

Memorializing

Instructions for Complying with the Virginia Freedom of Information Act's and the Virginia Public Records Act's Promulgations and Case Law that Touch and Concern this Request to Inspect the Agency's Public Records***

16 and office address is 306 Main Street, Newport News, Virginia
 17 23601 [PETITIONER] is endeavoring to provide a valuable public
 18 service by independently analyzing and reviewing, without cost
 19 to the taxpayers, the operations and records of public
 20 entities/bodies (Virginia's FOIA exists to provide a mechanism
 21 [Slip Op. II] for Virginia citizens to obtain an accounting from their
 22 public officials . . . *McBurney v. Young*, 569 U.S. ___ 1217
 23 (2013))to insure that the operations of government, such as the
 24 AGENCY ["Agency" means all boards, commissions, departments,
 25 divisions, institutions, authorities, or parts thereof, of the
 26 Commonwealth or its political subdivisions and includes the offices
 27 of constitutional officers. Virginia Code § 42.1-77] named in
 28 EXHIBIT I are ethically and competently run.

29 **You should not make the mistake of reversing our roles when**
 30 **you respond to this request. Neither PETITIONER(s) nor I/we**
 31 **need to present a compelling argument as to why we are entitled**
 32 **to examine/inspect or copy the public records we have**
 33 **requested to examine. There are several places in Virginia's**
 34 **Code says we are to see the public records without making any**
 35 **argument whatsoever. Virginia Code § 2.2-3713.E. says, "In**
 36 **any action to enforce the provisions of this chapter, the public**
 37 **body shall bear the burden of proof to establish an exemption by**
 38 **a preponderance of the evidence; Virginia Code § 2.2-3713.E.**
 39 **also says, "Any failure by a public body to follow the procedures**
 40 **established by this chapter shall be presumed to be a violation**
 41 **of this chapter." We have provided below other Virginia CODE**
 42 **law, case law, and Attorney General Opinions that explains your**
 43 **role in replying to this request. Please take due notice thereof**
 44 **and govern yourself accordingly.**

45 **P**ETITIONER(s) requests that you, as the
 46 custodian["Custodian" means the public official("Public
 47 official" [OFFICIAL]means all persons holding *any office*
 48 *created by the Constitution of Virginia or by any act of the*
 49 *General Assembly, the Governor and all other officers of the*
 50 *executive branch of the state government, and all other officers,*
 51 *heads, presidents or chairmen of boards, commissions,*

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52 **departments, and agencies of the state government or its political**
 53 **subdivisions.** Virginia Code § 42.1-77)in charge of an office having
 54 public records. Virginia Code § 42.1-77] of the records provide the
 55 documents for our inspection this day [as we personal appear
 56 before you or your deputy] for the persons["Person" includes
 57 ("Includes" means includes, but not limited to. Virginia Code 1-
 58 218) any individual, corporation, partnership, association,
 59 cooperative, limited liability company, trust, joint venture,
 60 government, political subdivision, or any other legal or commercial
 61 entity and any successor, representative, agent, agency, or
 62 instrumentality thereof. Virginia Code 1-230] and/or entities
 63 named in EXHIBIT I,, in accordance with The Virginia Freedom of
 64 Information Act [FOIA and/ or VFOIA] Code §2.2-3704.A.:

65 "Public records" and "Electronic record"

66 **W**e first find a definition of "Public Record" in Virginia law;
 67 "In 1874, the Virginia Supreme Court [SCOVA (added by
 68 PETITIONER(s))] defined a public record as a written
 69 memorial, intended to serve as evidence of something
 70 written, said or done, made by a public officer authorized to make
 71 it. *Coleman v. Commonwealth*, 66 Va. (25 Gratt.) 865, 881-82
 72 (1874)."

73 PETITIONER(s) notes that in its wisdom to accommodate the new
 74 technologies that create a memorialization of something written
 75 or done by a public official the Virginia General Assembly [GA]
 76 expanded the 1874 definition of "Public Record" [PR] by adding to
 77 the CODE [statutory amendments to the common law ~ [a]long-
 78 standing principle of statutory construction under federal law: "No
 79 statute is to be construed as altering the common law, farther than
 80 its words import.". *Exxon Mobil Corporation v. Minton*, 285 Va.
 81 115, 139, 737 S.E.2d 16, ___ (2013)] several sections that further
 82 define a PR. The language and words of those amendments did not
 83 abrogate the common law definition of PR. The General Assembly
 84 has demonstrated in the past its intent to abrogate the common
 85 law when it is its intent to do so by saying the legislation is

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86 **intended to do exactly that. In the following code sections we**
87 **clearly see the legislature's intent is to amend the common law**
88 **and not abrogate it by its exclusion of the word or words of the**
89 **same meaning as abrogate in the amendments. Primary among**
90 **these CODE sections are;**

91 **a. Virginia Code § 2.2-3701 "Public records" means all**
92 **writings and recordings that consist of letters, words or**
93 **numbers, or their equivalent, set down by handwriting,**
94 **typewriting, printing, photostatting, photography, magnetic**
95 **impulse, optical or magneto-optical form, mechanical or**
96 **electronic recording or other form of data compilation,**
97 **however stored, and regardless of physical form or**
98 **characteristics, prepared or owned by, or in the possession**
99 **of a public body or its officers, employees or agents in the**
100 **transaction of public business. . . . ; FOIA defines "public**
101 **records" as all writings and recordings that consist of letters,**
102 **words or numbers, or their equivalent, set down by**
103 **handwriting, typewriting, printing, . . . mechanical or**
104 **electronic recording or other form of data compilation,**
105 **however stored, and regardless of physical form or**
106 **characteristics, prepared or owned by, or in the possession**
107 **of a public body or its officers, employees or agents in the**
108 **transaction of public business. *Virginian-Pilot Media Cos. v.***
109 ***City of Norfolk Sch. Bd.*, 4 Cir. CL102815, 81 Va. Cir. 450**
110 **(2010). And;**

111 **b. "Electronic record" means a public record whose**
112 **creation, storage, and access require the use of an**
113 **automated system or device. Ownership of the**
114 **hardware, software, or media used to create, store, or**
115 **access the electronic record has no bearing on a**
116 **determination of whether such record is a public record.**
117 **Virginia Code § 42.1-77.**

118 **c. "Essential public record" means records that are**
119 **required for recovery and reconstruction of any agency**
120 **to enable it to resume its core operations and functions**
121 **and to protect the rights and interests of persons.**

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122 **Virginia Code § 42.1-77**

123 **d. "Archival record" means a public record of**
124 **continuing and enduring value useful to the citizens of**
125 **the Commonwealth and necessary to the administrative**
126 **functions of public agencies in the conduct of services**
127 **and activities mandated by law that is identified on a**
128 **Library of Virginia approved records retention and**
129 **disposition schedule as having sufficient informational**
130 **value to be permanently maintained by the**
131 **Commonwealth. Virginia Code § 42.1-77.**

132 **When reading any provision of CODE and the aforesaid we must**
133 **keep in mind what the CODE says on what we do with the 1874**
134 **SCOVA holding on PR or any other component of the Common Law:**

135 **Virginia Code 1-200 The common law of England,**
136 **insofar as it is not repugnant to the principles of the Bill**
137 **of Rights and Constitution of this Commonwealth, shall**
138 **continue in full force within the same, and be the rule of**
139 **decision, except as altered by the General Assembly.**
140 **(Code 1919, § 2, § 1-10; 2005, c.839.)**

141 **Virginia Code 1-201 The right and benefit of all writs,**
142 **remedial and judicial, given by any statute or act of**
143 **Parliament, made in aid of the common law prior to the**
144 **fourth year of the reign of James the First, of a general**
145 **nature, not local to England, shall still be saved, insofar**
146 **as the same are consistent with the Bill of Rights and**
147 **Constitution of this Commonwealth and the Acts of**
148 **Assembly. (Code 1919, § 3, § 1-11; 2005, c. 839.)**

149 **You should include in a. through d. above records created in the**
150 **course of your regularly conducted public business activity in your**
151 **regular practice to make these public records in accordance with**
152 **the practices you are to follow in doing so, as found set out in the**
153 **promulgations of the Code of Virginia, the U.S. Code, and their**
154 **authorized corresponding rules and regulations. This includes the**
155 **public records that are made at or near the time of the events they**

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156 are purport to describe, by a person with the knowledge of the acts
157 or events, or by a computer or other similar digital means or as it
158 may be described in the Code of Virginia, which
159 contemporaneously reports/records the event as it occurred
160 including the index(s) of those public records. **Included in the PRs**
161 **being addressed by this FOIA request are those PRs that touch and**
162 **concern Virginia Code § 8.01-420.7.A.** When disclosure of those
163 communications or information covered by the attorney-client
164 privilege or work product protection made in any proceeding or to
165 any public body as defined in § 2.2-3701 operates as a waiver of
166 the privilege or protection. . . .

167 **ANALYSIS**
168 ***Virginia Freedom of Information Act, Generally***
169 ***Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd., 4 Cir.***
170 ***CL102815, 81 Va. Cir. 450 (2010)***

171 **A. *Virginia Freedom of Information Act, Generally***

172 **Virginia's Freedom of Information Act was enacted in**
173 **1968 to ensure citizens ready access to public records**
174 **and free entry to meetings where "business of the**
175 **people is being conducted." Va. Code Ann. § 2.2-3700**
176 **(2010). FOIA provisions are to be liberally construed to**
177 **promote an increased awareness by all persons of**
178 **governmental activities and afford every opportunity to**
179 **citizens to witness the operations of government. Any**
180 **exemption from public access to records or meetings**
181 **shall be narrowly construed and no record shall be**
182 **withheld or meeting closed to the public unless**
183 **specifically made exempt pursuant to [the Act] or other**
184 **specific provision of law. *Virginian-Pilot Media Cos. v.***
185 ***City of Norfolk Sch. Bd., 4 Cir. CL102815, 81 Va. Cir. 450***
186 ***(2010) Id. § 2.2-3700(B); see also City of Danville v.***
187 ***Laird, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982)***

188 **(“The policy expressly stated in this section is that this**
189 **chapter shall be liberally construed to enable citizens to**

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190 **observe the operations of government and that the**
191 **exemptions shall be narrowly construed in order that**
192 **nothing which should be public may be hidden from any**
193 **person.”). *City of Danville v. Laird*, 223 Va. 271, 276,**
194 **288 S.E.2d 429, 431 (1982), *Virginian-Pilot Media Cos.***
195 ***v. City of Norfolk Sch. Bd.*, 4 Cir. CL102815, 81 Va. Cir.**
196 **450 (2010)**

