

EXHIBIT 1 ~ VFOIA Request To: Commissioner John M.R. Bull / In his capacity as Commissioner of the Virginia Marine Resources Commission, an Agency of the Commonwealth and / John M.R. Bull / in his individual capacity / VMRC Agency at 2600 Washington Ave, Third Floor / Newport News, Virginia 23607



The Virginia Marine Resources Foundation

David Lindsey / Executive Secretary

P. O. BOX 1224

Parksley, Virginia 23421-1224

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✉ Executive.Secretary@VMRF.us

www.vmrff.us

Request To Examine Documents

As used herein Virginia Code / Title 1 General Provisions / Chap. 1 Code of Virginia, §§ 1-1 – 1-9 / is understood to mean and include:

§ 1-1. Contents and designation of Code. — The laws embraced in this and the following titles, chapters, articles and sections of this act shall constitute, and be designated and cited as the "Code of Virginia," hereinafter referred to as "the Code" or "this Code." (Code 1919, § 1; R. P. 1948, § 1-1.)

VMRF adds to the aforesaid designation, for the purpose of this request, simply "CODE".

Commissioner John M.R. Bull
In his capacity as Commissioner of the Virginia Marine Resources Commission, an Agency of the Commonwealth and
John M.R. Bull, in his individual capacity
VMRC Agency at 2600 Washington Ave, Third Floor,
Newport News, Virginia 23607

Dear Mr. Bull:

Introduction

The Virginia Marine Resources Foundation [VMRF], (Virginia State Corporation Commission ID No. 0788354-9 a **Virginia citizen**, a Virginia a not-for-profit corporation/organization and

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24 a **news organization** {see www.VMRF.us}) whose [1] mailing
25 address is P. O. BOX 1224 Parksley, Virginia 23421-1224, [2] and
26 office address is 293 Independence Boulevard, Suite 231, Virginia
27 Beach, Virginia 23462 is endeavoring to provide a valuable public
28 service by independently analyzing and reviewing, without cost to the
29 taxpayers, the operations and **records of public entities/bodies**
30 **(Virginia's FOIA exists to provide a mechanism [Slip Op. II] for**
31 **Virginia citizens to obtain an accounting from their public**
32 **officials . . . *McBurney v. Young*, 569 U.S. ___ 1217 (2013))** to insure
33 that the operations of government, such as The Virginia Marine
34 Commission [VMRC] are ethically and competently run.

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

50 **V**MRF requests that you provide the documents for our
51 inspection this day [as we personal appear before you or
52 your deputy] found in EXHIBIT 2 attached hereto to for
53 the persons ["Person" includes ("Includes" means includes, but not
54 limited to. Virginia Code 1-218) any individual, corporation,
55 partnership, association, cooperative, limited liability company, trust,
56 joint venture, government, political subdivision, or any other legal or
57 commercial entity and any successor, representative, agent, agency,
58 or instrumentality thereof. Virginia Code 1-230] **named in EXHIBIT**
59 **3, attached hereto, in accordance with Virginia Code §2.2-**

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60 **3704.A.:**

61 **"Public records" and "Electronic record"**

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

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

87 a. Virginia Code § 2.2-3701 **"Public records" means all**
88 **writings and recordings** that consist of letters, words or
89 numbers, or their equivalent, set down by handwriting,
90 typewriting, printing, photostatting, photography, magnetic
91 impulse, optical or magneto-optical form, mechanical or
92 electronic recording or other form of data compilation, however
93 stored, and regardless of physical form or characteristics,

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

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

114 c. "Essential public record" means records that are
115 required for recovery and reconstruction of any agency to
116 enable it to resume its core operations and functions and
117 **to protect the rights and interests of persons.** 42.1-
118 77

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

128 When reading any provision of CODE and the aforesaid we must keep

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129 in mind what the CODE says on what we do with the 1874 SCOVA
130 holding on PR or any other component of the Common Law:

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

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

147 You should include in a. through d. above records created in the
148 course of your regularly conducted public business activity in your
149 regular practice to make these public records in accordance with the
150 practices you are to follow in doing so, as found set out in the
151 promulgations of the Code of Virginia, the U.S. Code, and their
152 authorized corresponding rules and regulations. **This includes the**
153 **public records that are made at or near the time of the events**
154 **they are purport to describe, by a person with the knowledge**
155 **of the acts or events, or by a computer or other similar digital**
156 **means or as it may be described in the Code of Virginia, which**
157 **contemporaneously reports/records the event as it occurred**
158 **including the index(s) of those public records.** Included in the
159 PRs being addressed by this FOIA request are those PRs that touch
160 and concern Virginia Code § 8.01-420.7.A. When disclosure of those
161 communications or information covered by the attorney-client
162 privilege or work product protection made in any proceeding or to any
163 public body as defined in § 2.2-3701 **operates as a waiver of the**
164 **privilege or protection. . . .**

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

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A. Virginia Freedom of Information Act, Generally

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

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("The policy expressly stated in this section is that this chapter shall be liberally construed to enable citizens to observe the operations of government and that the exemptions shall be narrowly construed in order that nothing which should be public may be hidden from any person."). *City of Danville v. Laird*, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982), *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 4 Cir. CL102815, 81 Va. Cir. 450 (2010)

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FOIA requires all public records to be open to inspection and copying by any Virginia citizens, including representatives of newspapers and

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magazines with in-state circulation, subject to certain provisions excluding mandatory disclosure of records. See Va. Code Ann. § 2.2-3704(A) (2010); *id.* §§ 2.2-3705.1(1)-(13). Section 2.2-3705.1(3), upon which Defendant largely relies in refusing most of Plaintiff's FOIA request, provides that "[I]legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711" are excluded from mandatory disclosure. *Id.*

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

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Among other entities, FOIA defines "public body" as encompassing school boards, as well as any "committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members." *Id.* The Norfolk School Board constitutes a public body. *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 4 Cir. CL102815, 81 Va. Cir. 450 (2010)

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

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Virginia Code § 2.2-3701 **"Public body" means any legislative**

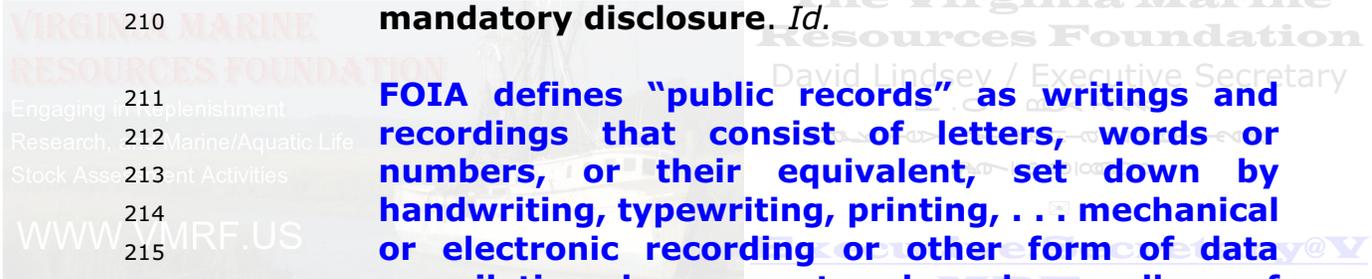


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234 **body, authority, board, bureau, commission, district or agency**
 235 **of the Commonwealth or of any political subdivision of the**
 236 **Commonwealth, including cities, towns and counties,**
 237 **municipal councils, governing bodies of counties,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

251 Agency as referenced in 2.2-3701 is defined in Virginia Code § 42.1-
 252 77:

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

258 b. Virginia Code § 42.1-77 **"Electronic record" means**
 259 **a public record whose creation, storage, and access**
 260 **require the use of an automated system or device.**
 261 **Ownership of the hardware, software, or media**
 262 **used to create, store, or access the electronic**
 263 **record has no bearing on a determination of**
 264 **whether such record is a public record;**

265 "Public official" / "Custodian"
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266 Virginia Code § 42.1-77 **"Public official" means all**
 267 **persons** holding any office created by the Constitution of

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268 Virginia or by any act of the General Assembly, the
269 Governor and **all other officers** of the executive branch
270 of the state government, and **all other officers, heads,**
271 **presidents or chairmen of boards, commissions,**
272 **departments, and agencies of the state government**
273 **or its political subdivisions.**

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

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

297 **The FOIA deals with public access to records** and
298 **meetings of public bodies. There is no question that**
299 **e-mails fall within the definition of public records**
300 **under Code § 2.2-3701** *Beck v. Shelton, 267 Va. 482,*
301 *483, 593 S.E.2d 195, ___ (2004)*

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

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Constitutional Officers

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

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

To this end, VMRF and the undersigned [we / I / us] are here today and would like to examine records The Virginia Marine Resources Commission maintains, accordingly, pursuant to [1] the 1st Amendment fo the U.S. Constitution(1st adm.):

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

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

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

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

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Section 1. Citizenship Rights Not to Be Abridged by States. -- All persons born or naturalized in the United

