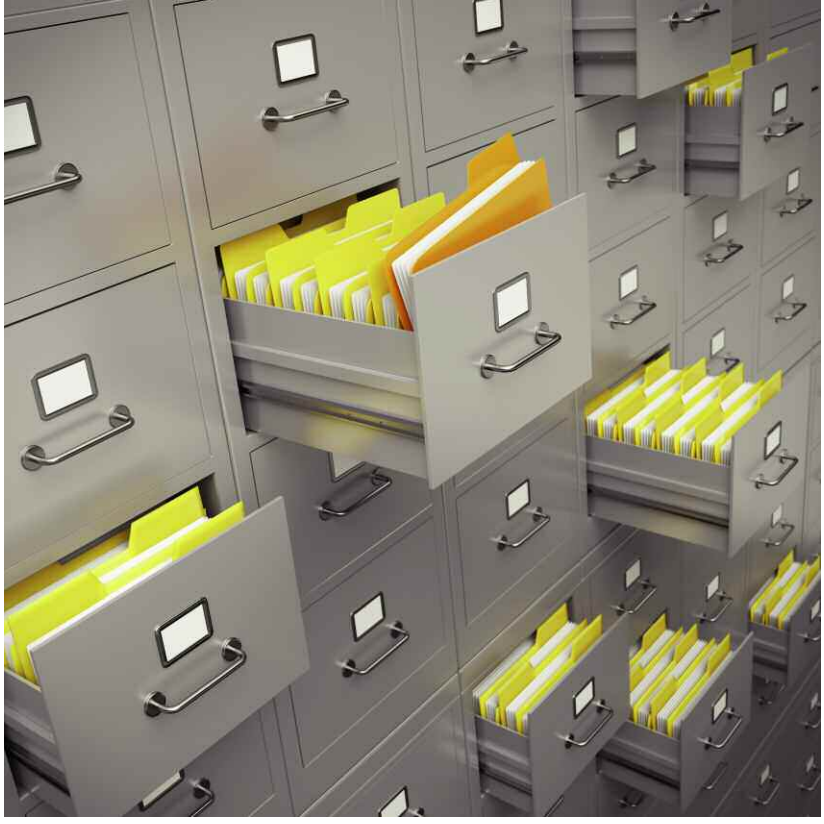

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Use and Enforcement of Records Demands Under the Virginia Freedom of Information Act

by Stevens R. Miller

By definition, the Virginia Freedom of Information Act (FOIA), "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees[.]"[1] In practice, actually obtaining records under the act isn't always as ensured as the General Assembly may have hoped. The act includes provisions for enforcement, but citizens frustrated by non-compliance often complain that there's nothing they can do when an agency refuses to provide records (or, in some cases, simply fails to respond to a demand at all).

Demanding Records Under the Act

Invoking the act is easy. As it is to be "liberally construed" to achieve its purpose, a request under the act need not take any particular form, nor recite any reference to authority. Strictly speaking, any request for records subject to production under the act, however made, is a "FOIA request." But as a practical matter, a written request is preferred. Not only does this create a record that the request was made, and when, it also assists the respondent in knowing what has been requested. The Virginia Freedom of Information Advisory Council sensibly recommends a short written request that cites the act by name and number, with a plain-language statement of what is being requested, and a request for an estimate of costs before production is made.[2] Note that the respondent *may* withhold records if

the cost of production exceeds $200 until that cost is paid, but this is not required.[3] To protect against a surprisingly large bill, the act allows the requesting party to ask for an estimate of costs before production, but this option is not self-activating; the requesting party must invoke it explicitly to be sure it applies.[4] Also, frequent users of the act need to keep their bills paid, as a blanket denial of rights under the act applies to anyone who is thirty or more days late in paying for a prior FOIA production.[5]