197 **FOIA requires all public records to be open to inspection**
198 **and copying by any Virginia citizens, including**
199 **representatives of newspapers and magazines with in-**
200 **state circulation, subject to certain provisions excluding**
201 **mandatory disclosure of records. See Va. Code Ann. §**
202 **2.2-3704(A) (2010); *id.* §§ 2.2-3705.1(1)-(13). Section**
203 **2.2-3705.1(3), upon which Defendant largely relies in**
204 **refusing most of Plaintiff's FOIA request, provides that**
205 **“[I]legal memoranda and other work product compiled**
206 **specifically for use in litigation or for use in an active**
207 **administrative investigation concerning a matter that is**
208 **properly the subject of a closed meeting under § 2.2-**
209 **3711” are excluded from mandatory disclosure. *Id.***

210 **FOIA defines “public records” as writings and**
211 **recordings that consist of letters, words or numbers, or**
212 **their equivalent, set down by handwriting, typewriting,**
213 **printing, . . . mechanical or electronic recording or other**
214 **form of data compilation, however stored, and**
215 **regardless of physical form or characteristics, prepared**
216 **or owned by, or in the possession of a public body or its**
217 **officers, employees or agents in the transaction of**
218 **public business. *Id.* § 2.2-3701.**

219 **Among other entities, FOIA defines “public body” as**
220 **encompassing school boards, as well as any**
221 **“committee, subcommittee, or other entity however**
222 **designated, of the public body created to perform**
223 **delegated functions of the public body or to advise the**
224 **public body. It shall not exclude any such committee,**
225 **subcommittee or entity because it has private sector or**

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226 citizen members." Id. The Norfolk School Board
227 constitutes a public body. Virginian-Pilot Media Cos. v.
228 City of Norfolk Sch. Bd., 4 Cir. CL102815, 81 Va. Cir. 450
229 (2010)

The full text of the CODE the Court relies on reads:

231 Virginia Code § 2.2-3701 "Public body" means any legislative
232 body, authority, board, bureau, commission, district or agency of
233 the Commonwealth or of any political subdivision of the
234 Commonwealth, including cities, towns and counties, municipal
235 councils, governing bodies of counties, school boards and planning
236 commissions; boards of visitors of public institutions of higher
237 education; and other organizations, corporations or agencies in the
238 Commonwealth supported wholly or principally by public funds. It
239 shall include (i) the Virginia Birth-Related Neurological Injury
240 Compensation Program and its board of directors established
241 pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii)
242 any committee, subcommittee, or other entity however designated,
243 of the public body created to perform delegated functions of the
244 public body or to advise the public body. It shall not exclude any
245 such committee, subcommittee or entity because it has private
246 sector or citizen members. Corporations organized by the Virginia
247 Retirement System are "public bodies" for purposes of this
248 chapter.

249 Agency as referenced in 2.2-3701 is defined in Virginia Code §
250 42.1-77:

251 Agency" means all boards, commissions, departments,
252 divisions, institutions, authorities, or parts thereof, of
253 the Commonwealth or its political subdivisions and
254 includes the offices of constitutional officers.

255 b. Virginia Code § 42.1-77 "Electronic record" means
256 a public record whose creation, storage, and access
257 require the use of an automated system or device.
258 Ownership of the hardware, software, or media used to

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259 **create, store, or access the electronic record has no**
260 **bearing on a determination of whether such record is a**
261 **public record;**

262

"Public official" / "Custodian"

263 **Virginia Code § 42.1-77 "Public official" means all**
264 **persons holding any office created by the Constitution**
265 **of Virginia or by any act of the General Assembly, the**
266 **Governor and all other officers of the executive branch**
267 **of the state government, and all other officers, heads,**
268 **presidents or chairmen of boards, commissions,**
269 **departments, and agencies of the state government or**
270 **its political subdivisions.**

271
272 **Under Code § 2.2-3701 the definition of "public body"**
273 **is extended to any committee, subcommittee, or other**
274 **entity however designated, of the public body created**
275 **to perform delegated functions of the public body or to**
276 **advise the public body. It shall not exclude any such**
277 **committee, subcommittee or entity because it has**
278 **private sector or citizen members. *Beck v. Shelton*, 267**
279 **Va. 482, 482, 593 S.E.2d 195, ____ (2004)**

280 **This provision of Code § 2.2-3701 simply includes**
281 **committees, subcommittees, or entities within the types**
282 **of public bodies covered by FOIA, irrespective of**
283 **participation by private sector or citizen members. It**
284 **does not expand the meaning of "members" in the**
285 **definition of "meetings" also contained in Code § 2.2-**
286 **3701. Furthermore, the city council does not have**
287 **private sector or citizen members and did not use a**
288 **committee or subcommittee structure. The full body or**
289 **a quorum of the city council cannot logically be**
290 **presumed to be a committee or subcommittee of itself.**
291 **[Page 483] *Beck v. Shelton*, 267 Va. 482, 482-483, 593**
292 **S.E.2d 195, ____ (2004)**

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293 **The FOIA deals with public access to records and**
294 **meetings of public bodies. There is no question that e-**
295 **mails fall within the definition of public records under**
296 **Code § 2.2-3701 Beck v. Shelton, 267 Va. 482, 483, 593**
297 **S.E.2d 195, ___ (2004)**

298 **Virginia Code § 42.1-77 "Custodian" means the public**
299 **official in charge of an office having public records.**

300 **Constitutional Officers**

301 **Virginia Code § 2.2-3701 For the purposes of the**
302 **provisions of this chapter applicable to access to public**
303 **records, constitutional officers shall be considered**
304 **public bodies and, except as otherwise expressly**
305 **provided by law, shall have the same obligations to**
306 **disclose public records as other custodians of public**
307 **records.**

308 **Records Sought Are Authorized to Be Released VIA Federal**
309 **and State Law Which Laws Are as Follows:**

310 **To this end, PETITIONER(s) and the undersigned [we / I / us] are**
311 **here today and would like to examine records The AGENCY**
312 **maintains, accordingly, pursuant to [1] the 1st Amendment fo the**
313 **U.S. Constitution(1st adm.):**

314 **The Constitution of the United States of America**
315 **1st Amendment (1791)**

316 **Freedom of Religion, of Speech, and of the Press. --**
317 **Congress shall make no law respecting an**
318 **establishment of religion, or prohibiting the free**
319 **exercise thereof; or abridging the freedom of speech, or**
320 **of the press; or the right of the people peaceably to**
321 **assemble, and to petition the government for a redress**
322 **of grievances.;**

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323 and [2] the 14th Admendment to the U.S. Constitution (14th
324 adm.):

325 **The Constitution of the United States of America**
326 **14th Amendment., § 1 (1868)**

327 **Section 1. Citizenship Rights Not to Be Abridged by**
328 **States. -- All persons born or naturalized in the United**
329 **States, and subject to the jurisdiction thereof, are**
330 **citizens of the United States and of the state wherein**
331 **they reside. No state shall make or enforce any law**
332 **which shall abridge the privileges or immunities of**
333 **citizens of the United States; nor shall any State deprive**
334 **any person of life, liberty, or property, without due**
335 **process of law; nor deny to any person within its**
336 **jurisdiction the equal protection of the laws.;**

337 **amendments of the Constitution of the United States (CR or**
338 **Constitutional Rights), and [3] Article 1, Sec. 12 of the Constitution**
339 **of Virginia (Art. 1~12 CVA);**

340 **Virginia Constitution, Bill of Rights, Art. 1 § 12 (1971)**

341 **Section 12. Freedom of speech and of the press; right**
342 **peaceably to assemble, and to petition. — That the**
343 **freedoms of speech and of the press are among the**
344 **great bulwarks of liberty, and can never be restrained**
345 **except by despotic governments; that any citizen may**
346 **freely speak, write, and publish his sentiments on all**
347 **subjects, being responsible for the abuse of that right;**
348 **that the General Assembly shall not pass any law**
349 **abridging the freedom of speech or of the press, nor the**
350 **right of the people peaceably to assemble, and to**
351 **petition the government for the redress of grievances.**

352 **the state open records law [4] [The Virginia Freedom of**

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353 **Information Act] (VFOIA or FOIA), Va. Code Ann. Sec. 2.2-3700**
 354 **to 2.2-3714, and the promulgations of [5] the Virginia Public**
 355 **Records Act, Va. Code Ann. Sec. §§ 42.1-76 – 42.1-91 (VPRA),**
 356 **[6] Virginia Attorney General Opinion 15-052 ~ Bundick at pages**
 357 **3 to page 5 (VAGO 15-052), [7] the Virginia Government Data**
 358 **Collection and Dissemination Practices Act, Va. Code Ann. Sec. §§**
 359 **2.2-3800 – 2.2-3809 (VGDCDPA or VGD), the Unalienable Rights**
 360 **Foundation, David M. Lindsey [Lindsey], individually and**
 361 **personally and a citizen of this Commonwealth who resides in**
 362 **Virginia Beach, Virginia, John Fenter [Fenter] individually and**
 363 **personally and a citizen of this Commonwealth who resides in**
 364 **Virginia Beach, Virginia, Max Shapiro [Shapiro], individually and**
 365 **personally and a citizen of this Commonwealth who resides in**
 366 **Norfolk, Virginia and Kathleen McCarthy [McCarthy], individually**
 367 **and personally and a citizen of this Commonwealth who resides**
 368 **in Norfolk, Virginia, and Douglas Buckley [Buckley], individually**
 369 **and personally and a citizen of this Commonwealth who resides**
 370 **in Parksley, Virginia all of which from time to time may be**
 371 **referred to herein as we/us/I, are asking you as the Public**
 372 **Official and the Custodian of the records we seek (Custodian ~**
 373 **means the public official in charge of an office having public**
 374 **records. CODE §42.1-77) :**

375 **Title 1 General Provisions**
 376 **Chap. 2.1 Common Law and Rules of Construction, §§ 1-200 –**
 377 **1-257**
 378 **Art. 2 Rules of Construction and Definitions, §§ 1-202 – 1-257**
 379 **§ 1-213. Delegation of duties assigned to political**
 380 **subdivision. — The governing body of a political**
 381 **subdivision shall be responsible for any duty or**
 382 **responsibility imposed upon its political subdivision.**
 383 **(1986, c. 239, § 1-17.2; 1987, c. 471; 1988, c. 273;**
 384 **2005, c. 839.);**

385 **As first set out above we ask you or your deputy to provide**
 386 **records for our inspection this day as we personal appear before**
 387 **you or your deputy relating to The AGENCY, PETITIONER(s),**
 388 **Lindsey, Fenter, Shapiro , McCarthy, and Buckley request that**
 389 **you provide the documents found in EXHIBIT 1 attached hereto**

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390 to for the persons named in EXHIBIT 1 attached hereto in
391 accordance with Virginia Code §2.2-3704.A.:

392 **Public Records Shall Be Open to Inspection and Copying**

393 **I. Virginia Code §2.2-3704.A.:**

394 **Except as otherwise specifically provided by law, all**
395 **public records shall be open to inspection and copying**
396 **by any citizens of the Commonwealth during the**
397 **regular office hours of the custodian ["Custodian"**
398 **means the public official in charge of an office having**
399 **public records. Virginia Code § 42.1-77] of such**
400 **records. Access to such records shall not be denied to**
401 **citizens of the Commonwealth, representatives of**
402 **newspapers and magazines with circulation in the**
403 **Commonwealth, and representatives of radio and**
404 **television stations broadcasting in or into the**
405 **Commonwealth . . .;**

406 **Virginia Code § 2.2-3700.B. By enacting this chapter,**
407 **the General Assembly ensures the people of the**
408 **Commonwealth ready access to public records in the**
409 **custody of a public body or its officers and employees,**
410 **and free entry to meetings of public bodies wherein**
411 **the business of the people is being conducted.**

412 **Virginia Code § 2.2-3700.B. The affairs of government**
413 **are not intended to be conducted in an atmosphere of**
414 **secrecy since at all times the public is to be the**
415 **beneficiary of any action taken at any level of**
416 **government.**

417 **Virginia Code § 2.2-3700.B. Unless a public body or its**
418 **officers or employees specifically elect to exercise an**
419 **exemption provided by this chapter or any other**
420 **statute, every meeting shall be open to the public and**
421 **all public records shall be available for inspection and**

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422 copying upon request.