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332 **States, and subject to the jurisdiction thereof, are**
333 **citizens of the United States and of the state wherein**
334 **they reside. No state shall make or enforce any law**
335 **which shall abridge the privileges or immunities of**
336 **citizens of the United States; nor shall any State**
337 **deprive any person of life, liberty, or property, without**
338 **due process of law; nor deny to any person within its**
339 **jurisdiction the equal protection of the laws.;**

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

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

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

355 **the state open records law [4] [The Virginia Freedom of**
356 **Information Act] (VFOIA or FOIA), Va. Code Ann. Sec. 2.2-3700**
357 **to 2.2-3714, and the promulgations of [5] the Virginia Public**
358 **Records Act, Va. Code Ann. Sec. §§ 42.1-76 — 42.1-91 (VPRA),**
359 **[6] Virginia Attorney General Opinion 15-052 ~ Bundick at pages**
360 **3 to page 5 (VAGO 15-052), [7] the Virginia Government Data**
361 **Collection and Dissemination Practices Act, Va. Code Ann. Sec. §§**
362 **2.2-3800 — 2.2-3809 (VGDCDPA or VGD), the Unalienable Rights**
363 **Foundation, David M. Lindsey [Lindsey], individually and**
364 **personally and a citizen of this Commonwealth who resides in**
365 **Virginia Beach, Virginia, Joshua Thompson [Thompson]**
366 **individually and personally and a citizen of this Commonwealth**

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367 **who resides in Virginia Beach, Virginia, Michal Bogacki [Bogacki],**
368 **individually and personally and a citizen of this Commonwealth**
369 **who resides in Norfolk, Virginia and William Graham [Graham],**
370 **individually and personally and a citizen of this Commonwealth**
371 **who resides in Parksley, Virginia, and Douglas Buckley [Buckley],**
372 **individually and personally and a citizen of this Commonwealth**
373 **who resides in Parksley, Virginia (we/us/I), are asking you as**
374 **the Commissioner of the Virginia Marine Commission and the**
375 **custodian of the records we seek (Custodian ~ means the public**
376 **official in charge of an office having public records. CODE §42.1-**
377 **77) :**

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378 Title 1 General Provisions
379 Chap. 2.1 Common Law and Rules of Construction, §§ 1-200 — 1-257
380 Art. 2 Rules of Construction and Definitions, §§ 1-202 — 1-257
381 **§ 1-213. Delegation of duties assigned to political**
382 **subdivision. — The governing body of a political**
383 **subdivision shall be responsible for any duty or**
384 **responsibility imposed upon its political subdivision.**
385 (1986, c. 239, § 1-17.2; 1987, c. 471; 1988, c. 273; 2005,386 c. 839.);

387 As first set out above we ask you or your deputy to provide records for
388 our inspection this day as we personal appear before you or your deputy
389 relating to The Virginia Marine Resources Commission, **VMRF, Lindsey,**
390 **Thompson, Bogacki, Graham, and Buckley request that you**
391 **provide the documents found in EXHIBIT 2 attached hereto to for**
392 **the persons named in EXHIBIT 3 attached hereto in accordance**
393 **with Virginia Code §2.2-3704.A.:**

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

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

396 **Except as otherwise specifically provided by law, all**
397 **public records shall be open to inspection and copying**
398 **by any citizens of the Commonwealth during the**
399 **regular office hours of the custodian ["Custodian"**
400 **means the public official in charge of an office having**

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401 **public records. Virginia Code § 42.1-77] of such**
402 **records.** Access to such records shall not be denied to
403 citizens of the Commonwealth, representatives of
404 newspapers and magazines with circulation in the
405 Commonwealth, and representatives of radio and television
406 stations broadcasting in or into the Commonwealth . . . ;

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

413 Virginia Code § 2.2-3700.B. The affairs of government are
414 not intended to be conducted in an atmosphere of secrecy
415 since at all times the public is to be the beneficiary of any
416 action taken at any level of 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 all**
421 **public records shall be available for inspection and**
422 **copying upon request.**

423 Virginia Code § 2.2-3700.B. **All public records** and
424 meetings **shall be presumed open, unless an exemption**
425 **is properly invoked.**

426
427 II. Virginia Code § 42.1-86.A.:
428 . . . **[t]he head of each agency, . . . [s]hall establish**
429 **and maintain a program for the selection and**
430 **preservation of essential public records. The program**
431 **shall provide for preserving, classifying, arranging,**
432 **and indexing essential public records**[Virginia Code §
433 **42.1-77"Essential public record" means records that**
434 **are required** for recovery and reconstruction of any agency
435 to enable it to resume its core operations and functions and

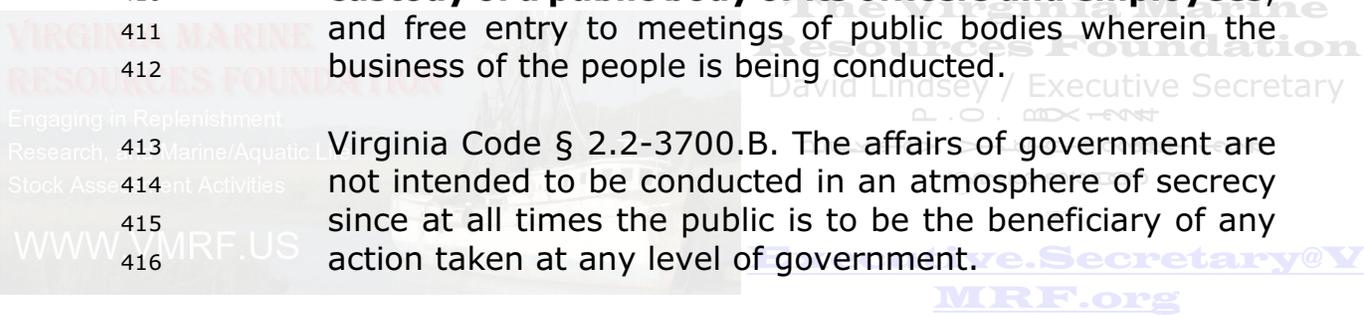


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436 **to protect the rights and interests of persons.] so that**
437 **such records are made available to the public.**

438 The Virginia Marine Resources Foundation [VMRF], and its agents named
439 herein and the agents in their individual capacities: Joshua Thompson
440 [Thompson], personally and individually, a Citizen of this Commonwealth
441 who resides in Virginia Beach, Virginia, Michal Bogacki [Bogacki],
442 individually and personally and a citizen of this Commonwealth who
443 resides in Norfolk, Virginia, Douglas Buckley [Buckley], individually and
444 personally and a citizen of this Commonwealth who resides in Accomack
445 County, Virginia, William Graham [Graham], individually and personally
446 and a citizen of this Commonwealth who resides in Accomack County,
447 Virginia, and David M. Lindsey [personally and individually], a Citizen of
448 this Commonwealth who resides in Virginia Beach, Virginia, further
449 request, pursuant to the state open records law, the Virginia Freedom of
450 Information Act, Va, Code Ann, Sec. 2.2-3700 through 2.2-3714 (FOIA),
451 and the promulgations of the Virginia Public Records Act, §§ 42.1-76 —
452 42.1-91, that you, as VMRC Commissioner, **give us access to records,**
453 **both hand written/prepared and electronic** relating to The Virginia
454 Marine Resources Commission, **VMRF, Thompson, Graham, Bogacki,**
455 **Buckley and Lindsey are requesting to examine the** **Ninety-Nine
456 [99] categories of documents [This includes copies of any electronic mail
457 or other requested information maintained in electronic form] for the
458 period beginning **January November 15, 2008 to date shown on
459 EXHIBIT 2:

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

462 Virginia Code § 42.1-87 **A. Custodians of archival public records**
463 **shall keep them in fire-resistant, environmentally controlled,**
464 **physically secure rooms designed to ensure proper preservation**
465 **and in such arrangement as to be easily accessible. Current public**
466 **records should be kept in the buildings in which they are**
467 **ordinarily used.**

468 ***There is no case law that relates to Code § 42.1-87 and any court***
469 ***action on this matter as a result of this request would be a matter***
470 ***of first impression in this Commonwealth. There is however a***

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Virginia Attorney General Opinion on the subject that was issued pursuant to an VMRF VFOIA request to the Treasurer of Accomack County (12-05 Bundick) that can guide you (as a result of our public service):

Pg. 3, ¶ 1:

II. Records Storage and Retention

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

Pg. 4, ¶ 4, (2) - pg. 5:

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

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

VIRGINIA MARINE RESOURCES COMMISSION
Engaging Research Stock Ass
plenishment Marine/Aquatic Activities
WWW.VMRF.US

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508 **T**o be clear, we do not expect any of The Virginia Marine
509 **R**esources Commission nor want The Virginia Marine
510 **R**esources Commission to search through all of those
511 **e**lectronic records or boxes of the Virginia Marine Resources
512 **C**ommission's records - we don't want to put The Virginia Marine
513 **R**esources Commission out. Therefore, there will not be a need
514 **f**or The Virginia Marine Resources Commissions to search through
515 **a**ll of those electronic records and boxes of The Virginia Marine
516 **R**esources Commission offices' records as Graham, Thompson,
517 **L**indsey, Buckley, Bogacki and VMRF Forensic Evidence Teams
518 **a**nd Civil Rights Case Management Teams will do all the searching
519 **a**nd copying of the records requested in this FOIA request
520 **p**ursuant to Virginia Code §2.2-3704.A. and Virginia Code §42.1-
521 **87.A.**