Reactions to demands under the act can vary. In most cases, the responding government agency will simply deliver what it has (or else reply that it has nothing responsive). Some response is required within five working days of receiving the request (including the option to declare that production is not possible within five days, thus adding another seven working days to the respondent's time).[6] When the response is finally made, it must be in one of four forms: the records themselves; a denial of production along with citation to the code section(s) authorizing denial; a partial production (including productions with redactions) along with citation to the code section(s) authorizing denial; or a statement that the records could not be found or do not exist.[7]

Although the act's introductory language includes sweeping statements about the virtues of openness and the evils of secrecy, the larger part of the act consists of a long list of exceptions to what must be produced.[8] Users of the act should at least review these exclusions before presuming that production is required. Some of them are noteworthy, such as the prohibition on disclosure of the answers to tests given to students in the public schools.[9] In practice, however, it is the responding agency's responsibility to identify the specific provision authorizing non-disclosure, at which point the demanding party must decide if, and how, to contest the respondent's decision.

Enforcing a Demand

After the time for response has run and either no response has been made or the respondent has invoked one of the act's exceptions, the demanding party has the option to ask for a court order compelling production.[10] Before seeking judicial review, however, some relief may be had by simply engaging the respondent in a greater dialog. As a valid demand can be made by e-mail, and responses are often made the same way, a useful record can be made by asking, when a denial is received, what the respondent's reasoning was for that denial. Until such discussions grow heated (or go cold), it may be possible to argue successfully that a denial was not warranted under the provision claimed, or that some other production may be useful in the alternative (or with redactions).

At some point, an unsatisfied demanding party may have to resort to court action. The act calls for review by either the general district court or the circuit court.[11] As proceedings tend to be somewhat more relaxed in district courts, and the case may well be brought by a non-lawyer, this is probably the better option.

The proper form of the proceeding is as a petition for mandamus, which can be filled out online and printed for presentation to the court clerk.[12] Happily for the petitioner, the application is given an accelerated schedule, with the hearing required to be held, "within seven days of the date the [petition] is made[.]"[13] Note that to obtain this speedy date the petitioner must serve, and the respondent must receive, a copy of the petition, "at least three working days prior to filing."[14] In practice, then, the soonest a petitioner can be sure of being entitled to a hearing may be as long as twelve calendar days (thirteen, if a holiday intervenes). Given the five-working-day response time allowed by the act, and its option for a seven-working-day extension at the respondent's discretion, the total time from service of a demand under the act to appearance before a judge could be as long as thirty days, which may seem lightning-fast by the standards of some Virginia jurisdictions, but is likely to be epochal to a party seeking records during the pendency of a legislative act by the state or a local government.

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While the law grants accelerated treatment to the process, the petitioner (or their counsel) should be prepared to help guide the clerk's office in handling the petition, as experience shows they are very infrequently used.[15] The District Court Judges' Benchbook[16] and the Circuit Court Clerk's Manual[17] can be helpful references to have at hand when visiting the clerk's office.

Typically, when the case is called in district court, the hearing will not take place immediately, as the docket is likely to include numerous other cases that can be disposed of quickly. However, strict application of the seven-day limit should grant the petitioner at least the start of a full hearing on the first appearance date. The ultimate duration of the proceeding will most likely depend on whether any facts are in dispute. More often, the issues involved will center on the applicability, or lack thereof, of the basis for exclusion from production asserted by the respondent.[18]

When the case is actually heard, the burden of proof will be upon the respondent (that is, on the public body seeking to deny production), under the preponderance standard.[19] Specifically, the respondent must show that at least one of the statutory bases for denial applies.[20] If the respondent is unable to establish a basis to the court's satisfaction, the court should order the production of the requested records. Note that, in addition to the bases for denial, the respondent may also attack the standing of the requesting party to demand records in the first instance. While the act grants substantial rights to citizens of Virginia, and to newspapers and broadcasters with audiences in Virginia, it does *not* grant any rights to non-citizens of Virginia.[21]

