

## **CAMERAS IN THE COURTROOM AND FREEDOM OF INFORMATION ACT**

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*In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. New York Times Co. v. Sullivan, 403 U.S. 713, 717 (1971) (Black, J., concurring).*

### **I. CAMERAS IN THE COURTROOM**

#### **A. State Law**

1. By statute, Virginia has provided for cameras in the courtroom as follows:

The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice.

Va. Code Ann. § 19.2-266(1). The Virginia Court of Appeals has interpreted this section to mean that the press may photograph trial proceedings unless there is a showing of "good cause" for a prohibition on such photography. Diehl v. Commonwealth of Virginia, 9 Va. App. 191, 385 S.E.2d 228, 232 (Va. App. 1989).

- a. **Exceptions.** Va. Code Ann. § 19.2-266(1) prohibits coverage of:
  - (i) adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, temporary and permanent spousal support proceedings, proceedings concerning sexual offenses, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings;
  - (ii) the following categories of witnesses shall be prohibited: police informants, minors, undercover agents and victims and families of victims of sexual offenses;

- (iii) Coverage of jurors shall be prohibited expressly at any stage of a judicial proceeding.

2. Factors related to ‘good cause’ for prohibition:

- a. Virginia and federal constitutional mandates favor open judicial proceedings In re Times-World Corp., 7 Va. App. 317, 373 S.E.2d 474 (Va. App. 1988).
- b. There must be a factual basis in the record supporting denial of coverage In re Times-World Corp., 7 Va. App. 317, 373 S.E.2d 474 (Va. App. 1988)
- c. Other states have observed the following:

Florida: A “judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public.” State of Florida v. Green, 395 So. 2d 532, 536 (Fla. 1981)

West Virginia: Courts are required to consider whether there will be “irreparable damage to the defendant’s right to a fair trial.” State of West Virginia v. Hanna, 378 S.E.2d 640, 643-44 (W. Va. 1989).

New Hampshire: A court may limit electronic media coverage only if “there is a substantial likelihood of harm to any person or other harmful consequence.” In re Petition of WMUR Channel 9, 813 A.2d 455, 461 (N.H. 2002).

Mississippi: The presiding judge’s discretion to restrict press access “whether by closing the proceedings or by eliminating the use of the tools of the trade, must be supported by specific, on the record findings of fact which show in what manner the coverage will cause a party to lose the right to a fair trial.” In re WLBT, Inc., 905 So. 2d 1196, 1199 (Miss. 2005). Furthermore, “the complete exclusion of cameras should be resorted to only after less restrictive measures have been considered and found to be inadequate.” Id. See also Annotation, Validity, Propriety, and Effect of Allowing or Prohibiting Media’s Broadcasting, Recording, or Photographing Court Proceedings, 14 A.L.R.4<sup>th</sup> 121 (1982).

3. Procedure to gain access:

- (a) The Virginia Association of Broadcasters and Virginia Press Association are to designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers “in each jurisdiction in which electronic media and still photographic coverage is desired.” Va. Code Ann. § 19.2-266.
  - (b) The names of the designated persons are to be forwarded to the chief judge of the court. Id.
  - (c) Only the designated persons are “authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.” Id.
  - (d) Typically, media members, by counsel, file a motion to intervene in the proceedings, along with a motion to permit cameras in the courtroom.
4. Despite Virginia’s approach to cameras in the courtroom, there is no constitutional right to broadcast or record court proceedings, or have live witness testimony recorded and broadcasted. The public trial guarantee is satisfied by the opportunity of members of the public and press to attend the trial and report what they have observed. Nixon v Warner Communications Inc., 435 US 589. In fact, federal courts have banned cameras at the trial level.