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

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

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

534 **Any charges/fees charged by you under the color of VFOIA § 2.2-**
535 **3704.F. for searching/looking for public records that are to be**
536 **maintained under VPRC § 42.1-86.A. [. . . shall provide for**
537 **preserving, classifying, arranging, and indexing essential public**
538 **records so that such records are made available to the public] is**
539 **viewed by VMRF, Thompson, Graham, Buckley, Bogacki and**
540 **Lindsey [1] as a violation of their civil rights, "public's right to know**
541 **and the media's right of access" as set out and pursuant to the First and**
542 **Fourteenth Amendments to the United States Constitution, and Article I,**

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543 **Section 12 of the Virginia Constitution,** VFOIA and the VPRA § 42.1-86.A.
544 **and [2] that the Agency’s Director and employees and agents**
545 **assessment for any fees for it duties set out under VPRA §42.1-**
546 **86.A. are malfeasance, misfeasance, and nonfeasance of**
547 **office/duties under the colour of VA. Code Section 2.2-3704.F.**
548 **and would appear to VMRF to be nothing less than incompetency**
549 **and sufficient grounds to request that either the Attorney General**
550 **or the Accorney for the Commonwealth to remove you and any**
551 **one of you employees engaged in this activity to be removed from**
552 **office.**

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

561 VA. Code §2.2-3704.F. A public body may make reasonable charges not
562 to exceed its actual cost incurred in accessing, duplicating, supplying, or
563 searching for the requested records. **No public body shall impose any**
564 **extraneous [adjective 1 irrelevant or unrelated to the subject. 2**
565 **of external origin. -DERIVATIVES extraneously >adverb**
566 **extraneousness >noun. -ORIGIN Latin extraneus / Oxford**
567 **University Press Dictionary, 2012], intermediary or surplus fees**
568 **or expenses to recoup the general costs associated with creating**
569 **or maintaining records or transacting the general business of the**
570 **public body. Any duplicating fee charged by a public body shall**
571 **not exceed the actual cost of duplication.** The public body may also
572 make a reasonable charge for the cost incurred in supplying records
573 produced from a geographic information system at the request of anyone
574 other than the owner of the land that is the subject of the request.
575 **However, such charges shall not exceed the actual cost to the**
576 **public body in supplying such records,** except that the public body
577 may charge, on a pro rata per acre basis, for the cost of creating
578 topographical maps developed by the public body, for such maps or
579 portions thereof, which encompass a contiguous area greater than 50

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580 acres. **All charges for the supplying of requested records shall be**
581 **estimated in advance at the request of the citizen.**

582 **Virginia Courts Have Addressed Allowed Expenses Under**
583 **Virginia Code §2.2-3704.F.**

584 **... [C]ode § 2.2-3704(F) does not grant a public body**
585 **the authority for charging for the costs of reviewing or**
586 **redacting records. This simply is not in the statute nor**
587 **is there any implication from the statute that this can**
588 **be recovered. *Albright v. Woodfin*, 24 Cir. CL050006,**
589 **68 Va. Cir. 115 (2005)**

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

592 **Virginia Code §2.2B. Any public body that is subject to this chapter**
593 **and that is the custodian of the requested records shall promptly,**
594 **but in all cases within five working days of receiving a request, provide**
595 **the requested records to the requester or make one of the**
596 **following responses in writing:**

597 1. The requested records are being entirely withheld because their
598 release is prohibited by law or the custodian has exercised his
599 discretion to withhold the records in accordance with this chapter.
600 Such response shall identify with reasonable particularity the volume
601 and subject matter of withheld records, and cite, as to each category
602 of withheld records, the specific Code section that authorizes the
603 withholding of the records.

604 2. The requested records are being provided in part and are being
605 withheld in part because the release of part of the records is
606 prohibited by law or the custodian has exercised his discretion to
607 withhold a portion of the records in accordance with this chapter.
608 Such response shall identify with reasonable particularity the subject
609 matter of withheld portions, and cite, as to each category of withheld
610 records, the specific Code section that authorizes the withholding of
611 the records. When a portion of a requested record is withheld, the

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612 public body may delete or excise only that portion of the record to
613 which an exemption applies and shall release the remainder of the
614 record.

615 3. The requested records could not be found or do not exist.
616 However, if the public body that received the request knows that
617 another public body has the requested records, the response shall
618 include contact information for the other public body.

619 4. It is not practically possible to provide the requested records or
620 to determine whether they are available within the five-work-day
621 period. Such response shall specify the conditions that make a
622 response impossible. If the response is made within five working
623 days, the public body shall have an additional seven work days in
624 which to provide one of the four preceding responses.

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

626 **Virginia Code § 2.2-3713 E. says, "In any action to enforce**
627 **the provisions of this chapter, the public body shall bear the**
628 **burden of proof to establish an exemption by a**
629 **preponderance of the evidence. Any failure by a public body**
630 **to follow the procedures established by this chapter shall be**
631 **presumed to be a violation of this chapter."**

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

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

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

641 **§ 18.2-168. Forging public records, etc. — If any person**

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642 **forge a public record, or certificate, return, or attestation,**
 643 **of any public officer or public employee, in relation to any**
 644 **matter wherein such certificate, return, or attestation may**
 645 **be received as legal proof, or utter, or attempt to employ**
 646 **as true, such forged record, certificate, return, or**
 647 **attestation, knowing the same to be forged, he shall be**
 648 **guilty of a Class 4 felony.** (Code 1950, § 18.1-92; 1960, c.
 649 358; 1975, cc. 14, 15; 1976, c. 146.)

650 [the Supreme Court of Virginia concluded, after an extensive review
 651 of the history of the common law offenses of forging a public
 652 document and forging private papers, that actual prejudice to the
 653 public's ownership rights is not a necessary element of the crime of
 654 forging a public document. *Campbell v. Commonwealth*, 246 Va. 174,
 655 179-82, 431 S.E.2d 648, 651-53 (1993). The Court noted:

656 **“At Common Law the Counterfeiting a Matter**
 657 **of Record is Forgery; for since the Law gives**
 658 **the highest Credit to all Records, it cannot but**
 659 **be of the utmost ill Consequence to the Publik**
 660 **to have them either forged or falsified.”** 2
 661 Matthew Bacon, *Abridgment* *568 (1786). **The**
 662 **common-law crime of forgery of public**
 663 **records, a capital offense in England, was**
 664 **augmented by statutes punishing the lesser**
 665 **offense of forgery of certain private**
 666 **documents.** See, e.g., An Act Concerning
 667 Counterfeit Letters or Privy Tokens to Receive
 668 Money or Goods in Others Men's Names, 1541-42,
 669 33 Hen. VIII, ch. 1 (Eng.). Unlike **the crime of**
 670 **forgery of public records in which “ill**
 671 **Consequence to the Publik” was conclusively**
 672 **presumed,** and unlike the common-law crime of
 673 forgery of private papers in which proof of *potential*
 674 harm or prejudice to another was required,
 675 conviction of the several statutory offenses
 676 generally required proof of *actual* harm or prejudice
 677 to the rights of another person. See 1 Hawkins at
 678 263 n. 1; 2 Bacon at *568. [Page 757]

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679 *Id.* at 179-80, 431 S.E.2d at 651 (emphasis in
680 original). **The Court further reviewed the**
681 **legislative history and the scheme of the**
682 **Virginia forgery statutes and concluded**
683 **“that harm or prejudice to the right of**
684 **another person has never been and is not**
685 **now an element of the crime of forgery of**
686 **public records in this Commonwealth.”** *Id.*
687 at 184, 431 S.E.2d at 654.

688
689 **As the crime of forgery of a public**
690 **document does not require personal loss of**
691 **ownership,** appellant's comparison to larceny is
692 inapposite. Therefore, we will not extend the
693 single larceny doctrine to cases involving Code
694 § 18.2-168.