While the act makes no provision for an expiration of the rights to enforce a demand in court, demanding parties that anticipate the need for court action should act with haste. The act requires nothing more than a demand followed by a failure to respond or an improper denial to authorize court action and enforcement. However, in at least one case, the court held that a county agency could validly deny production on the basis that the records sought were part of an open criminal investigation, even though that investigation had not begun until *after* the agency's deadline for production had passed. In other words, an exclusion that did not exist when the demand was made, and did not exist until after the respondent had failed to timely produce the records demanded, was nonetheless held to be a valid basis for exclusion by the court, as it did apply as of the date of the enforcement hearing.[22] Conceivably, an agency seeking to avoid production could, after receiving a demand, manufacture its own basis for denial by opening an investigation into the same facts addressed by the records in question.[23]

As with all district court matters, an appeal by right to circuit court can be brought.[24] Such appeals take the form of hearing the matter *de novo*.[25] When final judgment is reached, the act provides (in an uncommonly one-sided form) for the petitioner to receive reasonable fees for expert witnesses and attorneys.[26] Finally, while it would most likely not be the goal of a typical petitioner whose real interest was in obtaining records, the court can impose fines for deliberate violations.[27]

Endnotes:

1 The act also enforces open-meeting requirements for public bodies. This article address the right to obtain and inspect documenets under the act.
2 http://foiacouncil.dls.virginia.gov /sample%20letters/requestletter.docx.
3 Virginia Code § 2.2-3704(H).
4 Virginia Code § 2.2-3704(F).
5 Virginia Code § 2.2-3704(I).
6 Virginia Code § 2.2-3704(B).
7 *Id.* This section also requires that, if the respondent knows of another public body that is likely to have the requested records, it must provide that body's contact information.
8 Virginia Code §§ 2.2-3705.1-8, §2.2-3706.
9 Virginia Code § 2.2-3705.1(4).
10 Virginia Code § 2.2-3713.
11 Virginia Code § 16.1-77. See § 2.2-3713(1) to determine the proper venue.
12 http://www.courts.state.va.us/forms/district /dc495.pdf.
13 Virginia Code §2.2-3713(C).
14 *Id.*
15 When counsel filed the petition in "*Elizabeth Miller v. County of Loudoun,*" Loudoun Gen. Dist. Ct., GV12009477-00, the clerk's office employee said she had never seen such a filing before. A senior staffer assisted by, among other things, looking up the process in a guidebook.
16 http://www.courts.state.va.us/courts/gd /resources/manuals/districtcourtbencbook.pdf

17 http://www.courts.state.va.us/courts/circuit/resources/manuals/cc_manual_civil/table.pdf

18 Parties should not always assume that a FOIA hearing will be a short affair. "*Bradford v. Loudoun Board of Equalization*," Loudoun Gen. Dist. Ct., GV11005508-00, extended over eight months, with eleven separate appearances for hearings and motions. This was a case involving open meetings, not the production of records, however, and involved substantial witness testimony.

19 Virginia Code § 2.2-3713(E).

20 *Id.*

21 *See* "*McBurney v. Young*," 133 S.Ct. 1709 (2013), holding that only citizens of Virginia have rights under the act in the capacity as individuals. Corporate petitioners, such as newspapers and broadcasters, should take note of the relaxed prohibitions on the unlicensed practice of law, however, as Virginia Code § 2.2-3713(B) expressly permits corporate petitioners to appear by an officer, director, or managing agent, without the assistance of counsel.

22 "*Elizabeth Miller v. County of Loudoun*," Loudoun Gen. Dist. Ct., GV12009477-00

23 In *Miller*, the county asserted the "criminal investigation" basis for denial. Earlier, after receiving a FOIA demand, county officials subsequently opened an administrative investigation and asserted that as a basis for denial under a different part of the Act.
Virginia Code § 16.1-106

24 *Id.*

25 Virginia Code § 2.2-3713(D). No similar provision exists for a respondent to recover fees.

26 Virginia Code § 2.2-3714.

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