

What's in Your File?

How FOIA Keeps Procurement Transparent

Presented by

Julie Whitlock

DGS Policy, Legislative and
FOIA Analyst



FORUM2014

Virginia Freedom of Information Act – “FOIA”

- It's a Verb
- It's an Adverb
- It's an Adjective
- It's even a song

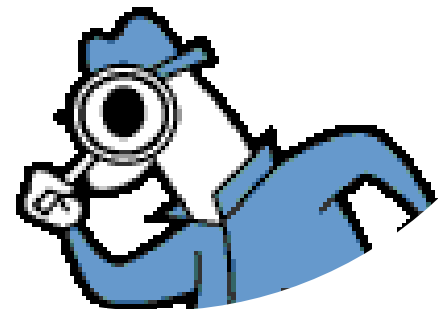
<http://appealinglybrief.files.wordpress.com/2013/05/the-foi2.mp3>



Purpose of FOIA

- ❖ Purpose of Virginia Freedom of Information Act is to ensure ready access to government
- ❖ It's about being responsive – citizens have a right to know what it's government is doing
- ❖ FOIA deals with both public meetings and public records

TRANSPARENCY



Put your citizen hat on

PUBLIC NOTICE PROPOSED ACTION(S):

- | | |
|--------------------------------------|------------------------------------|
| <input type="checkbox"/> ZONE CHANGE | <input type="checkbox"/> PLAT |
| <input type="checkbox"/> ANNEXATION | <input type="checkbox"/> SITE PLAN |
| <input type="checkbox"/> VARIANCE | <input type="checkbox"/> OTHER |

FOR MORE INFORMATION CONTACT :
BUILDING & DEVELOPMENT OFFICE

(307) 637 - 6282

or visit : www.CheyenneCity.org



FORUM2014

How do you know you've been FOIA'd

Any request for documents or records = FOIA request
Does not have to mention FOIA, does not have to be in writing

Can I see ...

I would like a
copy of ...



Which of these is not a FOIA request?

- ❖ *A voice message asking for a list of state contracts within your division.*
- ❖ *An email asking for all RFP responses for a contract.*
- ❖ *A visitor at your front desk asking why a vendor was disbarred.*
- ❖ *A request for all of your emails for the past three years.*



The Request

- The request can ask to inspect or receive copies
- Must be “reasonably specific”
- It must contain the requestor’s name and address
 - Address helps with providing response, but also helps to determine if they are a citizen

Why they are making the request or what they plan to do with the records is irrelevant



Who is allowed to ask?

- ✓ Virginia citizens
- ✓ Members of the media
- ✓ Sometimes, firms that competed may ask even if not Virginia citizens



What are they allowed to ask for?

“Public records”

-Anything in your possession used in the transaction of public business, regardless of format. Includes:

- Word documents
- Excel spreadsheets
- .pdf files
- E-mails
- Audio

“Personal notes”

-Notes that you make in order to help you do your public business

-These are public records and are not “personal”



Time for Responding

- Five “business” days
- Day 1 is the day after receiving the request

Your response – pick 1 of 4

- 1) Here is everything you asked for
- 2) We don't have it
- 3) Part or all of what you requested is protected from disclosure
- 4) We need 7 more days



The easy answers – 1 & 2

Here's everything

- Produce it in the manner in which it is kept
- If kept electronically, you can produce electronically
- Work with requestor to determine best format

We don't have anything

- You are not required to create something
- If you know who does have the records, you should provide contact information

Response 3 – Some or all records are protected from disclosure

- FOIA has approximately 175 exemptions
- For records submitted as part of a Public Procurement Act process:
 - VPPA provides specific exemptions
 - VPPA extends right to inspect to any interested person, firm or corporation
 - If your locality has exempted itself from VPPA or you are at a higher ed institution which has been delegated procurement authority, VPPA does not apply and you should look to FOIA's various exemptions

FOIA Exemption– Va. Code § 2.2-3705.1(12)

- ❖ Records relating to the negotiation and award of a specific contract
 - ❖ where competition or bargaining is involved, and
 - ❖ where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body.
- ❖ Such records shall not be withheld after the public body has made a decision to award or not to award the contract



VPPA –Va. Code § 2.2-4342

- Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act
- This is an extension of FOIA beyond the citizenship requirement



VPPA Broadens FOIA

VPPA allows inspection sooner than FOIA

- Before award, records are open to any bidder or offeror after bids are opened or competitive negotiations are complete*

*except in the event that the public body decides not to accept any of the bids and to reopen the contract



VPPA says what documents are protected

- Budget estimates
- “Proprietary” and “Trade Secret” information, but only to the extent that vendor has properly invoked this protection
 - protections of Va. Code Sec. 2.2-4342(F) invoked prior to or upon submission of the data or other materials
 - data or other materials to be protected specifically identified, and
 - reasons why protection is necessary have been stated
- Insufficient under VPPA to simply say “confidential”



What about an RFI?

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a **procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317** shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.)



If a record is protected

- ❖ An entire record is not likely to be protected. Thus, you will need to get a bla [REDACTED] 1 to help you redact. You must provide information which is not subject to protection.
- ❖ Also note the amount and subject matter of the redaction

Section V – Financial Statements
[5 pages redacted as proprietary information
under Va. Code § 2.2-4342(F)]



Confidentiality agreements

- Be careful when agreeing to keep information confidential
 - You could find yourself obligated under FOIA to disclose information that you have contractually agreed to protect

**FOIA violation vs.
breach of the contract**



Response 4 – We need extra time

- FOIA allows agency to request an additional 7 days, but must give reason why
- If agency needs more than the 12 total business days (5+7), get agreement from requestor or ask court to approve additional time



Charges

- Charge for copies are allowed; check with agency about whether you have a policy on charging
- Charges for searching costs are allowed, but be careful here
- Where costs are estimated to be greater than \$200, you can request a deposit
- Charges for legal review are not allowed



Other FOIA Considerations

You can't produce what you don't have

- ❖ Consider what you are collecting
- ❖ Records management policies
- ❖ VITA is not a record-keeper
- ❖ Destruction practices

Destruction of Records

- ❖ Before destroying any record (including deleting emails or throwing away “personal” notes), be familiar with the records retention policies
 - Library of Virginia
 - any specific schedules for your agency
- ❖ Be careful with electronic records



Questions?