423 EXEMPTIONS SET OUT IN VFOIA

424 VFOIA and Virginia's Supreme Court [White Dog Publishing v.
425 Culpeper Bd. of Sup., 272 Va. 377, 634 S.E.2d 334 (2006)
426 (White Dog); Fenter v. Norfolk Airport Authority, 274 Va. 524,
427 649 S.E.2d 704 (2007) (Fenter); Cartwright v. Commonwealth
428 Transp. Comm'r, 270 Va. 58, 613 S.E.2d 449 (2005)
429 (Cartwright)] clearly sets out what PR are exempt from VFOIA
430 requirements;

431 Virginia Code § 2.2-3700.B. All public records and
432 meetings shall be presumed open, unless an
433 exemption is properly invoked.

434
435 II. Virginia Code § 42.1-86.A.:
436 . . . [t]he head of each agency, . . . [s]hall establish
437 and maintain a program for the selection and
438 preservation of essential public records. The program
439 shall provide for preserving, classifying, arranging,
440 and indexing essential public records[Virginia Code
441 § 42.1-77"Essential public record" means records that
442 are required for recovery and reconstruction of any
443 agency to enable it to resume its core operations and
444 functions and to protect the rights and interests of
445 persons.] so that such records are made available to
446 the public. . . .

447 III. Title 2.2 Administration of Government / Chap. 37
448 Virginia Freedom of Information Act, §§ 2.2-3700 – 2.2-
449 3714 / § 2.2-3704.1. Posting of notice of rights and
450 responsibilities by state public bodies; assistance by the
451 Freedom of Information Advisory Council:

452 A. All state public bodies created in the executive
453 branch of state government and subject to the
454 provisions of this chapter shall make available the

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455 **following information to the public upon request and**
456 **shall post such information on their respective public**
457 **government websites:**

458 **1. A plain English explanation of the rights of a**
459 **requester under this chapter, the procedures to obtain**
460 **public records from the public body, and the**
461 **responsibilities of the public body in complying with**
462 **this chapter. For purposes of this section, "plain**
463 **English" means written in nontechnical, readily**
464 **understandable language using words of common**
465 **everyday usage and avoiding legal terms and phrases**
466 **or other terms and words of art whose usage or**
467 **special meaning primarily is limited to a particular**
468 **field or profession;**

469 **2. Contact information for the person designated by**
470 **the public body to (i) assist a requester in making a**
471 **request for records or (ii) respond to requests for**
472 **public records;**

473 ****3. A general description, summary, list, or index of**
474 **the types of public records maintained by such state**
475 **public body;**

476 ****4. A general description, summary, list, or index of**
477 **any exemptions in law that permit or require such**
478 **public records to be withheld from release;**

479 ****5. Any policy the public body has concerning the**
480 **type of public records it routinely withholds from**
481 **release as permitted by this chapter or other law; and**

482 ****B. The Freedom of Information Advisory Council,**
483 **created pursuant to § 30-178, shall assist in the**
484 **development and implementation of the provisions of**
485 **subsection A, upon request. (2004, c. 730; 2009, c.**
486 **626; 2014, c. 421.)**

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Instructions for Complying with the Virginia Freedom of Information Act's and the Virginia Public Records Act's Promulgations and Case Law that Touch and Concern this Request to Inspect the Agency's Public Records***

487 The PETITIONER(S) and its agent(s) named herein and the
488 agent(s) in their individual capacities: John Fenter [Fenter],
489 personally and individually, a Citizen of this Commonwealth who
490 resides in Virginia Beach, Virginia,Max Shapiro [Shapiro],
491 individually and personally and a citizen of this Commonwealth
492 who resides in Norfolk, Virginia, Douglas Buckley [Buckley],
493 individually and personally and a citizen of this Commonwealth
494 who resides in Accomack County, Virginia, Kathleen McCarthy
495 [McCarthy], individually and personally and a citizen of this
496 Commonwealth who resides in Norfolk, Virginia, and David M.
497 Lindsey [personally and individually], a Citizen of this
498 Commonwealth who resides in Virginia Beach, Virginia, further
499 request, pursuant to the state open records law, the Virginia
500 Freedom of Information Act, Va, Code Ann, Sec. 2.2-3700 through
501 2.2-3714 (FOIA), and the promulgations of the Virginia Public
502 Records Act, §§ 42.1-76 — 42.1-91, that 42.1-91,that you, as an
503 individual holds records that pertain to an AGENCY, give us
504 access to records, both hand written/prepared and electronic
505 relating to the AGENCY. PETITIONER(s), Fenter, McCarthy,
506 Shapiro , Buckley and Lindsey are requesting to examine the
507 documents set out in Exhibit I attached hereto [This includes
508 copies of any electronic mail or other requested information
509 maintained in electronic form] for the period beginning
510 **January 2, 2010 to date or the other named Ninety-Six plus
511 [96+] [Exhibit II in the Section tiled PRESERVATION NOTICE
512 starting at line 1008***]categories of documents herein
513 delineated [Exhibit 1] for the ** person[s] and/or
514 parties/entities named in Exhibit II attached hereto:

515 Where The Public Records We Want to Examine
516 Should Be and Maintained

517 Virginia Code § 42.1-87 A. Custodians of archival public records
518 shall keep them in fire-resistant, environmentally controlled,
519 physically secure rooms designed to ensure proper preservation
520 and in such arrangement as to be easily accessible. Current public
521 records should be kept in the buildings in which they are
522 ordinarily used.

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523 ***There is no case law that relates to Code § 42.1-87 and any court***
 524 ***action on this matter as a result of this request would be a matter***
 525 ***of first impression in this Commonwealth. There is however a***
 526 ***Virginia Attorney General Opinion on the subject that was issued***
 527 ***pursuant to an PETITIONER(s) VFOIA request to the Treasurer of***
 528 ***Accomack County (12-05 Bundick) that can guide you (as a result***
 529 ***of our public service):***

530 **Pg. 3, ¶ 1:**

531 **II. Records Storage and Retention**

532 "[T]o establish a single body of law applicable to all
 533 public officers ... [for] public records management and
 534 preservation ... [,]"⁸ the General Assembly enacted
 535 the Virginia Public Records Act ("Records Act"). The
 536 Records Act provides, with respect to where records
 537 used in the transaction of business should be located,
 538 that "[c]urrent public records should be kept in the
 539 buildings in which they are ordinarily used." Thus, a
 540 treasurer's records should be stored where his offices
 541 are located. The Records Act further directs the
 542 Library of Virginia ("LVA") to "establish procedures
 543 and techniques for the effective management of public
 544 records." All agencies, including constitutional
 545 officers, holding public records are required to comply
 546 with any applicable LVA records retention and
 547 disposition schedules. The LVA, in General Schedule
 548 No. GS-28, has issued a records retention and
 549 disposition schedule applicable to county treasurers.
 550 This schedule comprehensively lists the retention
 551 period and disposition method for various types of
 552 records." I therefore conclude that a treasurer should
 553 abide by this schedule in retaining and disposing of his
 554 records.

555 **Pg. 4, ¶ 4, (2) - pg. 5:**

556 **[t]he records of a county treasurer must be located in**
 557 **the same building as that county treasurer's office,**
 558 **and such records must be retained according to the LV**
 559 **A's records retention and disposition schedules**
 560 **applicable to county treasurers;**

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These requests have been directed to you as the AGENCY 's Custodian as it appears it is your duty to comply with our request under Virginia Code.

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To be clear, we do not expect any of The AGENCY nor want The AGENCY to search through all of those electronic records/inventory [including indexes] or boxes/inventory of the AGENCY's records [including indexes] - we don't want to put The AGENCY out. Therefore, there will not be a need for The AGENCY to search through all of those electronic records/inventory and boxes/inventory of The AGENCY offices' records and indexes as McCarthy, Fenter, Lindsey, Buckley, Shapiro and PETITIONER(s) Forensic Evidence Teams and Civil Rights Case Management Teams will do all the searching and copying of the records requested in this FOIA request pursuant to Virginia Code §2.2-3704.A., Virginia Code §42.1-87.A. and the Library of Virginia [the Administrative Law Agency as provided for in Virginia's Public Records Act], **Virginia Public Records Management Manual.**

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Please advise us immediately when and where these records will be available.

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**Request to Be Provided With All Cost
To be Charged In Advance**

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PETITIONER(s) Fenter, Shapiro , Buckley, McCarty and Lindsey also request to be provided with an *itemized* schedule of any/all charges [each one and all; with no exception] related to this request [Virginia Code § 2.2-3704.F.] including (1) the statutory authority for each and every charge, (2) the charges for copying each item/material that we may request a copy of during and after our examination of the items herein requested for examination [please provide in the schedule all segregable portions of otherwise exempt material].