## II. ACCESS TO JUVENILE AND DOMESTIC RELATIONS COURT

### A. State Law

- 1. Under Virginia Code Ann. § 16.1-302(C), “the general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper.”
- 2. However, Virginia Code Ann. § 16.1-302, also includes a presumption of access to proceedings involving adult defendants. Specifically, § 16.1-302(C) provides that, “proceedings in cases involving an adult charged with a crime ... shall be open.”

Exception: “for good cause shown, the court may, sua sponte or on motion of the accused or the attorney for the Commonwealth close the proceedings.” § 16.1-302(C).

### B. Federal Law

1. The First Amendment to the United States Constitution generally permits the news media free and untrammelled access to court proceedings. Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980). (This protection of free media access to court proceedings is mirrored in the Constitution of the Commonwealth of Virginia, Article 1, § 12.)

Exception to Presumption of Access to Court Proceedings: “the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values” Richmond Newspapers, supra, 448 U.S. at 581.

Exception to Presumption of Access to Court Documents: The Supreme Court has recognized three established exceptions to the presumption of public access: 1) where disclosure may be used to gratify private spite or promote public scandal; 2) where disclosed records may serve as reservoirs of libelous statements for press consumption; or 3) where disclosure may reveal trade secrets. Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99, 98 S.Ct. 1306 (1978); Under Seal v. Seal, 326 F.3d 479, 485 (4<sup>th</sup> Cir. 2003).

However: While acknowledging that the protection of the physical and psychological well-being of a minor is a compelling state interest, the Court noted that the interest:

[d]oes not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interest of the parents and relatives.” Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) @ 608.

Also:

“Closure of juvenile proceedings should not occur unless specific supportive findings are made which demonstrate that closure is essential to preserve higher values and the order must be narrowly tailored to serve that interest.” Associated Press v. Bradshaw, 410 N.W.2d at 580, 14 Med. L. Repr., citing Press Enterprises, 478 U.S. at 15, 106 S. Ct. at 2744

### **III. VIRGINIA FREEDOM OF INFORMATION ACT (Va. Code §§ 2.2-3700 et seq.)**

#### **A. Overview**

1. The Act applies to any “public body,” which is defined in Section 2.2-3701.
2. The Act was intended to ensure “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.” Va. Code § 2.2-3700(B).
3. Section 2.2-3701 defines “public records” as all writings and records 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.
4. Public records include records maintained in electronic format. Va. Code § 2.2-3704(G).
5. Unless exempt, the Act states that, “[a]ccess to such records shall not be denied 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.” Va. Code § 2.2-3704(A).

#### **B. Procedure for Requesting Records**

1. An individual seeking records must make a request for records. The request can be oral and does not need to mention the Act. To avoid confusion and uncertainty, however, it is recommended that a request be in writing and state that the request is being made pursuant to the Act.
2. The request must “identify the requested records with reasonable specificity.” Va. Code § 2.2-3704(B).
3. Within five working days, the public body must either produce the records or make one of four responses: (1) the records will be withheld in their entirety because their release is prohibited by law or the records are exempt; (2) the records will be provided in part and withheld in part; (3) the requested records could not be found or do not exist; or (4) that it is not practically possible to provide the records or to determine whether they are available within the five-day period, which automatically

provides the public body with an additional seven working days to provide one of the first three responses. Va. Code § 2.2-3704(B).

4. A public body may petition a court for additional time to respond if there is a request for an extraordinary volume of records. Va. Code § 2.2-3704(C).
5. The Act provides access to records, not information. The Act does not require a public body to create a record that does not already exist. Va. Code § 2.2-3704(D).

#### C. Charges

1. The Act states that 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.” Va. Code § 2.2-3704(F).
2. This sets out two general requirements: (1) the charges cannot exceed the actual cost of producing the records; and (2) the charges must be reasonable.
3. If requested in advance, the public body must estimate the charges for responding to the request. Va. Code § 2.2-3704(F). If an estimate has been requested, the public body cannot charge the requester for responding if it fails to provide the estimate first.
4. If the estimated charges exceed \$200, the public body may require the requester to make a deposit not to exceed the estimate. The response time is tolled during the period between the time when the deposit is requested and the time when it is paid. Va. Code § 2.2-3704(H).

