a copy of the town's fiscal year 2024 budget in an unlocked Excel version. A determination of a violation depends primarily on the issue of whether an unlocked version of Excel is a tangible medium used in the regular course of business by the public body. Generally, our office defers making any determination of fact since "a court of law is the appropriate place to make any determinations of fact."<sup>9</sup>

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<sup>7</sup> Freedom of Information Advisory Opinion 01 (2023).

<sup>8</sup> Freedom of Information Advisory Opinion 11 (2000).

<sup>9</sup> Freedom of Information Advisory Opinion 08 (2018).

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Nevertheless, if the town manager or other officials in the town's budgetary office utilize an unlocked Excel version in their regular course of business, then it would appear that the town manager failed to comply with FOIA when she did not provide the requested record in the identified medium.

In addition, the town manager appears to have repeatedly refused to provide the public records in the medium identified and requested by you and cut off further communication. Specifically, in her April 24 email, she stated that "this will be my last written correspondence regarding this matter." A FOIA request is intended to be a cooperative and collaborative process between the public body and the requester and "is not an adversarial event."<sup>10</sup> As stated previously, the established policy of FOIA, in subsection B of § 2.2-3700, provides that "[a]ll 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." In support of this policy, our office has advocated on prior occasions that "a FOIA request is not meant to be an adversarial process."<sup>11</sup> Moreover, "[a]ny attempt by a government entity to intimidate or discourage requesters from exercising this right creates a hostile and adversarial environment, pitting government against the very people that it serves, which clearly goes against the legislative intent of the law."<sup>12</sup> In 2004, this office offered the following advice that is still relevant and appropriate today:

FOIA operates most effectively as a tool that can be used by citizens to obtain government records; invoking FOIA rights should not be interpreted as the invocation of an adversarial process staking government against citizens. Unfortunately, situations do sometime[s] escalate and require a citizen to enforce his FOIA rights in court. However, the practical perspective of dealing with the application of FOIA on a daily basis has taught me that clear and concise communication between a requester and a government official — relying on the requirements set forth in the law and not on editorial comment — is often the best way to successfully resolve any concerns about a FOIA request.<sup>13</sup>

Thank you for contacting this office. We hope that this opinion is of assistance.

Sincerely,

Joseph Underwood  
Senior Attorney

Alan Gernhardt  
Executive Director

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<sup>10</sup> Freedom of Information Advisory Opinion 15 (2003).

<sup>11</sup> Freedom of Information Advisory Opinions 06 (2009), 06 (2005), 25 (2004), 16 (2004), 15 (2003), and 11 (2003).

<sup>12</sup> Freedom of Information Advisory Opinion 15 (2003).

<sup>13</sup> Freedom of Information Advisory Opinion 16 (2004).