594

Any charges/fees charged by you under the color of VFOIA § 2.2-

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595 **3704.F. for searching/looking for public records that are to be**
 596 **maintained under VPRA § 42.1-86.A. [. . . shall provide for**
 597 **preserving, classifying, arranging, and indexing essential public**
 598 **records so that such records are made available to the public] is**
 599 **viewed by PETITIONER(s), Fenter, McCarthy, Buckley, Shapiro**
 600 **and Lindsey [1] as a violation of their civil rights, "public's right**
 601 **to know and the media's right of access" as set out and pursuant**
 602 **to the First and Fourteenth Amendments to the United States**
 603 **Constitution, and Article I, Section 12 of the Virginia Constitution,**
 604 **VFOIA and the VPRA § 42.1-86.A. and [2] that the Agency's**
 605 **Director and employees and agents assessment for any fees for**
 606 **it duties set out under VPRA §42.1-86.A. are malfeasance,**
 607 **misfeasance, and nonfeasance of office/duties under the colour**
 608 **of VA. Code Section 2.2-3704.F. and would appear to**
 609 **PETITIONER(s) to be nothing less than incompetency and**
 610 **sufficient grounds to request that either the Attorney General or**
 611 **the Attorney for the Commonwealth to remove you and any one**
 612 **of you employees engaged in this activity to be removed from**
 613 **office.**

614 **Va. Constitution Va. Con. Art. 1 § 12 (1971) That the freedoms**
 615 **of speech and of the press are among the great bulwarks of**
 616 **liberty, and can never be restrained except by despotic**
 617 **governments; that any citizen may freely speak, write, and**
 618 **publish his sentiments on all subjects, being responsible for the**
 619 **abuse of that right; that the General Assembly shall not pass any**
 620 **law abridging the freedom of speech or of the press, nor the right**
 621 **of the people peaceably to assemble, and to petition the**
 622 **government for the redress of grievances.**

623 **VA. Code §2.2-3704.F. A public body may make reasonable**
 624 **charges not to exceed its actual cost incurred in accessing,**
 625 **duplicating, supplying, or searching for the requested records. No**
 626 **public body shall impose any extraneous [adjective 1 irrelevant**
 627 **or unrelated to the subject. 2 of external origin. -DERIVATIVES**
 628 **extraneously >adverb extraneousness >noun. -ORIGIN Latin**
 629 **extraneus / Oxford University Press Dictionary, 2012],**
 630 **intermediary or surplus fees or expenses to recoup the general**
 631 **costs associated with creating or maintaining records or**

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632 **transacting the general business of the public body. Any**
633 **duplicating fee charged by a public body shall not exceed the**
634 **actual cost of duplication. The public body may also make a**
635 **reasonable charge for the cost incurred in supplying records**
636 **produced from a geographic information system at the request of**
637 **anyone other than the owner of the land that is the subject of the**
638 **request. However, such charges shall not exceed the actual cost**
639 **to the public body in supplying such records, except that the**
640 **public body may charge, on a pro rata per acre basis, for the cost**
641 **of creating topographical maps developed by the public body, for**
642 **such maps or portions thereof, which encompass a contiguous**
643 **area greater than 50 acres. All charges for the supplying of**
644 **requested records shall be estimated in advance at the request of**
645 **the citizen.**

646 **Virginia Courts Have Addressed Allowed Expenses Under**
647 **Virginia Code §2.2-3704.F.**

648 **. . . [C]ode § 2.2-3704(F) does not grant a public body**
649 **the authority for charging for the costs of reviewing or**
650 **redacting records. This simply is not in the statute nor**
651 **is there any implication from the statute that this can**
652 **be recovered. *Albright v. Woodfin*, 24 Cir. CL050006,**
653 **68 Va. Cir. 115 (2005)**

654 **Virginia Code §2.2-3704.B. allows for the following response**
655 **to this FOIA request**

656 **Virginia Code §2.2-3704.B. Any public body [Agency ~ 42.1-**
657 **77]that is subject to this chapter and that is the custodian [Va.**
658 **Code Section 42.1-77] of the requested records shall promptly,**
659 **but in all cases within five working days of receiving a request,**
660 **provide the requested records to the requester or make one of**
661 **the following responses in writing:**

662 **1. The requested records are being entirely withheld**
663 **because their release is prohibited by law or the custodian has**

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664 **exercised his discretion to withhold the records in accordance**
 665 **with this chapter. Such response shall identify with reasonable**
 666 **particularity**
 667 ● **the volume and+**
 668 ● **subject matter+**
 669 ● **of withheld records, and+**
 670 ● **cite, as to each category of withheld records,+**
 671 ● ***the specific Code section* that authorizes the withholding of**
 672 **the records.+**

673 **2. The requested records are being provided in part and are**
 674 **being withheld in part because the release of part of the**
 675 **records is prohibited by law or the custodian has exercised his**
 676 **discretion to withhold a portion of the records in accordance**
 677 **with this chapter. Such response shall+**
 678 ● **identify with reasonable particularity+**
 679 ● **the subject matter of withheld portions, and cite, as to each**
 680 **category of withheld records,+**
 681 ● ***the specific Code section* that authorizes the withholding of**
 682 **the records. +**
 683 ● **When a portion of a requested record is withheld, the public**
 684 **body may**
 685 ● **delete or +**
 686 ● **excise+**
 687 ● **only that portion of the record to which an exemption**
 688 **applies and+**
 689 ● **shall release the remainder of the record.+**

690 **3. The requested records**
 691 ● **could not be found or +**
 692 ● **do not exist. +**
 693 ● **However, if the public body that received the request knows**
 694 **that another public body has the requested records, the**
 695 **response shall include contact information for the other**
 696 **public body.+**

697 **4. It is not practically possible to provide the requested**
 698 **records or to determine whether they are available within the**
 699 **five-work-day period. Such response shall specify the**

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700 **conditions that make a response impossible. If the response is**
701 **made within five working days, the public body shall have an**
702 **additional seven work days in which to provide one of the four**
703 **preceding responses.**

704 **Remember in your response to this FOIA that:**

705 **Virginia Code § 2.2-3713 E. says, "In any action to enforce**
706 **the provisions of this chapter,**
707 **• *the public body shall bear the burden of proof to establish***
708 ***an exemption by a preponderance of the evidence.***
709 **Any failure by a public body to follow the procedures**
710 **established by this chapter shall be presumed to be a**
711 **violation of this chapter."**

712 **Virginia Code § 2.2-3700. B. says, "All public bodies and *their***
713 ***officers and employees* shall make reasonable efforts to**
714 **reach an agreement with a requester concerning the**
715 **production of the records requested."**

716 **The Response you make in accordance with the requirements**
717 **of VA Code § 2.2-3704.B is a Public Record**

718 **Your response to this FOIA request you make in accordance**
719 **with the requirements of VA Code § 2.2-3704.B is a Public**
720 **Record and as such is subject to VA Code § 18.2-168, and §**
721 **18.2-172;**

722 **§ 18.2-168. Forging public records, etc. — If any person**
723 **forge a public record, or certificate, return, or attestation,**
724 **of any public officer or public employee, in relation to any**
725 **matter wherein such certificate, return, or attestation**
726 **may be received as legal proof, or utter, or attempt to**
727 **employ as true, such forged record, certificate, return, or**
728 **attestation, knowing the same to be forged, he shall be**
729 **guilty of a Class 4 felony. (Code 1950, § 18.1-92; 1960, c.**
730 **358; 1975, cc. 14, 15; 1976, c. 146.)**

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731 **[the Supreme Court of Virginia concluded, after an extensive**
732 **review of the history of the common law offenses of forging a**
733 **public document and forging private papers, that actual**
734 **prejudice to the public's ownership rights is not a necessary**
735 **element of the crime of forging a public document. *Campbell v.***
736 ***Commonwealth*, 246 Va. 174, 179-82, 431 S.E.2d 648, 651-53**
737 **(1993). The Court noted:**

738 **"At Common Law the Counterfeiting a Matter**
739 **of Record is Forgery; for since the Law gives**
740 **the highest Credit to all Records, it cannot but**
741 **be of the utmost ill Consequence to the Publik**
742 **to have them either forged or falsified." 2**
743 **Matthew Bacon, *Abridgment* *568 (1786). The**
744 **common-law crime of forgery of public**
745 **records, a capital offense in England, was**
746 **augmented by statutes punishing the lesser**
747 **offense of forgery of certain private**
748 **documents. See, e.g., An Act Concerning**
749 **Counterfeit Letters or Privy Tokens to Receive**
750 **Money or Goods in Others Men's Names, 1541-**
751 **42, 33 Hen. VIII, ch. 1 (Eng.). Unlike the crime**
752 **of forgery of public records in which "ill**
753 **Consequence to the Publik" was conclusively**
754 **presumed, and unlike the common-law crime**
755 **of forgery of private papers in which proof of**
756 **potential harm or prejudice to another was**
757 **required, conviction of the several statutory**
758 **offenses generally required proof of actual**
759 **harm or prejudice to the rights of another**
760 **person. See 1 Hawkins at 263 n. 1; 2 Bacon at**
761 ***568. [Page 757]**

762 ***Id.* at 179-80, 431 S.E.2d at 651 (emphasis**
763 **in original). The Court further reviewed the**
764 **legislative history and the scheme of the**
765 **Virginia forgery statutes and concluded**
766 **"that harm or prejudice to the right of**
767 **another person has never been and is not**

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768 **now an element of the crime of forgery of**
769 **public records in this Commonwealth." *Id.***
770 **at 184, 431 S.E.2d at 654.**

771
772 **As the crime of forgery of a public**
773 **document does not require personal loss of**
774 **ownership, appellant's comparison to**
775 **larceny is inapposite. Therefore, we will not**
776 **extend the single larceny doctrine to cases**
777 **involving Code § 18.2-168.**

778 **Additionally, the language and structure of the Code**
779 **prove the legislature intended to allow multiple forgery**
780 **convictions in situations such as the one before us.**
781 **Code § 18.2-168 states:**

782 **If any person forge a public record, or certificate,**
783 **return, or attestation, of any public officer or**
784 **public employee, in relation to any matter**
785 **wherein such certificate, return, or attestation**
786 **may be received as legal proof, or utter, or**
787 **attempt to employ as true, such forged record,**
788 **certificate, return, or attestation, knowing the**
789 **same to be forged, he shall be guilty of a Class 4**
790 **felony.**

791 **(Emphasis added.) While criminal statutes must be**
792 **construed strictly against the Commonwealth and in**
793 **favor of the accused, *Johnson v. Commonwealth*, 211**
794 **Va. 815, 819, 180 S.E.2d 661, 664 (1971), when the**
795 **language of a statute is clear and unambiguous, a**
796 **court will give the statute its plain meaning, *Tross v.***
797 ***Commonwealth*, 21 Va. App. 362, 377-78, 464 S.E.2d**
798 **523, 530 (1995). We also note, "The legislature in its**
799 **discretion may determine the appropriate 'unit of**
800 **prosecution' and set the penalty for separate**
801 **violations." *Jordan v Commonwealth*, 2 Va. App. 590,**
802 **594, 347 S.E.2d 152, 154 (1986). An analysis of the**
803 **concept of "a public record" and a summons proves the**
804 **legislature intended to allow multiple prosecutions for**

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805 **contemporaneous forgeries of such documents. [Page**
806 **758]**