#### D. Exemptions

1. The Act contains over 100 specifically enumerated exemptions. Exemptions may be exercised in the discretion of the public body (i.e., the public body can choose not to exercise the exemption).
2. Exemptions are to be construed narrowly 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.” Va. Code § 2.2-3700(B).
3. If disclosure of records is prohibited by another statute, the Act does not require disclosure. Va. Code § 2.2-3704(A).

E. Meetings

1. The Act generally requires that all meetings of public bodies be open. Va. Code § 2.2-3707(A). A “meeting” is defined as “the meetings, including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, 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. The gathering of employees of a public body shall not be deemed a ‘meeting’ subject to the provisions of this chapter.” Va. Code § 2.2-3701.
2. The Act generally requires that notice of meetings be given three days prior to the meeting, with an exception for special or emergency meetings. Va. Code §§ 2.2-3707(C) and (D).
3. There is a provision under which an individual may file a written request for notification of all public meetings in a given year. Va. Code § 2.2-3704(E).
4. Subject to the adoption of rules designed to prevent interference with the proceedings, the Act permits any person to “photograph, film, record or otherwise reproduce any portion of the meeting required to be open.” Va. Code § 2.2-3707(H). The Act generally requires that minutes be taken, and that those minutes be made available to the public. Va. Code § 2.2-3707(I). The Act also imposes limits on “electronic communication meetings.” Va. Code § 2.2-3708.
5. A public body may only act pursuant to a vote taken at an open meeting. This does not, however, prohibit members of public bodies from contacting other members of the body to ascertain another’s position with respect to the transaction of public business. Va. Code § 2.2-3710.
6. The Act contains 39 specific provisions permitting a public body to conduct a closed meeting to discuss certain matters. Va. Code § 2.2-3711.

F. Closed Meeting Procedures

1. Prior to convening a closed meeting, the public body must approve a motion in open meeting that (1) identifies the subject matter, (2) states the purpose of the meeting, and (3) makes specific reference to the applicable exemption from the open meeting requirements. Conclusory references and descriptions are insufficient. Va. Code § 2.2-3712(A).
2. During a closed meeting, the public body can only discuss those matters specifically exempted by the Act and identified in the motion. Va. Code § 2.2-3712(C).

3. Following the closed meeting, the public body must certify that, to the best of each member's knowledge, only public business matters lawfully exempted from the open meeting requirements were heard, discussed or considered in the meeting. Va. Code § 2.2-3712(D).

G. Enforcement of the Act

1. The Act provides a right of action to individuals to enforce their rights and privileges under the Act. An individual may file a petition for mandamus or injunction, which must be supported by an affidavit showing good cause. Va. Code § 2.2-3713(A).
2. Absent extraordinary circumstances, the petition must be heard within seven days from the date it is filed. Va. Code § 2.2-3713(C).
3. Absent "special circumstances," a petitioner who succeeds enforcing the Act is entitled to recover reasonable costs and attorney's fees from the public body. Va. Code § 2.2-3713(D).
4. If a court finds that a member of a public body willfully and knowingly violated the Act, the court can impose a civil penalty between \$250 and \$1,000 Va. Code § 2.2-3714.

**II. Federal Freedom of Information Act (5 U.S.C. § 552)**

A. Overview

1. The Federal Act applies to every "agency," "department," "regulatory commission," "government controlled corporation," and "other establishment" in the executive branch of the federal government. Not all entities which receive federal funds are covered by the Federal Act. The Federal Act does not apply to Congress, the federal courts, private corporations, or federally funded state agencies.
2. The Federal Act covers all "records" in the possession or control of a federal agency.
3. As with the State Act, the Federal Act does not require an agency to answer specific questions or create new records, but rather only requires disclosure of existing non-exempt records.
4. A request may be made by "any person." Status as a member of the media does not provide additional access to records, but may entitle that individual to certain fee benefits and an expedited review.