695 **Additionally, the language and structure of the Code**
696 **prove the legislature intended to allow multiple**
697 **forgery convictions** in situations such as the one before us.
698 Code § 18.2-168 states:

699 **If any person forge a public record, or certificate,**
700 **return, or attestation, of any public officer or**
701 **public employee, in relation to any matter**
702 **wherein such certificate, return, or attestation**
703 **may be received as legal proof, or utter, or**
704 **attempt to employ as true, such forged record,**
705 **certificate, return, or attestation, knowing the**
706 **same to be forged, he shall be guilty of a Class 4**
707 **felony.**

708 (Emphasis added.) While criminal statutes must be
709 construed strictly against the Commonwealth and in favor of
710 the accused, *Johnson v. Commonwealth*, 211 Va. 815, 819,
711 180 S.E.2d 661, 664 (1971), **when the language of a**
712 **statute is clear and unambiguous, a court will give the**
713 **statute its plain meaning, *Tross v. Commonwealth*, 21**
714 **Va. App. 362, 377-78, 464 S.E.2d 523, 530 (1995).** We
715 also note, **“The legislature in its discretion may**

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716 **determine the appropriate 'unit of prosecution' and**
717 **set the penalty for separate violations." *Jordan v***
718 ***Commonwealth*, 2 Va. App. 590, 594, 347 S.E.2d 152,**
719 **154 (1986). An analysis of the concept of "a public**
720 **record" and a summons proves the legislature**
721 **intended to allow multiple prosecutions for**
722 **contemporaneous forgeries of such documents. [Page**
723 **758]**

724 **At common law, a public record was "a written**
725 **memorial, intended to serve as evidence of something**
726 **written, said or done, made by a public officer**
727 **authorized to make it." *Reid v. Commonwealth*, 16 Va.**
728 **App. 468, 470, 431 S.E.2d 63, 64 (1993) (citing**
729 ***Coleman v. Commonwealth*, 66 Va. (25 Gratt.) 865,**
730 **881-82 (1874)). Under the Virginia Public Records Act, a**
731 **public record is defined as:**

732 recorded information that documents a transaction or
733 activity by or with any public officer, agency or
734 employee of the state government or its political
735 subdivisions. Regardless of physical form or
736 characteristic, the recorded information is a public
737 record if it is produced, collected, received or retained
738 in pursuance of law or in connection with the
739 transaction of public business. Code § 42.1-77.

740 **§ 18.2-172. Forging, uttering, etc., other writings. — If any**
741 **person forge any writing, other than such as is mentioned**
742 **in §§ 18.2-168 and 18.2-170, to the prejudice of another's**
743 **right, or utter, or attempt to employ as true, such forged**
744 **writing, knowing it to be forged, he shall be guilty of a Class**
745 **5 felony. Any person who shall obtain, by any false pretense**
746 **or token, the signature of another person, to any such**
747 **writing, with intent to defraud any other person, shall be**
748 **deemed guilty of the forgery thereof, and shall be subject to**
749 **like punishment. (Code 1950, § 18.1-96; 1960, c. 358; 1975,**
750 **cc. 14, 15.);**

751 **Code § 18.2-172, codifying the common law**

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crime of forgery, provides that "[i]f any person forge any writing, . . . to the prejudice of another's right, . . . [she] shall be guilty of a Class 5 felony." Under the common law, forgery "is defined as 'the false making or materially altering with intent to defraud, or any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability.'" *Fitzgerald v. Commonwealth*, 227 Va. 171, 173-74, 313 S.E.2d 394, 395 (1984) (quoting *Bullock v. Commonwealth*, 205 Va. 558, 561, 138 S.E.2d 261, 263 (1964)). *Timbers v. Commonwealth*, 28 Va. App. 187, 202, 503 S.E.2d 233, ____ (1998);

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

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

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Appellant was convicted of forgery under Code § 18.2-172, which provides that "[i]f any person forge any writing . . . to the prejudice of another's right . . . , [that person] shall be guilty of a Class 5 felony." **The General Assembly codified the English common law of forgery when it enacted Code § 18.2-172.**

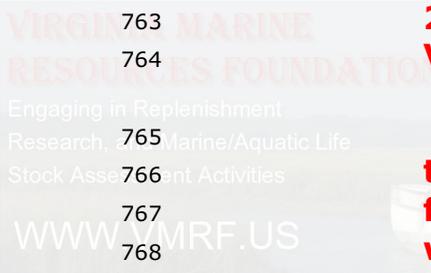


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788 See *Campbell v. Commonwealth*, 246 Va. 174, 182-
789 83, 431 S.E.2d 648, 653 (1993). *Beshah v.*
790 *Commonwealth*, 60 Va. App. 161, 169, 725 S.E.2d
791 144, ____ (2012)

792 **Forgery is “[t]he act of fraudulently making a**
793 **false document or altering a real one to be used**
794 **as if genuine.” *Black’s Law Dictionary 677 (8th***
795 **ed. 1999).***McQuinn v. Commonwealth*, 09 Vap
796 **UNP 0404082 (2009)**

797 **“Code § 18.2-172 provides, in pertinent part,**
798 **that, ‘[i]f any person forge any writing . . . to the**
799 **prejudice of another's right, or utter, or attempt**
800 **to employ as true, such forged writing, knowing**
801 **it to be forged, he shall be guilty of a Class 5**
802 **felony.’”** *Oliver v. Commonwealth*, 35 Va. App. 286,
803 295, 544 S.E.2d 870, 874 (2001) (quoting *Fitzgerald*
804 *v. Commonwealth*, 227 Va. 171, 173-74, 313 S.E.2d
805 394, 395 (1984)). “To sustain a conviction for forgery
806 in violation of Code § 18.2-172, the Commonwealth
807 **must prove that the accused falsely made or**
808 **materially altered a writing, without the**
809 **authority to do so, and did so to the prejudice of**
810 **another's right.”** *Bowman v. Commonwealth*, 28 Va.
811 App. 204, 213, 503 S.E.2d 241, 245 (1998). *Wooding*
812 *v. Commonwealth*, 10 Vap UNP 1385093 (2010)

813 Code § 18.2-172 provides “If any person . . . utter, or
814 attempt to employ as true, such forged writing,
815 knowing it to be forged, he shall be guilty of a Class 5
816 felony.” In order to sustain a conviction, Code § 18.2-
817 172 requires that the person who utters a check know
818 that it is forged. “The word ‘utter’ is defined in Black’s
819 Law Dictionary, 4th ed., page 1716, as meaning ‘To
820 put or send [as a forged check] into circulation’
821 It is an assertion by word or action that a writing
822 known to be forged is good and valid.” *Bateman v.*
823 *Commonwealth*, 205 Va. 595, 599-600, 139 S.E.2d

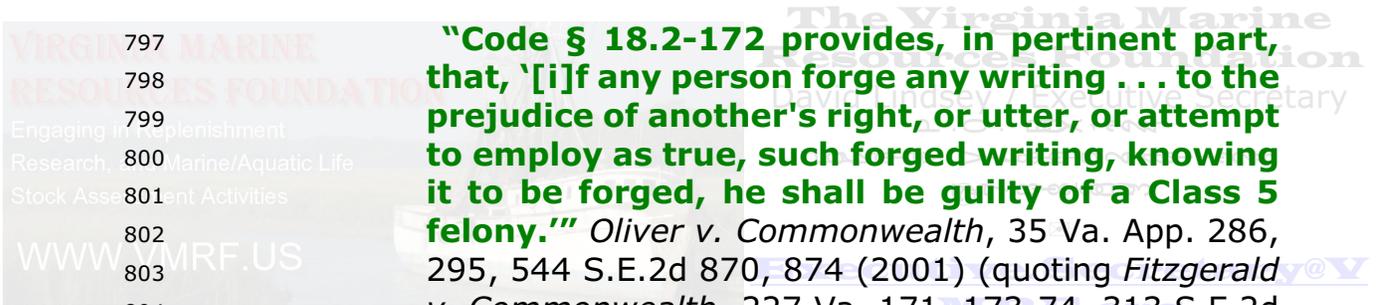


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824 102, 106 (1964). "[A]ny assertion or declaration, by
 825 word or act, directly or indirectly, that the forged
 826 writing or endorsement is good, with such knowledge
 827 and intent is an uttering" *Sands v.*
 828 *Commonwealth*, 61 Va. (20 Gratt.) 800, 823 (1871).
 829 *Massengale v. Commonwealth*, 08 Va. S. Ct. UNP
 830 070746 (2008)

831 [C]ode § 18.2-172 provides that it is unlawful to forge
 832 "any writing" or to utter such forged writing knowing
 833 it to be forged. Forgery "is defined as 'the false making
 834 or materially altering with the intent to defraud, of any
 835 writing which, if genuine, might apparently be of legal
 836 efficacy, or the foundation of legal liability.'" *Fitzgerald*
 837 *v. Commonwealth*, 227 Va. 171, 173, 313 S.E.2d 394,
 838 395 (1984) (quoting *Bullock v. Commonwealth*, 205
 839 Va. 558, 561, 138 S.E.2d 261, 263 (1964)) (affirming
 840 convictions for forgery of blank checks stolen from a
 841 business). *McQuinn v. Commonwealth*, 09 Vap UNP
 842 0404082 (2009)