807 **At common law, a public record was "a written**
808 **memorial, intended to serve as evidence of something**
809 **written, said or done, made by a public officer**
810 **authorized to make it." *Reid v. Commonwealth*, 16 Va.**
811 **App. 468, 470, 431 S.E.2d 63, 64 (1993) (citing**
812 ***Coleman v. Commonwealth*, 66 Va. (25 Gratt.) 865,**
813 **881-82 (1874)). Under the Virginia Public Records Act,**
814 **a public record is defined as:**

815 **. . . [r]ecorded information that documents a**
816 **transaction or activity by or with any public**
817 **officer, agency or employee of the state**
818 **government or its political subdivisions.**
819 **Regardless of physical form or characteristic, the**
820 **recorded information is a public record if it is**
821 **produced, collected, received or retained in**
822 **pursuance of law or in connection with the**
823 **transaction of public business. Code § 42.1-77.**

824 **§ 18.2-172. Forging, uttering, etc., other writings. — If any**
825 **person forge any writing, other than such as is mentioned in**
826 **§§ 18.2-168 and 18.2-170, to the prejudice of another's**
827 **right, or utter, or attempt to employ as true, such forged**
828 **writing, knowing it to be forged, he shall be guilty of a Class**
829 **5 felony. Any person who shall obtain, by any false pretense**
830 **or token, the signature of another person, to any such**
831 **writing, with intent to defraud any other person, shall be**
832 **deemed guilty of the forgery thereof, and shall be subject to**
833 **like punishment. (Code 1950, § 18.1-96; 1960, c. 358; 1975,**
834 **cc. 14, 15.);**

835 **Code § 18.2-172, codifying the common law**
836 **crime of forgery, provides that "[i]f any person**
837 **forge any writing, . . . to the prejudice of**
838 **another's right, . . . [she] shall be guilty of a**
839 **Class 5 felony." Under the common law, forgery**
840 **"is defined as 'the false making or materially**

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841 **altering with intent to defraud, or any writing**
842 **which, if genuine, might apparently be of legal**
843 **efficacy, or the foundation of legal liability.”**
844 ***Fitzgerald v. Commonwealth*, 227 Va. 171, 173-**
845 **74, 313 S.E.2d 394, 395 (1984) (quoting *Bullock***
846 ***v. Commonwealth*, 205 Va. 558, 561, 138 S.E.2d**
847 **261, 263 (1964)). *Timbers v. Commonwealth*, 28**
848 **Va. App. 187, 202, 503 S.E.2d 233, ____ (1998);**

849 **“The purpose of the statute against forgery is to**
850 **protect society against the fabrication,**
851 **falsification and the uttering of instruments**
852 **which *might* be acted upon as being genuine.”**
853 ***Muhammad*, 13 Va. App. at 199, 409 S.E.2d at**
854 **821 (quoting *Mayes v. State*, 571 S.E.2d 420, 427**
855 **(Ark. 1978)) (emphasis in original).**

856 **This argument is flawed because it does not**
857 **accurately portray the case law. Actual prejudice**
858 **is not required. As we have already noted, to**
859 **uphold a conviction under Code § 18.2-172, the**
860 **evidence must show only the possibility that the**
861 **forged instrument may operate to the prejudice**
862 **of another's right. See *Gordon*, 100 Va. at 829, 41**
863 **S.E. at 748; *Muhammad*, 13 Va. App. at 196-97,**
864 **409 S.E.2d at 819-20. *Beshah v. Commonwealth*,**
865 **60 Va. App. 161, 171, 725 S.E.2d 144, ____ (2012)**

866 **Appellant was convicted of forgery under Code §**
867 **18.2-172, which provides that “[i]f any person**
868 **forge any writing . . . to the prejudice of**
869 **another's right . . . , [that person] shall be guilty**
870 **of a Class 5 felony.” The General Assembly**
871 **codified the English common law of forgery when**
872 **it enacted Code § 18.2-172. See *Campbell v.***
873 ***Commonwealth*, 246 Va. 174, 182-83, 431 S.E.2d**
874 **648, 653 (1993). *Beshah v. Commonwealth*, 60**
875 **Va. App. 161, 169, 725 S.E.2d 144, ____ (2012)**

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876 **Forgery is "[t]he act of fraudulently making a**
 877 **false document or altering a real one to be used**
 878 **as if genuine." Black's Law Dictionary 677 (8th**
 879 **ed. 1999).McQuinn v. Commonwealth, 09 Vap**
 880 **UNP 0404082 (2009)**

881 **"Code § 18.2-172 provides, in pertinent part,**
 882 **that, '[i]f any person forge any writing . . . to the**
 883 **prejudice of another's right, or utter, or attempt**
 884 **to employ as true, such forged writing, knowing**
 885 **it to be forged, he shall be guilty of a Class 5**
 886 **felony.'" Oliver v. Commonwealth, 35 Va. App.**
 887 **286, 295, 544 S.E.2d 870, 874 (2001) (quoting**
 888 **Fitzgerald v. Commonwealth, 227 Va. 171, 173-**
 889 **74, 313 S.E.2d 394, 395 (1984)). "To sustain a**
 890 **conviction for forgery in violation of Code § 18.2-**
 891 **172, the Commonwealth must prove that the**
 892 **accused falsely made or materially altered a**
 893 **writing, without the authority to do so, and did so**
 894 **to the prejudice of another's right." Bowman v.**
 895 **Commonwealth, 28 Va. App. 204, 213, 503 S.E.2d**
 896 **241, 245 (1998). Wooding v. Commonwealth, 10**
 897 **Vap UNP 1385093 (2010)**

898 **Code § 18.2-172 provides "If any person . . .**
 899 **utter, or attempt to employ as true, such forged**
 900 **writing, knowing it to be forged, he shall be**
 901 **guilty of a Class 5 felony." In order to sustain a**
 902 **conviction, Code § 18.2-172 requires that the**
 903 **person who utters a check know that it is forged.**
 904 **"The word 'utter' is defined in Black's Law**
 905 **Dictionary, 4th ed., page 1716, as meaning 'To**
 906 **put or send [as a forged check] into circulation .**
 907 **. . . .' It is an assertion by word or action that a**
 908 **writing known to be forged is good and valid."**
 909 **Bateman v. Commonwealth, 205 Va. 595, 599-**
 910 **600, 139 S.E.2d 102, 106 (1964). "[A]ny**
 911 **assertion or declaration, by word or act, directly**
 912 **or indirectly, that the forged writing or**

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913 **endorsement is good, with such knowledge and**
 914 **intent is an uttering . . ."** *Sands v.*
 915 ***Commonwealth*, 61 Va. (20 Gratt.) 800, 823**
 916 **(1871). *Massengale v. Commonwealth*, 08 Va. S.**
 917 **Ct. UNP 070746 (2008)**

918 **[C]ode § 18.2-172 provides that it is unlawful to**
 919 **forge "any writing" or to utter such forged**
 920 **writing knowing it to be forged. Forgery "is**
 921 **defined as "the false making or materially altering**
 922 **with the intent to defraud, of any writing which,**
 923 **if genuine, might apparently be of legal efficacy,**
 924 **or the foundation of legal liability." *Fitzgerald v.***
 925 ***Commonwealth*, 227 Va. 171, 173, 313 S.E.2d**
 926 **394, 395 (1984) (quoting *Bullock v.***
 927 ***Commonwealth*, 205 Va. 558, 561, 138 S.E.2d**
 928 **261, 263 (1964)) (affirming convictions for**
 929 **forgery of blank checks stolen from a business).**
 930 ***McQuinn v. Commonwealth*, 09 Vap UNP 0404082**
 931 **(2009)**

932 **At common law, the crime of forgery "is defined as "the**
 933 **false making or materially altering with intent to defraud, of**
 934 **any writing which, if genuine, might apparently be of legal**
 935 **efficacy, or the foundation of legal liability." *Fitzgerald v.***
 936 ***Commonwealth*, 227 Va. 171, 173, 313 S.E.2d 394, 395**
 937 **(1984) (quoting *Bullock v. Commonwealth*, 205 Va. 558,**
 938 **561, 138 S.E.2d 261, 264 (1964)). A document or instrument**
 939 **is one of legal efficacy "where *by any possibility* it may**
 940 **operate to the injury of another." *Gordon v. Commonwealth*,**
 941 **100 Va. 825, 829, 41 S.E. 746, 748 (1902) (emphasis**
 942 **added). Therefore, to sustain a conviction under the modern**
 943 **forgery statute, the Commonwealth **must prove that the****
 944 ****forged or altered document operated to the *actual or*****
 945 *****potential* prejudice of another. See *Muhammed v.*****
 946 *****Commonwealth*, 13 Va. App. 194, 199, 409 S.E.2d 818, 821****
 947 ****(1991) (holding that the "bare possibility" of prejudice is****
 948 ****sufficient under Code § 18.2-172).****

949 **To prove a forgery under the statute, the**
 950 **Commonwealth was required to prove only that**
 951 **the forged document had the potential to operate**

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952 **"to the prejudice of another." Code § 18.2-172.**
953 **"The purpose of the statute against forgery is to**
954 **protect society against the fabrication,**
955 **falsification and the uttering of instruments**
956 **which *might* be acted upon as being genuine."**
957 ***Muhammad*, 13 Va. App. at 199, 409 S.E.2d at**
958 **821 (quoting *Mayes v. State*, 571 S.E.2d 420, 427**
959 **(Ark. 1978)) (emphasis in original). *Beshah v.***
960 ***Commonwealth*, 60 Va. App. 161, 169, 725 S.E.2d**
961 **144, ___ (2012)**

962 **We will also be looking at your response under the**
963 **guidelines set out in Code §§ 18.2-460 – 18.2-472.1,**
964 **Interference with Administration of Justice.**

965 **In your response please be sure to preserve your rights as**
966 **stated/provided for in the 5th. amendment to the U.S.**
967 **Constitution and Art. 1, Sec. 8 of the Virginia Constitution.**

968 **Please be advised that if it is less expensive,**
969 **labor intensive, and more convenient to you, we**
970 **will be happy to accept the requested materials**
971 **in electronic format, including .pdf, .gif, .jpg,**
972 **Word, Word for Windows, WordPerfect, and Mac**
973 **formats via email to general.counsel@UARF.us, or**
974 **you can mail on a CD or DVD to PETITIONER(s),**
975 **P.O. Box 65002, Virginia Beach, VA, 23467-5002.**

976 **If you do not maintain these public records, please let me**
977 **know who does and include the proper custodian's name**
978 **and address.**

979 ***In addition, if you refuse the above request please provide***
980 ***a written explanation for your refusal including the***
981 ***(1)reference to the specific statutory (legislative)***
982 ***exemption(s) upon which you rely, (2)Any opinion of the***
983 ***Attorney General that supports your position(s) [Code § 2.2-***
984 ***3713.D.], and (3) any decision of a court that supports your***
985 ***position(s) [Code § 2.2-3713.D.] that the material requested***
986 ***under this FOIA request is exempted from disclosure under***
987 ***the provision of FOIA [Virginia Code § 2.2-3713.D.90(In***
988 ***making this determination, a court may consider, among***

