



VIRGINIA FREEDOM OF INFORMATION ADVISORY
COUNCIL

COMMONWEALTH OF VIRGINIA

AO-37-01

August 6, 2001

Mr. John Baulis
San Anselmo, California

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence of May 18, 2001.

Dear Mr. Baulis:

You have asked whether a Florida company may access "proof of coverage" information from the Virginia Workers' Compensation Commission ("the Commission") under the Virginia Freedom of Information Act (FOIA). You indicate that proof of coverage generally includes information such as name and address of the employer, the employer class code or Standard Industry Classification code, the number of employees, the current insurer, and the insurance policy effective date or renewal date. When you requested this information, the Commission responded that such information was collected by and in the custody of a third party vendor, and as a result that the Commission was not the custodian of those records. You ask whether the Commission is required to provide you with this information under FOIA.

FOIA requires that *[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth*. Therefore, the Commission need not provide public records to out-of-state citizens or corporations. However, because of the likelihood of an out-of-state corporation getting a Virginia citizen to make the request for it, which would require the public body to respond under FOIA, this opinion will analyze the substantive question that you have asked.

As the Commission noted in response to your request, subsection B of § 2.1-342 requires that *[a]ny public body which is subject to [FOIA] and which is the custodian of the record shall respond to a request for records*. The Commission relied on the fact that it did not have physical custody of the requested records in asserting that it was not the custodian, and thus declined to provide the records. FOIA does not define what it means to be the custodian of a record. According to statutory construction rules, in the absence of a statutory definition, a term is considered to have its ordinary meaning, given the context in which it is used.¹ The policy of FOIA at § 2.1-340.1 dictates that *[t]he provisions of the chapter shall be liberally construed to promote an increased awareness by all persons of governmental activity*. These two principals must be used to determine what it means for a public body to be the custodian of a record.

The term "custodian" is defined in the dictionary as *one in charge of something*.² In the context of FOIA, the term is used when accessing public records held by a public body. FOIA defines public records at § 2.1-341 as *all writings and recordings ... prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business*. (Emphasis added.) Construing the ordinary use of the term "custodian" in this context, in light of the liberal construction required by FOIA, it appears that a public body

can be a custodian in a broader sense than just having physical possession of a document. In the instant case, all Virginia employers must secure workers' compensation liability insurance and file proof of coverage with the Commission pursuant to § 65.2-804. Thus, while the Commission has chosen to contact a third-party vendor to collect this data for it, the documents that you request would appear to contain the type of information that § 65.2-804 requires the Commission to maintain. Because the Commission is statutorily mandated to collect the information, it would remain *in charge of* these documents, to refer back to the ordinary meaning of the term "custodian." As such, the Commission is the legal, if not the physical, custodian of the records.

The definition of a public record further supports this interpretation. The use of the word "or" in describing a public record *prepared or owned by, or in the possession of a public body* indicates that physical possession of a document by a public body is not the only criterion for determining whether or not it is accessible by the public. The definition indicates that a record that a public body owns, but is not in physical possession of, may still be a public record subject to public access under FOIA. In addition, the definition of a public record indicates that a record in the possession of an agent of a public body would likewise be accessible under FOIA. In the instant case, the third-party vendor is acting as an agent for the Commission, because the Commission has delegated its statutory duty to collect proof of coverage to the third-party. Thus, records relating to the proof of coverage by Virginia employers are owned by the Commission, and in the possession of the Commission's agent. In applying this broad definition of a public record in conjunction with the use of the term "custodian," it becomes clear that "custodian" must have a broader application than just physical possession in order to effectuate the purpose and policy of public access behind FOIA, and more specifically, the definition of a public record. The scope of the term "custodian" has a broader application than just physical possession of a document.

The Attorney General of Virginia has issued one opinion addressing access to records collected for a state agency by a private party.³ In that opinion, the Department of Tourism wished to compile business and sales statistical data from travel attractions and facilities around the state. The businesses were concerned that confidential data provided to the Department of Tourism used to compile the statistics would be subject to public access under FOIA. The Department of Tourism asked if such records would remain private if it contracted with a private entity to compile the data. The Attorney General opined that the data maintained by the private entity would not be subject to disclosure unless it was submitted to the Department of Tourism. This Attorney General's opinion is distinguishable from the situation at hand, however. In the Attorney General's opinion, the Department of Tourism was not obligated under law to create such a report; instead it was used as one tool by the Department to aid in promoting tourism in the Commonwealth. In the instant case, the Commission is required by law to collect certain information concerning employers in Virginia. By choosing to utilize the services of a third-party vendor, the Commission has delegated its statutory duty and authority to collect such information, but ultimately under the law the Commission retains responsibility for ensuring that the information is collected. How it chooses to go about that collection is up to the Commission, but it cannot escape the requirements of FOIA by choosing to allow a third-party to maintain the information for it.

As can be seen from the discussion, the data collected from employers relating to proof of coverage is a public record of the Commission. As such, FOIA requires that such records must be open for inspection and copying *unless otherwise specifically provided by law*. Thus, the Commission may only withhold these records if a statutory exemption applies, and not on the grounds that it is not the custodian. Upon review of the exemptions set forth in both FOIA and Title 65 relating to Workers' Compensation, there does not appear to be an exemption that would apply to proof of coverage information provided by employers to the Commission. Thus, regardless of whether the Commission itself maintains this information or whether it delegates the task to another entity, the Commission must provide documents containing such information to requesters under FOIA. While not the physical custodian of the records, the Commission remains the legal custodian by virtue of the fact that it owns the records that are maintained by its agent.

Again, however, subsection A of § 2.1-342 only requires that public bodies open public records for inspection and copying to citizens of the Commonwealth. Because the requester is not a citizen of the Commonwealth, the Commission need not provide the requested records as discussed at the beginning of this opinion.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

¹ *Commonwealth Department of Taxation v. Orange-Madison Coop. Farm Service*, 220 Va. 655, 261 S.E. 2d 532 (1980); 1991 Op. Atty. Gen. Va. 413; 1986-87 Op. Atty. Gen. Va. 174; see generally Norman J. Singer, Statutes and Statutory Construction, 6th ed., § 46:01.

² The American Heritage College Dictionary (3d ed. 1993).

³ 1983-84 Op. Atty. Gen. Va. 439.