843 **At common law, the crime of forgery "is defined as 'the**
 844 **false making or materially altering with intent to defraud,**
 845 **of any writing which, if genuine, might apparently be of**
 846 **legal efficacy, or the foundation of legal liability.'" *Fitzgerald***
 847 ***v. Commonwealth*, 227 Va. 171, 173, 313 S.E.2d 394, 395 (1984)**
 848 **(quoting *Bullock v. Commonwealth*, 205 Va. 558, 561, 138 S.E.2d**
 849 **261, 264 (1964)). A document or instrument is one of legal**
 850 **efficacy "where by any possibility it may operate to the**
 851 **injury of another." *Gordon v. Commonwealth*, 100 Va. 825, 829,**
 852 **41 S.E. 746, 748 (1902) (emphasis added). Therefore, to sustain**
 853 **a conviction under the modern forgery statute, the Commonwealth**
 854 **must prove that the forged or altered document operated to**
 855 **the actual or potential prejudice of another. See *Muhammed***
 856 ***v. Commonwealth*, 13 Va. App. 194, 199, 409 S.E.2d 818, 821**
 857 **(1991) (holding that the "bare possibility" of prejudice is**
 858 **sufficient under Code § 18.2-172).**

859 **To prove a forgery under the statute, the**

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860 **Commonwealth was required to prove only that**
861 **the forged document had the potential to**
862 **operate "to the prejudice of another."** Code §
863 18.2-172. **"The purpose of the statute against**
864 **forgery is to protect society against the**
865 **fabrication, falsification and the uttering of**
866 **instruments which *might* be acted upon as being**
867 **genuine."** *Muhammad*, 13 Va. App. at 199, 409
868 S.E.2d at 821 (quoting *Mayes v. State*, 571 S.E.2d
869 420, 427 (Ark. 1978)) (emphasis in original). *Beshah*
870 *v. Commonwealth*, 60 Va. App. 161, 169, 725 S.E.2d
871 144, ___ (2012)

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The Virginia Marine
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David Lindsey / Executive Secretary

872 We will also be looking at your response under the guidelines set
873 out in Code §§ 18.2-460 — 18.2-472.1, Interference with
874 Administration of Justice.

875 In your response please be sure to preserve your rights as
876 stated/provided for in the 5th. amendment to the U.S. Constitution
877 and Art. 1, Sec. 8 of the Virginia Constitution. www.vmr.org

878 Please be advised that if it is less expensive, labor
879 intensive, and more convenient to you, we will be
880 happy to accept the requested materials in electronic
881 format, including .pdf, .gif, .jpg, Word, Word for
882 Windows, WordPerfect, and Mac formats via email to
883 general.counsel@VMRF.us, or you can mail on a CD or
884 DVD to VMRF, P.O. Box 65002, Virginia Beach, VA,
885 23467-5002.

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

888 ***In addition, if you refuse the above request please provide***
889 ***a written explanation for your refusal including the***
890 ***(1)reference to the specific statutory (legislative)***
891 ***exemption(s) upon which you rely, (2)Any opinion of the***
892 ***Attorney General that supports your position(s), and (3)***
893 ***any decision of a court that supports your position(s) that***

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894 ***the material requested under this FOIA request is exempted***
895 ***from disclosure under the provision of FOIA [Virginia Code***
896 ***§ 2.2-3713.D.90(In making this determination, a court may***
897 ***consider, among other things, the reliance of a public body on an***
898 ***opinion of the Attorney General or a decision of a court that***
899 ***substantially supports the public body's position.)]-please***
900 ***provide a schedule of all segregable portions of any***
901 ***material you otherwise claim as exempt.***

902 ***If you claim the documents do not exist please advise***
903 ***VMRF, Bogacki, Buckley, Graham, Thompson and Lindsey of***
904 ***the same in writing.***

905 Take notice that VMRF, Bogacki, Buckley, Thompson, Graham and
906 Lindsey will deem your failure supply the records this day or to
907 reply [Virginia Code § 2.2-3704.E.] within the statutory time of five
908 (5) days to be a denial of our request and will seek enforcement
909 of our request by filing a petition for writ of mandamus and/or
910 injunction under Virginia Code Section 2.2-3127, including requests
911 for attorneys' fees and cost for enforcing our rights under FOIA, of
912 the Commonwealth of Virginia.

913 **PRESERVATION NOTICE**

914 As you may know, a number of courts have held, that upon either
915 reasonable anticipation or actual notice of litigation, a party must
916 take affirmative steps to preserve all potentially relevant evidence.
917 Based upon recent event(s), it is likely that the Unalienable Rights
918 Foundation [VMRF] will need to take action in court to protect its
919 rights. Such action will require The Virginia Marine Resources
920 Commission take steps to preserve relevant evidence involving
921 VMRF and its recent Virginia Freedom of Information Act [FOIA]
922 request[s] ("Request"), including but not necessarily limited to,
923 those records/documents [Records] pertaining to the Record(s)
924 and INDEX(ES) requested herein and more particularly in the
925 attached EXHIBITS "2" and "3" in this FOIA Request to Larry
926 LeMond , Chairman, Board of Supervisors, The Virginia Marine
927 Resources Commission VA for these Records .

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928 And as laid out in the FOIA Request, under this PRESERVATION
929 NOTICE section of this Request the Foundation has sent to you.

930 Please be advised that the Unalienable Rights Foundation [VMRF]
931 William Graham, personally and individually [Graham], Joshua
932 Thompson, personally and individually [Thompson], Michal Bogacki
933 [Bogacki], individually and personally and a citizen of this
934 Commonwealth who resides in The Virginia Marine Resources
935 Commission, Virginia, Douglas Buckley [Buckley], individually and
936 personally and a citizen of this Commonwealth who resides in
937 Accomack County, Virginia, and David M. Lindsey, personally and
938 individually [Lindsey], believes manual and electronically stored
939 information to be an important and irreplaceable source of data
940 related to the documents/records they have requested from you
941 and The Virginia Marine Resources Commission or its employees
942 under The Virginia Freedom of Information Act [FOIA] and the
943 other promulgations of both the Federal and Virginia State
944 Governments and in any matter that may subsequently evolve as
945 a result of these request including any litigation related to these
946 requests.

947 As stated elsewhere herein this duty to preserve relevant evidence
948 applies not only to print documents, but also to electronic-stored
949 data, including but not limited to, e-mail and other electronic
950 communications, word processing documents, spreadsheets,
951 databases, calendars, voicemail, Internet usage files, and network
952 access information and the aforesaid index[es]. Complying with
953 this obligation will require the County to suspend its existing
954 document/record retention policy to the extent that allowing it to
955 remain in effect would result in the destruction of relevant
956 information and Records.

957 To implement the County's preservation obligation, VMRF and I
958 request that the County immediately issue a "litigation hold" memo
959 [Memo"] to all employees and elected officials including members
960 of the Board of Supervisors, Planning Commission and Board of
961 Zoning Appeals who may have and/or may of had access to
962 relevant print documents, email and electronic data.

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963 The Memo should specifically describe the types of print documents
964 and electronic data that must be preserved and [as outlined in the
965 FOIA Request] explain how the/those
966 documents/Records/materials should be maintained and stored.

967 Please keep in mind that the Memo may need to be reissued
968 periodically, and it will need to be provided in the future to new
969 employees who may have access to relevant information. Of
970 particular importance is the adequate protection of e-mails and
971 other electronic information, including those maintained on backup
972 media that may otherwise be routinely rotated or overwritten
973 [including minutes of all meetings].

974 **Compliance with your preservation obligations includes**
975 **forwarding a copy of this letter to all individuals or**
976 **organizations that are responsible for any of the items**
977 **referred to in this letter or with whom any subject matter**
978 **that touches and concerns this FOIA Request was discussed**
979 **with. If this correspondence is in any respect unclear,**
980 **please call me immediately.**

981 The subject matter(s) of these FOIA requests requires preservation
982 of all information from the persons named on the Attached Exhibit
983 3 or their employees along with the subjects matters named on the
984 Attached Exhibit 2 which shall include those named in attached
985 Exhibit 3 or their employees, family, contractors and is not limited
986 to all of their computer systems, computers, removable electronic
987 media used by them at any other locations.

988 Under the laws of this Commonwealth and the Federal Rules of
989 Civil Procedures [FRCP], more particularly the guidelines set out by
990 the Hon. Shira A. Scheindlin, Judge, United States District Court for
991 the Northern District of New York, issued five groundbreaking
992 opinions in the case of Zubulake v. UBS Warburg. Zubulake is
993 generally considered the first definitive case in the United States
994 on a wide range of electronic discovery issues:

995 Zubulake I, May 13, 2003: Zubulake v. UBS Warburg, 217 F.R.D.
996 309 (S.D.N.Y. 2003).

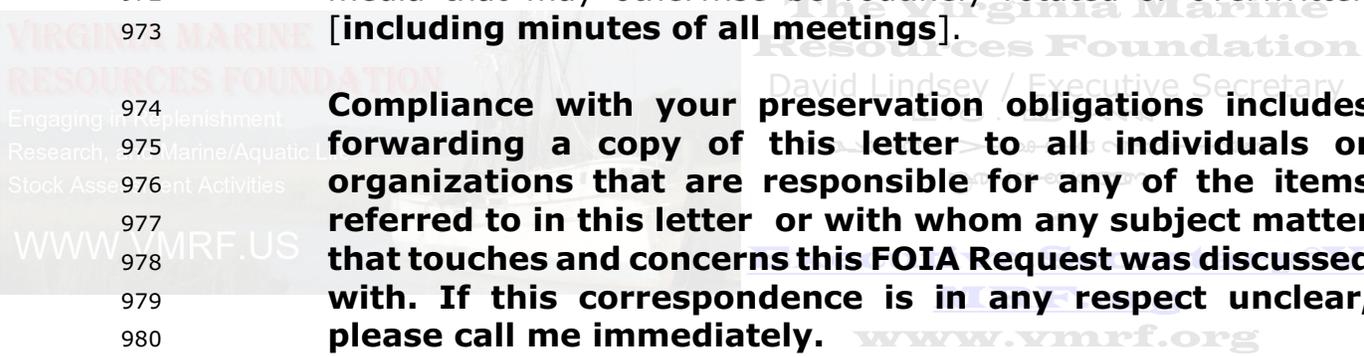


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997 Zubulake II (Please note: this does not relate to electronic
998 disclosure): Zubulake v. UBS Warburg, No. 02 Civ. 1243, 2003 WL
999 21087136 (S.D.N.Y. May 13, 2003).