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989 **other things, the reliance of a public body on an opinion of**
990 **the Attorney General or a decision of a court that**
991 **substantially supports the public body's position.)]-please**
992 **provide a schedule of all segregable portions of any material**
993 **you otherwise claim as exempt.**

994 ***If you claim the documents do not exist please advise***
995 ***PETITIONER(s), Shapiro , Buckley, McCarthy, Fenter and***
996 ***Lindsey of the same in writing.***

997 **Take notice that PETITIONER(s), Shapiro , Buckley, Fenter,**
998 **McCarthy and Lindsey will deem your failure supply the**
999 **records this day or to reply [Virginia Code § 2.2-3704.E.]**
1000 **within the statutory time of five (5) days to be a denial of**
1001 **our request and will seek enforcement of our request by**
1002 **filing a petition for writ of mandamus and/or injunction**
1003 **under Virginia Code Section 2.2-3127, including requests for**
1004 **attorneys' fees and cost for enforcing our rights under FOIA,**
1005 **of the Commonwealth of Virginia.**

1006

PRESERVATION NOTICE***

1007 **As you may know, a number of courts have held, that upon**
1008 **either reasonable anticipation or actual notice of litigation,**
1009 **a party must take affirmative steps to preserve all**
1010 **potentially relevant evidence. Based upon recent event(s),**
1011 **it is likely that the] will need to take action in court to**
1012 **protect its rights. Such action will require The AGENCY take**
1013 **steps to preserve relevant evidence involving**
1014 **PETITIONER(s) and its recent Virginia Freedom of**
1015 **Information Act [FOIA] request[s] ("Request"), including**
1016 **but not necessarily limited to, those records/documents**
1017 **[Records] pertaining to the Record(s) and INDEX(ES)**
1018 **requested herein and more particularly in the attached**
1019 **EXHIBIT "I" and herein to the AGENCY/ Custodian /**
1020 **Respondent / In his capacity as a Public Official of the**
1021 **AGENCY and the Custodian in his Individual Capacity for**
1022 **these Records and as laid out in the FOIA Request, under**
1023 **this PRESERVATION NOTICE section of this Request the**
1024 **Petitioner(s) have sent to you.**

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Instructions for Complying with the Virginia Freedom of Information Act's and the Virginia Public Records Act's Promulgations and Case Law that Touch and Concern this Request to Inspect the Agency's Public Records***

1025 **Please be advised that the PETITIONERS(S) Kathleen**
1026 **McCarthy, personally and individually [McCarthy], John**
1027 **Fenter, personally and individually [Fenter],Max Shapiro**
1028 **[Shapiro], individually and personally and a citizen of this**
1029 **Commonwealth who resides in Norfolk, Virginia, Douglas**
1030 **Buckley [Buckley], individually and personally and a citizen**
1031 **of this Commonwealth who resides in Accomack County,**
1032 **Virginia, and David M. Lindsey, personally and individually**
1033 **[Lindsey], believes manual and electronically stored**
1034 **information to be an important and irreplaceable source of**
1035 **data related to the documents/records they have requested**
1036 **from you and The AGENCY or its employees under The**
1037 **Virginia Freedom of Information Act [FOIA] and the other**
1038 **promulgations of both the Federal and Virginia State**
1039 **Governments and in any matter that may subsequently**
1040 **evolve as a result of these request including any litigation**
1041 **related to these requests.**

1042 **As stated elsewhere herein this duty to preserve relevant**
1043 **evidence applies not only to print documents, but also to**
1044 **electronic-stored data, including but not limited to, e-mail**
1045 **and other electronic communications, word processing**
1046 **documents, spreadsheets, databases, calendars, voicemail,**
1047 **Internet usage files, and network access information and**
1048 **the aforesaid index[es]. Complying with this obligation will**
1049 **require the AGENCY to suspend its existing**
1050 **document/record retention policy to the extent that**
1051 **allowing it to remain in effect would result in the destruction**
1052 **of relevant information and Records.**

1053 **To implement the AGENCY's preservation obligation,**
1054 **PETITIONER(s) and I request that the AGENCY immediately**
1055 **issue a "litigation hold" memo [Memo"] to all employees**
1056 **and elected officials including members of the Mayor's Office**
1057 **who may have and/or may of had access to relevant print**
1058 **documents, email and electronic data.**

1059 **The Memo should specifically describe the types of print**
1060 **documents and electronic data that must be preserved and**
1061 **[as outlined in the FOIA Request] explain how the/those**
1062 **documents/Records/materials should be maintained and**
1063 **stored.**

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1064 **Please keep in mind that the Memo may need to be**
1065 **reissued periodically, and it will need to be provided in the**
1066 **future to new employees who may have access to relevant**
1067 **information. Of particular importance is the adequate**
1068 **protection of e-mails and other electronic information,**
1069 **including those maintained on backup media that may**
1070 **otherwise be routinely rotated or overwritten [including**
1071 **minutes of all meetings].**

1072 **Compliance with your preservation obligations includes**
1073 **forwarding a copy of this letter to all individuals or**
1074 **organizations that are responsible for any of the items**
1075 **referred to in this letter or with whom any subject matter**
1076 **that touches and concerns this FOIA Request was discussed**
1077 **with. If this correspondence is in any respect unclear,**
1078 **please call me immediately.**

1079 **The subject matter(s) of these FOIA requests requires**
1080 **preservation of all information from the persons named on**
1081 **the Attached Exhibit I or their employees along with the**
1082 **subjects matters named on the Attached Exhibit I which**
1083 **shall include those named in attached Exhibit I or their**
1084 **employees, family, contractors and is not limited to all of**
1085 **their computer systems, computers, removable electronic**
1086 **media used by them at any other locations.**

1087 **Under the laws of this Commonwealth and the Federal**
1088 **Rules of Civil Procedures [FRCP], more particularly the**
1089 **guidelines set out by the Hon. Shira A. Scheindlin, Judge,**
1090 **United States District Court for the Northern District of New**
1091 **York, issued five groundbreaking opinions in the case of**
1092 **Zubulake v. UBS Warburg. Zubulake is generally considered**
1093 **the first definitive case in the United States on a wide**
1094 **range of electronic discovery issues:**

1095 **Zubulake I, May 13, 2003: Zubulake v. UBS Warburg, 217**
1096 **F.R.D. 309 (S.D.N.Y. 2003).**

1097 **Zubulake II (Please note: this does not relate to electronic**
1098 **disclosure): Zubulake v. UBS Warburg, No. 02 Civ. 1243,**
1099 **2003 WL 21087136 (S.D.N.Y. May 13, 2003).**

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1100 **Zubulake III, July 24, 2003: Zubulake v. UBS Warburg, 216**
1101 **F.R.D. 280 (S.D.N.Y. 2003).**

1102 **Zubulake IV, October 22, 2003: Zubulake v. UBS Warburg,**
1103 **220 F.R.D. 212 (S.D.N.Y. 2003).**

1104 **Zubulake V: Zubulake v. UBS Warburg, 2004 WL 1620866**
1105 **(S.D.N.Y. July 20, 2004).**

1106 **You should also look to Sekisui American Corp. v. Hart,**
1107 **Case 1:12-cv-03479-SAS-FM, slip op. at 14 & n. 51**
1108 **(S.D.N.Y. August 15, 2013) for complying with the FRCP.**

1109

The Aforesaid Scheindlin Opinions/Decisions Establish

1110 **[A] party seeking an adverse inference instruction based**
1111 **on the destruction of evidence must establish (1) that the**
1112 **party having control over the evidence had an obligation to**
1113 **preserve it at the time it was destroyed; (2) that the**
1114 **records were destroyed with a culpable state of mind; and**
1115 **(3) that the destroyed evidence was relevant to the party's**
1116 **claim or defense such that a reasonable trier of fact could**
1117 **find that it would support that claim or defense. Rule 37**
1118 **(FRCP) "authorizes a wide range of sanctions for discovery**
1119 **abuses."**

1120
1121 **If the . . . [c]ourt determines that a party wrongfully**
1122 **withheld or destroyed evidence, it may tell the jury "those**
1123 **facts and nothing more; or it might [add] that the jury**
1124 **could, but need not, draw inferences against [the**
1125 **spoliators] based on those facts; or . . . that the jury *should***
1126 **draw adverse inferences against [the spoliators] based on**
1127 **those facts; or that the jury should render a verdict for the**
1128 **[innocent party]."**

1129 **Establishing a Culpable State of Mind**
1130 **"The culpable state of mind factor is satisfied by a showing**
1131 **that the evidence was destroyed knowingly, even if without**
1132 **intent to [breach a duty to preserve it], or negligently."**
1133 **"The sanction of an adverse inference may be appropriate**
1134 **in some cases involving the negligent destruction of**

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1135 **evidence because each party should bear the risk of its own**
1136 **negligence."**

1137 **This is because [t]he adverse inference provides the**
1138 **necessary mechanism for restoring the evidentiary balance.**
1139 **The inference is adverse to the destroyer not because of**
1140 **any finding of moral culpability, but because the risk that**
1141 **the evidence would have been detrimental rather than**
1142 **favorable should fall on the party responsible for its loss.**

1143 **It follows that gross negligence also satisfies the**
1144 **culpability requirement. This circuit follows a "case-by-case**
1145 **approach to the failure to produce relevant evidence"**
1146 **because "such failures occur along a continuum of fault –**
1147 **ranging from innocence through the degrees of negligence**
1148 **to intentionality."**

1149 **Establishing Relevance**
1150 **"[R]elevant' in [the context of an adverse inference**
1151 **instruction] means . . . [that] the party seeking an adverse**
1152 **inference must adduce sufficient evidence from which a**
1153 **reasonable trier of fact could infer that 'the destroyed [or**
1154 **unavailable] evidence would have been of the nature**
1155 **alleged by the party affected by its destruction," i.e., that**
1156 **the destroyed evidence would have been helpful to the**
1157 **movant.**

1158 **Yet "[c]ourts must take care not to hold the prejudiced**
1159 **party to too strict a standard of proof regarding the likely**
1160 **contents of the destroyed or unavailable evidence, because**
1161 **doing so would subvert the purposes of the adverse**
1162 **inference, and would allow parties who have destroyed**
1163 **evidence to profit from that destruction."**

1164 **When evidence is destroyed willfully, the destruction alone**
1165 **"is sufficient circumstantial evidence from which a**
1166 **reasonable fact finder could conclude that the missing**
1167 **evidence was unfavorable to that party."**

1168 **"[T]he intentional destruction of relevant records, either**
1169 **paper or electronic, after the duty to preserve has attached,**
1170 **is willful."**