B. Procedure for Requesting Records



1. A requestor must “reasonably describe” the material sought from the federal agency. 5 U.S.C. § 552(a)(3)(A). All agencies are required to appoint a FOIA officer to handle requests. The agency may also have rules and regulations regarding the procedure for filing requests. Any requests should be directed to the individual FOIA officer for the specific agency and should comply with the rules and regulations adopted by that agency.
2. The Federal Act requires each agency to publish, without request, certain records including the following: (1) final opinions in the adjudication of cases; (2) statements of policies and interpretations which have been adopted by the agency and are not published in the Federal Register; (3) administrative staff manuals and instructions to staff that affect members of the public; (4) copies of all records which have been released under the prior category and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and (5) a general index of the records referred to under the last category. 5 U.S.C. § 552(a)(2).
3. Although an informal request may succeed in obtaining documents, only a formal written request will place the agency under a legal duty to act on your request.
4. The statute requires that an agency grant or deny a request within twenty working days unless “unusual circumstances” exist. 5 U.S.C. § 552(a)(6). Federal agencies have historically responded slowly to FOIA requests and often must deal with a backlog of requests. Recent amendments to the Act have attempted to limit agencies’ reliance of backlogs as a circumstance supporting a delay.
5. A requestor may ask for an expedited review of his request, which must be granted or denied within ten calendar days. The statute allows agencies to require the requester to certify the basis of the request for an expedited review. Expedited review may be appropriate in cases where there is a life threatening need for the information, where delayed disclosure could threaten the physical safety of any individual, or possibly where the request concerns a matter of great public concern. 5 U.S.C. § 552(a)(6)(E).

C. Charges

1. Agencies may charge “reasonable” fees for the “direct” costs of searching for and copying the records requested.
2. Unless the request is for a commercial use, agencies may not charge for the time spent examining files to determine which individual documents

should be exempt from disclosure. As a general matter, news media requests are not considered commercial uses.

3. The Federal Act provides that a requestor may ask an agency for a fee waiver. If certain public interest tests are met, the Act requires that the agency “shall” waive or reduce fees.
4. The Federal Acts sets out specific fee provisions for four categories of requestors: (1) commercial use requestors must pay fees for documents searched, duplication, and review; (2) non-commercial requestors from educational or scientific institutions pay no search fees and receive 100 pages of free duplication; (3) representatives of the news media pay no search fees and receive copies of 100 pages free; and (4) all other requestors receive two hours of search time and copies of 100 pages free. 5 U.S.C. § 552(a)(4).

#### D. Remedies

1. A requestor may appeal a full or partial denial of his request to the head of the agency involved. If the appeal is denied, or if the agency fails to respond to the appeal within twenty working days, a requestor may file a lawsuit in the United States District Court where the requester lives, or has his principal place of business, or in which the agency records are located, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B). Depending upon the nature of the request, a FOIA case in federal court may be entitled to an expedited review.
2. If a requestor substantially prevails in his or her lawsuit, the Act provides for payment of attorney’s fees and court costs. 5 U.S.C. § 552(a)(4)(E).
3. Individual agency employees may be further disciplined if the court finds that documents were withheld arbitrarily or capriciously. 5 U.S.C. § 552(a)(4)(F).

#### E. Exemptions

1. The federal statute includes nine specific exemptions from the Act’s disclosure requirements which include records relating to the following: (1) national security; (2) internal agency personnel rules; (3) information specifically exempted by certain other federal laws; (4) trade secrets and confidential commercial information; (5) internal agency memoranda and policy discussions; (6) personal privacy; (7) law enforcement investigation; (8) federally regulated banks; and (9) geographic information on wells. 5 U.S.C. § 552(b).
2. Most of these exemptions are discretionary and not mandatory.

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