1000 Zubulake III, July 24, 2003: Zubulake v. UBS Warburg, 216 F.R.D.
1001 280 (S.D.N.Y. 2003).

1002 Zubulake IV, October 22, 2003: Zubulake v. UBS Warburg, 220
1003 F.R.D. 212 (S.D.N.Y. 2003).

1004 Zubulake V: Zubulake v. UBS Warburg, 2004 WL 1620866
1005 (S.D.N.Y. July 20, 2004).

Engaging 1006 You should also look to Sekisui American Corp. v. Hart, Case
Research 1007 1:12-cv-03479-SAS-FM, slip op. at 14 & n. 51 (S.D.N.Y. August
Stock As: 1008 15, 2013) for complying with the FRCP.

1009 **The Aforesaid Scheindlin Opinions/Decisions Establish**

1010 [A] party seeking an adverse inference instruction based on the
1011 destruction of evidence must establish (1) that the party having
1012 control over the evidence had an obligation to preserve it at the
1013 time it was destroyed; (2) that the records were destroyed with a
1014 culpable state of mind; and (3) that the destroyed evidence was
1015 relevant to the party's claim or defense such that a reasonable trier
1016 of fact could find that it would support that claim or defense. Rule
1017 37 (FRCP) "authorizes a wide range of sanctions for discovery
1018 abuses."

1019
1020 If the . . . [c]ourt determines that a party wrongfully withheld or
1021 destroyed evidence, it may tell the jury "those facts and nothing
1022 more; or it might [add] that the jury could, but need not, draw
1023 inferences against [the spoliators] based on those facts; or . . .
1024 that the jury *should* draw adverse inferences against [the
1025 spoliators] based on those facts; or that the jury should render a
1026 verdict for the [innocent party]."

1027 **Establishing a Culpable State of Mind**
1028 "The culpable state of mind factor is satisfied by a showing that the

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1029 evidence was destroyed knowingly, even if without intent to
1030 [breach a duty to preserve it], or negligently." "The sanction of an
1031 adverse inference may be appropriate in some cases involving the
1032 negligent destruction of evidence because each party should bear
1033 the risk of its own negligence."

1034 This is because [t]he adverse inference provides the necessary
1035 mechanism for restoring the evidentiary balance. The inference is
1036 adverse to the destroyer not because of any finding of moral
1037 culpability, but because the risk that the evidence would have been
1038 detrimental rather than favorable should fall on the party
1039 responsible for its loss.

1040 It follows that gross negligence also satisfies the culpability
1041 requirement. This circuit follows a "case-by-case approach to the
1042 failure to produce relevant evidence" because "such failures occur
1043 along a continuum of fault – ranging from innocence through the
1044 degrees of negligence to intentionality."

Establishing Relevance

1045 "[R]elevant' in [the context of an adverse inference instruction]
1046 means . . . [that] the party seeking an adverse inference must
1047 adduce sufficient evidence from which a reasonable trier of fact
1048 could infer that 'the destroyed [or unavailable] evidence would
1049 have been of the nature alleged by the party affected by its
1050 destruction,'" i.e., that the destroyed evidence would have been
1051 helpful to the movant.
1052

1053 Yet "[c]ourts must take care not to hold the prejudiced party to
1054 too strict a standard of proof regarding the likely contents of the
1055 destroyed or unavailable evidence, because doing so would subvert
1056 the purposes of the adverse inference, and would allow parties who
1057 have destroyed evidence to profit from that destruction."

1058 When evidence is destroyed willfully, the destruction alone "is
1059 sufficient circumstantial evidence from which a reasonable fact
1060 finder could conclude that the missing evidence was unfavorable
1061 to that party."

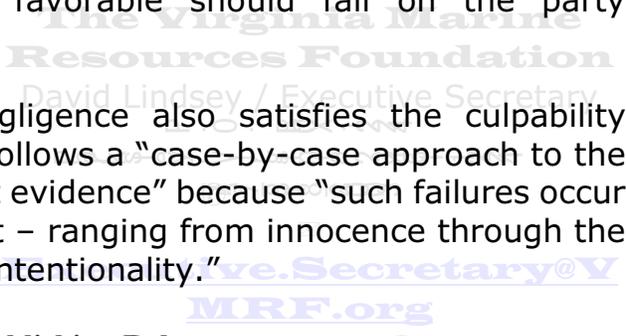
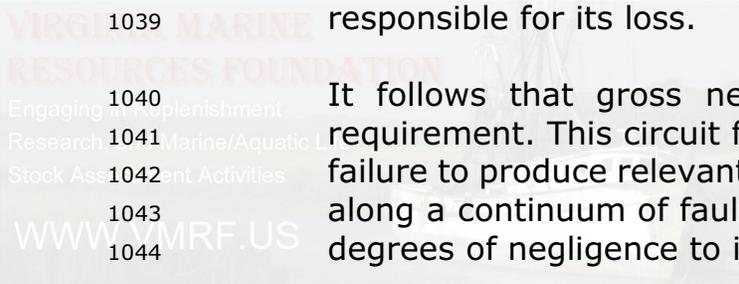


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1062 "[T]he intentional destruction of relevant records, either paper or
1063 electronic, after the duty to preserve has attached, is willful."

1064 "Similarly, a showing of gross negligence in the destruction . . . of
1065 evidence will in some circumstances suffice, standing alone, to
1066 support a finding that the evidence was unfavorable to the grossly
1067 negligent party."

1068 Accordingly:

1069 [w]here a party seeking an adverse inference adduces
1070 evidence that its opponent destroyed potential
1071 evidence . . . in bad faith or through gross negligence
1072 (satisfying the "culpable state of mind" factor), that
1073 same evidence . . . will frequently also be sufficient to
1074 permit a jury to conclude that the missing evidence is
1075 favorable to the party (satisfying the "relevance"
1076 factor).

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1077 **Prejudice**
1078 **When evidence is destroyed willfully or through gross**
1079 **negligence, prejudice to the innocent party may be**
1080 **presumed because that party is "deprived of what [the**
1081 **court] can assume would have been evidence relevant to**
1082 **[the innocent party's claims or defenses]."** That is,
1083 **prejudice is presumed precisely because relevant evidence,**
1084 **i.e., evidence presumed to be unfavorable to the spoliating**
1085 **party, has been intentionally destroyed and is no longer**
1086 **available to the innocent party. When, however, the**
1087 **destruction of evidence is merely negligent, the burden falls**
1088 **on the innocent party to prove prejudice. This circuit has**
1089 **"repeatedly held that a case-by-case approach to the failure**
1090 **to produce relevant evidence, at the discretion of the**
1091 **district court, is appropriate." *The failure to adopt good***
1092 ***preservation practices is "one factor in the determination of***
1093 ***whether discovery sanctions should issue.*" [Such as not**
1094 **following the guidelines of the Virginia Public Record Act (Added by**
1095 **VMRF)].**

1096 **Culpable State of Mind**

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1097 **[a]fter the duty to preserve had attached and the law does**
1098 **not require a finding of malevolence to constitute**
1099 **willfulness in the context of spoliation, I find this conclusion**
1100 **contrary to law and clearly erroneous.** [page 20, [Case 1:12-cv-](#)
1101 [03479-SAS-FM](#)]

1102 **The law does not require a showing of malice to establish**
1103 **intentionality with respect to the spoliation of evidence. In**
1104 **the context of an adverse inference analysis, there is no**
1105 **analytical distinction between destroying evidence in bad**
1106 **faith, i.e., with a malevolent purpose, and destroying it**
1107 **[page 21, [Case 1:12-cv-03479-SAS-FM](#)] willfully. That Sekisui**
1108 **provides a good faith explanation for the destruction of**
1109 **Hart’s ESI – suggesting that Taylor’s directive was given in**
1110 **order to save space on the server – does not change the fact**
1111 **that the ESI was willfully destroyed. [ibid pg. 22]**

Failure to Ensure Preservation of Relevant Documents

1112 **[f]ailure to meet even the most basic document**
1113 **preservation obligations constitutes gross negligence. [Ibid,**
1114 **pg. 24]**