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1171 **"Similarly, a showing of gross negligence in the destruction**
 1172 **. . . of evidence will in some circumstances suffice, standing**
 1173 **alone, to support a finding that the evidence was**
 1174 **unfavorable to the grossly negligent party."**

1175 **Accordingly:**
 1176 **[w]here a party seeking an adverse inference**
 1177 **adduces evidence that its opponent destroyed**
 1178 **potential evidence . . . in bad faith or through**
 1179 **gross negligence (satisfying the "culpable state**
 1180 **of mind" factor), that same evidence . . . will**
 1181 **frequently also be sufficient to permit a jury to**
 1182 **conclude that the missing evidence is favorable**
 1183 **to the party (satisfying the "relevance" factor).**

1184 **Prejudice**
 1185 **When evidence is destroyed willfully or through gross**
 1186 **negligence, prejudice to the innocent party may be**
 1187 **presumed because that party is "deprived of what [the**
 1188 **court] can assume would have been evidence relevant to**
 1189 **[the innocent party's claims or defenses]." That is,**
 1190 **prejudice is presumed precisely because relevant**
 1191 **evidence, *i.e.*, evidence presumed to be unfavorable to the**
 1192 **spoliating party, has been intentionally destroyed and is no**
 1193 **longer available to the innocent party. When, however, the**
 1194 **destruction of evidence is merely negligent, the burden**
 1195 **falls on the innocent party to prove prejudice. This circuit**
 1196 **has "repeatedly held that a case-by-case approach to the**
 1197 **failure to produce relevant evidence, at the discretion of**
 1198 **the district court, is appropriate." *The failure to adopt good***
 1199 ***preservation practices is "one factor in the determination***
 1200 ***of whether discovery sanctions should issue."* [Such as not**
 1201 **following the guidelines of the Virginia Public Record Act**
 1202 **(Added by PETITIONER(s))].**

1203 **Culpable State of Mind**

1204 **[a]fter the duty to preserve had attached and the law does**
 1205 **not require a finding of malevolence to constitute**
 1206 **willfulness in the context of spoliation, I find this**
 1207 **conclusion contrary to law and clearly erroneous. [page**
 1208 **20, [Case 1:12-cv-03479-SAS-FM](#)]**

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1209 **The law does not require a showing of malice to establish**
1210 **intentionality with respect to the spoliation of evidence. In**
1211 **the context of an adverse inference analysis, there is no**
1212 **analytical distinction between destroying evidence in bad**
1213 **faith, i.e., with a malevolent purpose, and destroying it**
1214 **[page 21, Case 1:12-cv-03479-SAS-FM] willfully. That**
1215 **Sekisui provides a good faith explanation for the**
1216 **destruction of Hart's ESI – suggesting that Taylor's**
1217 **directive was given in order to save space on the server –**
1218 **does not change the fact that the ESI was willfully**
1219 **destroyed. [ibid pg. 22]**

1220 **Failure to Ensure Preservation of Relevant Documents**

1221 **[f]ailure to meet even the most basic document**
1222 **preservation obligations constitutes gross negligence.**
1223 **[Ibid, pg. 24]**

1224 **Relevance and Prejudice**

1225 **[t]he destruction of evidence was intentional, . . . the**
1226 **imposition of such a burden on the innocent party is**
1227 **contrary to law. When evidence is destroyed intentionally,**
1228 **such destruction is sufficient evidence from which to**
1229 **conclude that the missing evidence was unfavorable to that**
1230 **party. As such, once wilfulness is established, no burden**
1231 **is imposed on the innocent party to point to now-destroyed**
1232 **evidence which is no [Ibid, pg. 26] longer available**
1233 **because the other party destroyed it. Rather, the "risk that**
1234 **the evidence would have been detrimental rather than**
1235 **favorable [to the spoliator] should fall on the party**
1236 **responsible for its loss." To shift the burden to the**
1237 **innocent party to describe or produce what has been lost as**
1238 **a result of the opposing party's willful or grossly negligent**
1239 **conduct is inappropriate because it incentivizes bad**
1240 **behavior on the part of would-be spoliators.**

1241 **That is, it "would allow parties who have destroyed**
1242 **evidence to profit from that destruction." Prejudice is**
1243 **presumed for the purposes of determining whether to give**
1244 **an adverse inference instruction when, as here, evidence is**
1245 **willfully destroyed by the spoliating party. [Ibid, pg. 27]**

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1246 [i]nability to use the missing documents to attempt to
1247 prove "routine [1] compliance" with law and regulations
1248 [2] conduct/practice may be as prejudicial to the
1249 PETITIONER(s) as depriving a party [PETITIONER(s)] of
1250 access to a "smoking gun" document. [Ibid, pg. 28 and
1251 modified by PETITIONER(s)]

1252 **That the destruction of documents as outlined herein by the**
1253 **spoiler is willful and that prejudice is therefore presumed.**
1254 **[pg. 28 as revised by PETITIONER(s)]**

1255 **Spoilation is the destruction of evidence or the failure to**
1256 **preserve property for another's use as evidence in pending**
1257 **or reasonably foreseeable litigation. [pg. 29]**

1258 **To demonstrate that spoliation occurred, several elements**
1259 **must be proven by a preponderance of the evidence: [pg.**
1260 **29]**

1261 ***First*, that relevant evidence was destroyed after the duty**
1262 **to**
1263 **preserve arose. [pg. 29]**

1264 ***Second*, that the evidence lost would have been favorable**
1265 **to the party requesting it. [pg. 29]**

1266 **In addition, if you have been found to spoil evidence you**
1267 **are subject to monetary sanctions. PETITIONER(s)/we are**
1268 **entitled to an award of reasonable costs, including**
1269 **attorneys' fees, associated with bringing this action to**
1270 **secure the public records shown on the attached**
1271 **referenced exhibits.**

1272 **You must preserve the items requested by this notice**
1273 **even if you or your legal counsel(s) feel these items are**
1274 **exempt from the FOIA request.**

1275 **It does not mater if you believe the material is exempt**
1276 **from the FOIA request as ultimately the court(s) will**
1277 **decide the application of statutory exemptions to the**
1278 **requested materials.**

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Instructions for Complying with the Virginia Freedom of Information Act's and the Virginia Public Records Act's Promulgations and Case Law that Touch and Concern this Request to Inspect the Agency's Public Records***

1279 **The material requested to be preserved includes, but is not**
1280 **limited to:**

1281 **Email and instant messages or other electronic**
1282 **communication, word processing documents,**
1283 **spreadsheets, databases, calendars, web**
1284 **camera logs and images, contact manager**
1285 **information, Internet usage files, and network**
1286 **access information - any representation of**
1287 **words, letters, symbols, numbers, or figures,**
1288 **whether (i) printed or inscribed on a tangible**
1289 **medium or (ii) stored in an electronic or other**
1290 **medium and retrievable in a perceivable form**
1291 **and whether an electronic signature authorized**
1292 **by the Code in Chapter 42.1 (§ 59.1-479 et seq.)**
1293 **of Title 59.1 is or is not affixed.**

1294 **You should also preserve the following platforms in your**
1295 **possession or a third party under the control of you (such**
1296 **as an friends, boy friends, girl friends, neighbors,**
1297 **employers or family members [associates]): databases,**
1298 **networks, computer systems, including legacy systems**
1299 **(hardware and software), servers, archives, backup or**
1300 **disaster recovery systems, tapes, discs, drives, cartridges**
1301 **and other storage media, laptops, personal computers,**
1302 **internet data, personal digital assistants (PDA), handheld**
1303 **wireless devices, mobile telephones, paging devices, and**
1304 **audio systems (including voicemail).**

1305
1306 **All of the information contained in this letter should be**
1307 **preserved from The AGENCY's inception to the present.**

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Instructions for Complying with the Virginia Freedom of Information Act's and the Virginia Public Records Act's Promulgations and Case Law that Touch and Concern this Request to Inspect the Agency's Public Records***

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PRESERVATION OBLIGATIONS

Virginia Code § 42.1-86.1 A. No agency shall sell or give away public records. No agency shall destroy or discard a public record unless (i) the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record's retention period has expired; (ii) a certificate of records destruction, as designated by the Librarian of Virginia, has been properly completed and approved by the agency's designated records officer; and (iii) there is no litigation, audit, investigation, request for records pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), or renegotiation of the relevant records retention and disposition schedule pending at the expiration of the retention period for the applicable records series. After a record is destroyed or discarded, the agency shall forward the original certificate of records destruction to The Library of Virginia.

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The laws and rules prohibiting destruction of documents and/or evidence apply to manually prepared and stored documents as well as electronically stored information in the same manner that they apply to other documents and/or evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, you must take every reasonable step to preserve this information until the final resolution of this matter.

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This includes [Virginia Code 1-218 Text in effect from and after October 1, 2005, Title 1 General Provisions, Chap. 2.1 Common Law and Rules of Construction, §§ 1-200 – 1-257, Art. 2 Rules of Construction and Definitions, §§ 1-202 – 1-257, "Includes" means includes, but not limited to.], but is not limited to, an obligation to:

- Discontinue all data destruction and backup tape recycling policies;**
- Preserve and not dispose of relevant hardware;**
- Preserve and not destroy passwords, decryption procedures (and accompany software), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software;**

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- 1347 ● **Maintain all other pertinent information and tools needed**
- 1348 **to access, review, and reconstruct necessary to access,**
- 1349 **view, and/or reconstruct all requested or potentially**
- 1350 **relevant electronic data.**

1351

FURTHER DESCRIPTION OF DATA SOUGHT

1352 **The FOIA request requires preservation of all information from**

1353 **your computer systems and computers systems you used,**

1354 **removable electronic media and other locations relating to the**

1355 **FOIA request. This includes, but is not limited to, email, instant**

1356 **messages, and other electronic communication, word processing**

1357 **documents, spreadsheets, databases, calendars, telephone logs,**

1358 **contact manager information, Internet usage files, web camera**

1359 **logs or files, network access information, photographs, images,**

1360 **and video clips or movies.**

1361 **I. Electronic Files. You have an obligation to preserve all digital**

1362 **or analog electronic files in electronic format, regardless of**

1363 **whether hard copies of the information exist. This includes**

1364 **preserving:**

- 1365 **A. Active data (i.e., data immediately and easily accessible**
- 1366 **on The AGENCY's, the individuals named in EXHIBIT I or**
- 1367 **your computer systems today);**
- 1368 **B. Archived data (i.e., data residing on backup tapes or**
- 1369 **other storage media);**
- 1370 **C. Deleted data (i.e., data that has been deleted from a**
- 1371 **computer hard drive but is recoverable through computer**
- 1372 **forensic techniques); and**
- 1373 **D. Legacy data (i.e., data created on old or obsolete**
- 1374 **hardware or software).**
- 1375 **E. You must preserve active, archived and legacy data**
- 1376 **including but not limited to:**
 - 1377 **1. Word-processed files, including drafts and**
 - 1378 **revisions;**
 - 1379 **2. Spreadsheets, including drafts and revisions;**
 - 1380 **3. Databases;**
 - 1381 **4. CAD (computer-aided design) files, including drafts**
 - 1382 **and revisions;**
 - 1383 **5. Presentation data or slide shows produced by**
 - 1384 **presentation software (such as Microsoft**