Relevance and Prejudice

1116 [t]he destruction of evidence was intentional, . . . the imposition
1117 of such a burden on the innocent party is contrary to law. **When**
1118 **evidence is destroyed intentionally, such destruction is**
1119 **sufficient evidence from which to conclude that the missing**
1120 **evidence was unfavorable to that party. As such, once**
1121 **wilfulness is established, no burden is imposed on the**
1122 **innocent party to point to now-destroyed evidence which is**
1123 **no [Ibid, pg. 26] longer available because the other party**
1124 **destroyed it. Rather, the “risk that the evidence would have**
1125 **been detrimental rather than favorable [to the spoliator]**
1126 **should fall on the party responsible for its loss.” To shift**
1127 **the burden to the innocent party to describe or produce**
1128 **what has been lost as a result of the opposing party’s willful**
1129 **or grossly negligent conduct is inappropriate because it**
1130 **incentivizes bad behavior on the part of would-be**
1131 **spoliators.**
1132

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1133 **That is, it "would allow parties who have destroyed**
1134 **evidence to profit from that destruction." Prejudice is**
1135 **presumed for the purposes of determining whether to give**
1136 **an adverse inference instruction when, as here, evidence is**
1137 **willfully destroyed by the spoliating party. [Ibid, pg. 27]**
1138 [i]nability to use the missing documents to attempt to prove
1139 "routine [1] compliance" with law and regulations [2]
1140 conduct/practice may be as prejudicial to the VMRF as depriving a
1141 party [VMRF] of access to a "smoking gun" document. **[Ibid, pg.**
1142 **28 and modified by VMRF]**

1143 **That the destruction of documents as outlined herein by the**
1144 **spoilor is willful and that prejudice is therefore presumed.**
1145 **[pg. 28 as revised by VMRF]**

1146 **Spoilation is the destruction of evidence or the failure to**
1147 **preserve property for another's use as evidence in pending**
1148 **or reasonably foreseeable litigation. [pg. 29]**

1149 **To demonstrate that spoliation occurred, several elements**
1150 **must be proven by a preponderance of the evidence: [pg.**
1151 **29]**

1152 ***First*, that relevant evidence was destroyed after the duty to**
1153 **preserve arose. [pg. 29]**

1154 ***Second*, that the evidence lost would have been favorable to**
1155 **the party requesting it. [pg. 29]**

1156 In addition, if you have been found to spoil evidence you are
1157 subject to monetary sanctions. VMRF/we are entitled to an award
1158 of reasonable costs, including attorneys' fees, associated with
1159 bringing this action to secure the public records shown on the
1160 attached referenced exhibits.

1161 **You must preserve the items requested by this notice**
1162 **even if you or your legal counsel(s) feel these items are**
1163 **exempt from the FOIA request.**

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

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

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

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

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All of the information contained in this letter should be preserved from The Virginia Marine Resources Commission's inception to the present.



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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;
- Maintain all other pertinent information and tools needed to access, review, and reconstruct necessary to access, view, and/or

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1233 reconstruct all requested or potentially relevant electronic data.

1234 **FURTHER DESCRIPTION OF DATA SOUGHT**

1235 The FOIA request requires preservation of all information from your
1236 computer systems and computers systems you used, removable
1237 electronic media and other locations relating to the FOIA request. This
1238 includes, but is not limited to, email, instant messages, and other
1239 electronic communication, word processing documents, spreadsheets,
1240 databases, calendars, telephone logs, contact manager information,
1241 Internet usage files, web camera logs or files, network access
1242 information, photographs, images, and video clips or movies.

1243 **I. Electronic Files.** You have an obligation to preserve all digital or
1244 analog electronic files in electronic format, regardless of whether hard
1245 copies of the information exist. This includes preserving:

1246 A. Active data (i.e., data immediately and easily accessible on The
1247 Virginia Marine Resources Commission's, the individuals named in
1248 EXHIBIT 3 or your computer systems today);

1249 B. Archived data (i.e., data residing on backup tapes or other
1250 storage media);

1251 C. Deleted data (i.e., data that has been deleted from a computer
1252 hard drive but is recoverable through computer forensic
1253 techniques); and

1254 D. Legacy data (i.e., data created on old or obsolete hardware or
1255 software).

1256 E. You must preserve active, archived and legacy data including
1257 but not limited to:

1258 1. Word-processed files, including drafts and revisions;

1259 2. Spreadsheets, including drafts and revisions;

1260 3. Databases;

1261 4. CAD (computer-aided design) files, including drafts and
1262 revisions;

1263 5. Presentation data or slide shows produced by presentation
1264 software (such as Microsoft PowerPoint);

1265 6. Graphs, charts and other data produced by project
1266 management software (such as Microsoft Project);

1267 7. Animations, images, audio, video and audiovisual
1268 recordings, MP3 players, and voicemail files.

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- 1269 8. Data generated by calendaring, task management and
- 1270 personal information management (PIM) software (such as
- 1271 Microsoft Outlook or Lotus Notes);
- 1272 9. Data created with the use of personal data assistants
- 1273 (PDAs), such as PalmPilot, HP Jornada; Cassiopeia or other
- 1274 Windows CE-based or Pocket PC devices;
- 1275 10. Data created with the use of document management
- 1276 software; and
- 1277 11. Data created with the use of paper and electronic mail
- 1278 logging and routing software.

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F. You must preserve media used by you or your computers and computers used by The Virginia Marine Resources Commission, persons name in EXHIBIT 3 or you including but not limited to:

- 1281 1. Magnetic, optical or other storage media, including the hard
- 1282 drives or floppy disks used by you or your computers;
- 1283 2. Backup media (i.e., other hard drives, backup tapes, floppies,
- 1284 Jazz cartridges, CD-ROMs) and the software necessary to
- 1285 reconstruct the data contained on the media; and
- 1286
- 1287
- 1288 3. Archived media (you should retain a mirror image copy of any
- 1289 media no longer in service but used from The Virginia Marine
- 1290 Resources Commission’s inception to the present.

II. Hardware. You have an obligation to preserve all electronic processing systems, even if they are replaced. This includes computer servers, stand-alone personal computers, hard drives, laptops, PDAs, and other electronic processing devices. You should retain copies of any hardware no longer in service but used from The Virginia Marine Resources Commission’s Inception to the present.

III. Emails. You have an obligation to preserve all potentially relevant internal and external emails that were sent or received. Email must be preserved in electronic format, regardless of whether hard copies of the information exist.

IV. Internet Web Activity. You have an obligation to preserve all

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1302 records of Internet and Web-browser generated files in electronic format,
1303 regardless of whether hard copies of the information exist. This includes
1304 Internet and Web-browser-generated history files, caches and "cookies"
1305 files stored on backup media.

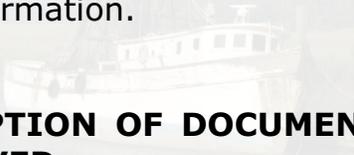
1306 **V. Activity Logs.** You must preserve all hard copy or electronic logs
1307 documenting computer(s) use by you.

1308 **VI. Supporting Information.** You must preserve all supporting
1309 information relating to the requested electronic data and/or media
1310 including:

1311 A. Codebooks, keys, data dictionaries, diagrams, handbooks, or
1312 other supporting documents that aid in reading or interpreting
1313 database, media, email, hardware, software, or activity log
1314 information.

VIRGINIA MARINE RESOURCES COMMISSION
Engaging
Research
Stock Assessment Activities

The Virginia Marine Resources Commission
David Lindsey / Executive Secretary
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1315 **DESCRIPTION OF DOCUMENTS AND MEDIA THAT SHOULD BE**
1316 **PRESERVED**

1317 **I. Data Preservation.** You should immediately preserve all data and
1318 information about the data (i.e., backup activity logs and document
1319 retention policies) relating to documents maintained in the ordinary
1320 course of computer operation for the individuals listed below. This
1321 includes, but is not limited to, the information listed below.

1322 A. Email and any relevant metadata, including message contents,
1323 header information, and email system logs that was sent or
1324 received by or is in the possession of the following parties including
1325 those maintained on PDAs and/or cellular phones and/or contains
1326 information about the following subjects:

1327 1. Parties named on Attached Exhibit 3 or any other
1328 person(s) these matters were discussed with.

1329
1330 2. Subject Matters:
1331 Those items given in attached Exhibit 2 and in the
1332 previous FOIA request to The Virginia Marine Resources
1333 Commission and its representatives by whatever name they
1334 might be called and those given herein.

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1335 B. Instant Messages and or Text Messages and any relevant
1336 metadata, including message contents, header information, and
1337 message system logs that was sent or received by or is in the
1338 possession of the following parties and/or contains information
1339 about the following subjects:

1340 1. Parties named in attached EXHIBIT 3 or Any other
1341 person(s) these matters were discussed with:

1342
1343 2. Subject Matters:

1344 Those items given in EXHIBIT 2 and previous FOIA
1345 request to The Virginia Marine Resources Commission and its
1346 representatives by whatever names they might be called and
1347 those given herein.