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- 1385 **PowerPoint);**
1386 **6. Graphs, charts and other data produced by project**
1387 **management software (such as Microsoft Project);**
1388 **7. Animations, images, audio, video and audiovisual**
1389 **recordings, MP3 players, and voicemail files.**
1390 **8. Data generated by calendaring, task management**
1391 **and personal information management (PIM)**
1392 **software (such as Microsoft Outlook or Lotus Notes);**
1393 **9. Data created with the use of personal data**
1394 **assistants (PDAs), such as PalmPilot, HP Jornada;**
1395 **Cassiopeia or other Windows CE-based or Pocket PC**
1396 **devices;**
1397 **10. Data created with the use of document**
1398 **management software; and**
1399 **11. Data created with the use of paper and electronic**
1400 **mail logging and routing software.**

1401 **F. You must preserve media used by you or your computers**
1402 **and computers used by The AGENCY, persons name in**
1403 **EXHIBIT I or you including but not limited to:**

1404
1405 **1. Magnetic, optical or other storage media, including the**
1406 **hard drives or floppy disks used by you or your computers;**

1407 **2. Backup media (i.e., other hard drives, backup tapes,**
1408 **floppies, Jazz cartridges, CD-ROMs) and the software**
1409 **necessary to reconstruct the data contained on the media;**
1410 **and**

1411 **3. Archived media (you should retain a mirror image copy**
1412 **of any media no longer in service but used from The**
1413 **AGENCY's inception to the present.**

1414 **II. Hardware. You have an obligation to preserve all electronic**
1415 **processing systems, even if they are replaced. This includes**
1416 **computer servers, stand-alone personal computers, hard drives,**
1417 **laptops, PDAs, and other electronic processing devices. You**
1418 **should retain copies of any hardware no longer in service but**
1419 **used from The AGENCY's Inception to the present.**

1420 **III. Emails. You have an obligation to preserve all potentially**
1421 **relevant internal and external emails that were sent or received.**

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1457 **Those items given in attached Exhibit I and in**
1458 **the previous FOIA request to The AGENCY and its**
1459 **representatives by whatever name they might be**
1460 **called and those given herein.**

1461 **B. Instant Messages and or Text Messages and any relevant**
1462 **metadata, including message contents, header information,**
1463 **and message system logs that was sent or received by or**
1464 **is in the possession of the following parties and/or**
1465 **contains information about the following subjects:**

1466 **1. Parties named in attached EXHIBIT I or Any other**
1467 **person(s) these matters were discussed with:**

1468 **2. Subject Matters:**
1469 **Those items given in EXHIBIT I 2 and previous**
1470 **FOIA request to The AGENCY and its representatives**
1471 **by whatever names they might be called and those**
1472 **given herein.**
1473

1474 **C. All active and deleted copies of any word processing**
1475 **files, spreadsheets, PowerPoint presentations, or other**
1476 **documents that are in the possession of the following**
1477 **parties and/or contain information about the following**
1478 **subjects:**

1479 **1. Parties: Parties named in attached EXHIBIT I or**
1480 **Any other person(s) these matters were discussed**
1481 **with:**

1482 **2. Subject Matters:**
1483 **Those items given in EXHIBIT I and previous**
1484 **FOIA request to The AGENCY and its representatives**
1485 **by whatever names they might be called and those**
1486 **given herein.**
1487
1488

1489 **D. Databases and any information about the**
1490 **databases that are in the possession of the following**
1491 **parties and/or contain information about the**
1492 **following subjects:**

1493 **1. Parties: Parties named in attached EXHIBIT I or**
1494 **Any other person(s) these matters were discussed**

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1495

with:

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2. Subject Matters:

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Those items given in EXHIBIT I and previous FOIA request to The AGENCY and its representatives by whatever names they might be called and those given herein.

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E. All paper and/or electronic logs of computer system and network activity that pertain to electronic data storage that are in the possession of the following parties and/or contain information about the following subjects:

1504

1505

1506

1. Parties: Parties named in attached EXHIBIT I or Any other person(s) these matters were discussed with:

1507

1508

1509

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1511

2. Subject Matters:

1512

Those items given in EXHIBIT I and previous FOIA request to The AGENCY and its representatives by whatever names they might be called and those given herein.

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F. All active and deleted copies of any electronic calendars or scheduling programs, including programs maintained on PDAs, that are in the possession of the following parties and/or contain information about the following subjects:

1517

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1519

1. Parties: Parties named in attached EXHIBIT 1 or Any other person(s) these matters were discussed with:

1520

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1522

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1524

2. Subject Matters:

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Those items given in EXHIBIT 1 and previous FOIA request to The AGENCY and its representatives by whatever names they might be called and those given herein.

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G. All active, archived, legacy, and deleted copies of any other electronic data that are in the possession of the following parties and/or contain information about the following subjects:

1530

1531

1532

1. Parties: Parties named in attached EXHIBIT 1 or Any other person(s) these matters were discussed

1533

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1535 **with:**

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1537

2. Subject Matters:

1538

Those items given in EXHIBIT I and previous FOIA request to The AGENCY and its representatives by whatever names they might be called and those given herein.

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1542 **II. Data Storage Devices**

1543 **A. *Online Data Storage.* If you use(s) online storage and/or**
1544 **direct access storage devices, they must immediately cease**
1545 **modifying or deleting any electronic data unless a computer**
1546 **forensic expert makes a mirror image of the electronic file,**
1547 **follows proper preservation protocols for assuring the accuracy**
1548 **of the file (i.e., chain of custody), and makes the file available for**
1549 **litigation.**

1550 **B. *Offline Data Storage.* Offline data storage includes, but is not**
1551 **limited to, backup and archival media, floppy diskettes,**
1552 **magnetic, magneto-optical, and/or optical tapes and cartridges,**
1553 **DVDs, CDRoms, and other removable media. You should**
1554 **immediately suspend all activity that might result in destruction**
1555 **or modification of all of the data stored on any offline media. This**
1556 **includes overwriting, recycling or erasing all or part of the**
1557 **media. This request includes, but is not limited to, media used to**
1558 **store data from personal computers, laptops, mainframe**
1559 **computers, and servers.**

1560 **C. *Data Storage Device Replacement.* If you replace(s) any**
1561 **electronic data storage devices, you may not dispose of the**
1562 **storage devices.**

1563 **D. *Preservation of Storage Devices.* You may not modify, delete**
1564 **or otherwise alter (i.e., by data compression, disk de-**
1565 **fragmentation, or optimization routines) any electronic data**
1566 **unless a computer forensic expert makes a mirror image of the**
1567 **electronic file, follows proper preservation protocols for assuring**
1568 **the accuracy of the file (i.e., chain of custody), and makes the**
1569 **file available for litigation. The expert must make a mirror image**
1570 **of active files, restored versions of deleted files, and restored**
1571 **versions of deleted file fragments, hidden files, and directory**

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1572 **listings. This includes, but is not limited to, preserving electronic**
1573 **data (stored on online or offline storage devices) that came from**
1574 **the following hardware or software applications:**

- 1575 **1. Fixed drives on stand-alone personal computers or**
1576 **laptops;**
1577 **2. Network servers and workstations; and**
1578 **3. Software application programs and utilities.**

1579 **PRESERVATION COMPLIANCE**

1580 **I. Activity Log. In order to show preservation compliance, you**
1581 **must maintain a log, documenting all alterations or deletions**
1582 **made to any electronic data storage device or any electronic data**
1583 **processing system. The log should include changes and deletions**
1584 **made by you or any other third parties.**

1585 **II. Mirror Images. You must secure a mirror image copy (a bit-**
1586 **by-bit copy of a hard drive that ensures the computer system is**
1587 **not altered during the imaging process) of all electronic data**
1588 **contained on the personal computers and/or laptops of the**
1589 **individuals listed below. The mirror image should include active**
1590 **files, deleted files, deleted file fragments, hidden files,**
1591 **directories, and any other data contained on the computer. You**
1592 **must also collect and store any offline or online storage devices**
1593 **that contain data from any electronic processing devices for the**
1594 **individuals listed in attached EXHIBIT I or Any other person(s)**
1595 **these matters were discussed with:**

1596 **III. Chain of Custody. For each piece of media that you**
1597 **preserve(s), you must document a complete chain of custody. A**
1598 **proper chain of custody will ensure that no material changes,**
1599 **alterations or modifications were made while the evidence was**
1600 **handled. Chain of custody documentation must indicate where**
1601 **the media has been, whose possession it has been in, and the**
1602 **reason for that possession.**

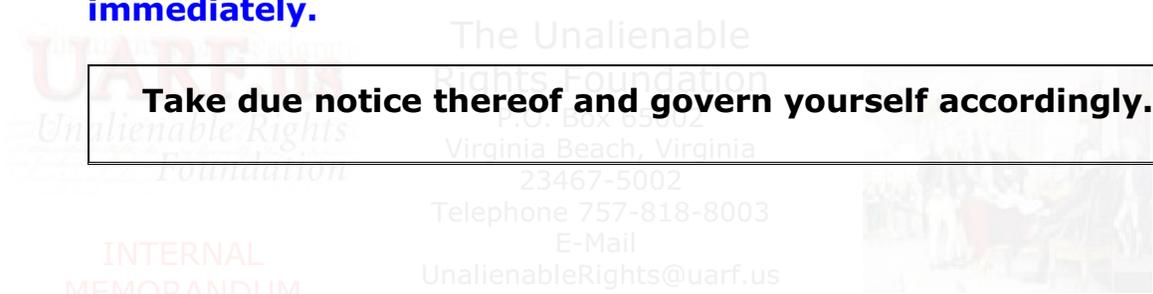
1603 **IV. Electronic and Manually Data/Records Created After This**
1604 **Letter. For any electronic and manually created data after this**
1605 **letter or for any electronic processing systems used after this**
1606 **letter, you must take the proper steps to avoid destroying**
1607 **potentially relevant evidence. This includes following the above**
1608 **preservation protocols.**

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Compliance with your preservation obligations includes forwarding a copy of this letter to all individuals or organizations that are responsible for any of the items referred to in this letter. If this correspondence is in any respect unclear, please call me immediately.

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Take due notice thereof and govern yourself accordingly.



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INTERNAL MEMORANDUM
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