1348 C. All active and deleted copies of any word processing files,
1349 spreadsheets, PowerPoint presentations, or other documents that
1350 are in the possession of the following parties and/or contain
1351 information about the following subjects:

1352
1353 1. Parties: Parties named in attached EXHIBIT 3 or Any other
1354 person(s) these matters were discussed with:

1355
1356 2. Subject Matters:

1357 Those items given in EXHIBIT 2 and previous FOIA
1358 request to The Virginia Marine Resources Commission and its
1359 representatives by whatever names they might be called and
1360 those given herein.

1361 D. Databases and any information about the databases that
1362 are in the possession of the following parties and/or contain
1363 information about the following subjects:

1364 1. Parties: Parties named in attached EXHIBIT 3 or Any other
1365 person(s) these matters were discussed with:

1366
1367 2. Subject Matters:

1368 Those items given in EXHIBIT 2 and previous FOIA
1369 request to The Virginia Marine Resources Commission and its
1370 representatives by whatever names they might be called and

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1371 those given herein.

1372

1373 E. All paper and/or electronic logs of computer system and network
1374 activity that pertain to electronic data storage that are in the
1375 possession of the following parties and/or contain information
1376 about the following subjects:

1377 1. Parties: Parties named in attached EXHIBIT 3 or Any other
1378 person(s) these matters were discussed with:

1379

1380 2. Subject Matters:

1381 Those items given in EXHIBIT 2 and previous FOIA
1382 request to The Virginia Marine Resources Commission and its
1383 representatives by whatever names they might be called and
1384 those given herein.

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1385 F. All active and deleted copies of any electronic calendars or
1386 scheduling programs, including programs maintained on PDAs, that
1387 are in the possession of the following parties and/or contain
1388 information about the following subjects:

1389 1. Parties: Parties named in attached EXHIBIT 3 or Any other
1390 person(s) these matters were discussed with:

1391

1392 2. Subject Matters:

1393 Those items given in EXHIBIT 2 and previous FOIA
1394 request to The Virginia Marine Resources Commission and its
1395 representatives by whatever names they might be called and
1396 those given herein.

1397 G. All active, archived, legacy, and deleted copies of any other
1398 electronic data that are in the possession of the following parties
1399 and/or contain information about the following subjects:

1400 1. Parties: Parties named in attached EXHIBIT 3 or Any other
1401 person(s) these matters were discussed with:

1402

1403 2. Subject Matters:

1404 Those items given in EXHIBIT 2 and previous FOIA
1405 request to The Virginia Marine Resources Commission and its
1406 representatives by whatever names they might be called and
1407 those given herein.

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1408 **II. Data Storage Devices**

1409 **A. Online Data Storage.** If you use(s) online storage and/or direct
1410 access storage devices, they must immediately cease modifying or
1411 deleting any electronic data unless a computer forensic expert makes a
1412 mirror image of the electronic file, follows proper preservation protocols
1413 for assuring the accuracy of the file (i.e., chain of custody), and makes
1414 the file available for litigation.

1415 **B. Offline Data Storage.** Offline data storage includes, but is not limited to,
1416 backup and archival media, floppy diskettes, magnetic, magneto-
1417 optical, and/or optical tapes and cartridges, DVDs, CDRoms, and other
1418 removable media. You should immediately suspend all activity that might
1419 result in destruction or modification of all of the data stored on any
1420 offline media. This includes overwriting, recycling or erasing all or part
1421 of the media. This request includes, but is not limited to, media used to
1422 store data from personal computers, laptops, mainframe computers, and
1423 servers.

1424 **C. Data Storage Device Replacement.** If you replace(s) any electronic
1425 data storage devices, you may not dispose of the storage devices.

1426 **D. Preservation of Storage Devices.** You may not modify, delete or
1427 otherwise alter (i.e., by data compression, disk de-fragmentation, or
1428 optimization routines) any electronic data unless a computer forensic
1429 expert makes a mirror image of the electronic file, follows proper
1430 preservation protocols for assuring the accuracy of the file (i.e., chain of
1431 custody), and makes the file available for litigation. The expert must
1432 make a mirror image of active files, restored versions of deleted files,
1433 and restored versions of deleted file fragments, hidden files, and
1434 directory listings. This includes, but is not limited to, preserving
1435 electronic data (stored on online or offline storage devices) that came
1436 from the following hardware or software applications:

- 1437 1. Fixed drives on stand-alone personal computers or laptops;
- 1438 2. Network servers and workstations; and
- 1439 3. Software application programs and utilities.

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1440

PRESERVATION COMPLIANCE

1441 **I. Activity Log.** In order to show preservation compliance, you must
1442 maintain a log, documenting all alterations or deletions made to any
1443 electronic data storage device or any electronic data processing system.
1444 The log should include changes and deletions made by you or any other
1445 third parties.

1446 **II. Mirror Images.** You must secure a mirror image copy (a bit-by-bit
1447 copy of a hard drive that ensures the computer system is not altered
1448 during the imaging process) of all electronic data contained on the
1449 personal computers and/or laptops of the individuals listed below. The
1450 mirror image should include active files, deleted files, deleted file
1451 fragments, hidden files, directories, and any other data contained on the
1452 computer. You must also collect and store any offline or online storage
1453 devices that contain data from any electronic processing devices for the
1454 individuals listed in attached EXHIBIT 3 or Any other person(s) these
1455 matters were discussed with: Executive.Secretary@VMRF.org

1456 **III. Chain of Custody.** For each piece of media that you
1457 preserve(s), you must document a complete chain of custody. A
1458 proper chain of custody will ensure that no material changes,
1459 alterations or modifications were made while the evidence was
1460 handled. Chain of custody documentation must indicate where
1461 the media has been, whose possession it has been in, and the
1462 reason for that possession.

1463 **IV. Electronic and Manually Data/Records Created After This**
1464 **Letter.** For any electronic and manually created data after this
1465 letter or for any electronic processing systems used after this
1466 letter, you must take the proper steps to avoid destroying
1467 potentially relevant evidence. This includes following the above
1468 preservation protocols.

1469
1470 **Compliance with your preservation obligations includes**
1471 **forwarding a copy of this letter to all individuals or organizations**
1472 **that are responsible for any of the items referred to in this letter.**
1473 **If this correspondence is in any respect unclear, please call me**
1474 **immediately.**

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Take due notice thereof and govern yourself accordingly.

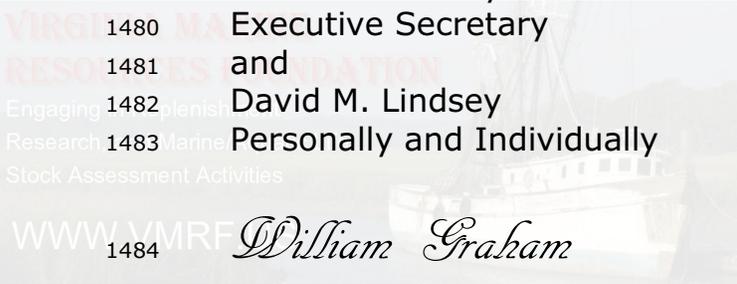
1475

1476 Thank you for your assistance.

1477 Sincerely,

1478 *David M. Lindsey*

1479 David M. Lindsey
1480 Executive Secretary
1481 and
1482 David M. Lindsey
1483 Personally and Individually



1484 *William Graham*

1485 William Graham
1486 Civil Rights Case Manager
1487 and
1488 William Graham
1489 Personally and Individually

1490 *Joshua Thompson*

1491 Joshua Thompson
1492 Civil Rights Case Manager
1493 and
1494 Joshua Thompson
1495 Personally and Individually

1496 *Michal Bogacki*

1497 Michal Bogacki
1498 Civil Rights Case Manager
1499 and
1500 Michal Bogacki
1501 Personally and Individually



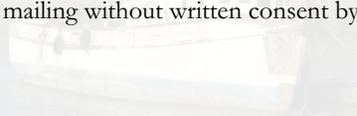
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1502 *Douglas Buckley*
1503 Douglas Buckley
1504 President
1505 and
1506 Douglas Buckley
1507 Personally and Individually

1508 ☒ P. O. Box 1224 / Parksly / Virginia / 23461-1224 / ☎ 757 - 818 - 8003

1509 *Disclaimers: [1]Regarding Electronic Signature: If this communication concerns the negotiation of a contract or
1510 agreement, electronic signature rules do not apply to this communication: [2] contract formation in this matter shall
1511 occur only with manually-affixed original signatures on original documents. [3] No negotiations respecting any item
1512 (including repairs), such as talking about that/any item (s)or securing estimates for same shall not in any way
1513 obligate The Virginia Marine Resource Foundation [VMRF] to that item or repair(s) discussed, nor shallVMRF or
1514 its Client be held liable for any damage(s)for failure not to include/honor the same unless obligated to do so by the
1515 terms set forth in a contract negotiated by the parties with the aforesaid manually affixed signatures. The foregoing
1516 comments are copyright © MMXV VMRF and may not be copied, redistributed, extracted from, or recirculated
1517 outside of this mailing without written consent by VMRF

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