



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

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March 13, 2013

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 our telephone conversations, your letters, your electronic mail, and your facsimiles from January through March, 2013.

Dear

You have inquired regarding whether certain volunteer organizations that help with public school functions are public bodies subject to the Virginia Freedom of Information Act (FOIA), and whether certain records held or prepared by these volunteer organizations are public records subject to FOIA. To briefly summarize the facts, you have described how a volunteer band booster group helps in arranging for school trips for Fairfax County Public Schools (FCPS), and often collects fees and handles the finances for such trips. You indicated that the group collects money for the trips, informs teachers of which students had paid and which had not, and keeps related financial records on a booster group member's personal computer. You stated that you had asked FCPS for copies of financial records regarding such trips and were told that the school division itself did not have the records you sought, so you would have to get them from the booster group. However, you noted that the booster group was a volunteer organization, not a public body subject to FOIA. You refused to accept the response from FCPS in denial of your request, asserting that because the trips in question were school-sponsored trips related to the school curriculum, the school should have records of the trips and those records should be publicly accessible. It appears that you have had a great deal of interaction with the schools on this matter over the course of approximately two years. You stated that over this course of time, the school system has provided you with what records it has, and is taking steps to ensure better record keeping in the future. Further factual background will be presented as needed below. ← no

The policy of FOIA expressed in § 2.2-3700 is to ensure *the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees....The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.* The term *public record* is defined in § 2.2-3701 to mean *all writings and recordings ... 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. Records that are not prepared for or used in the transaction of public business are not public records.* Section 2.2-3704 requires *[a]ny public body that is subject to this chapter and that is the custodian of the requested records* to respond to a request for records, and sets out the procedure for doing so.¹

While FOIA requires the custodian of records to respond to requests, FOIA does not define the term *custodian*. In considering a situation where a public body had a statutory duty to maintain records, but a third party had actual physical custody of the records, this office opined as follows:

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. The policy of FOIA at [former § 2.1-340.1, now § 2.2-3700] 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. In the context of FOIA, the term is used when accessing public records held by a public body. FOIA defines public records at [former § 2.1-341, now § 2.2-3701] 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. 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.... Because the [public body] 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 [public body] is the legal, if not the physical, custodian of the records.²*

¹ It is not necessary to go into the details of the procedural requirements of FOIA for purposes of this opinion, as you did not allege any specific FOIA procedural errors or violations. To the extent you have alleged any procedural violations, they concern regulatory compliance, not FOIA.

² Freedom of Information Advisory Opinion 37 (2001)(internal footnotes omitted; emphasis in original).

← what?

Therefore, in examining the situation you present, we must look to whether the school system has a legal duty to maintain the records you seek.

You provided copies of various school regulations related to financial record keeping and volunteer programs. One such regulation follows regulations of the Virginia Board of Education and defines *school activity funds* to mean *all funds received from extracurricular school activities*.³ Another section of the same regulation goes on to state that the *responsibility of safeguarding, accounting for, and managing the school activity funds rests solely with the principal. The duties that must be performed in providing proper management and security may be delegated to the degree desired by the principal, but the responsibility shall remain with the principal*.⁴ The regulation goes on to describe specific financial management, audit and record keeping practices, including five-year retention requirements. The regulation also states as follows:

*All funds derived from cooperative school activities, such as all athletic events, sales drives, etc., which involve school personnel, students, and school property, are defined by the Virginia Board of Education as school activity funds. Except as outlined below, such activities must be accounted for in the school activity fund records.*⁵

It goes on to state that booster clubs and other volunteer organizations *are separate activities with individual financial records and not school organizations. Therefore, there is no requirement that activities of such groups be accounted for in the school activity fund account structure*.⁶ The regulation subsequently sets forth a provision that distinguishes between *supported* activities and *sponsored* activities:

Funds raised by school activities supported but not sponsored by PTAs and booster groups are defined as school activity funds and must be receipted into the school activity fund records.

(1) *To support is to provide assistance to a school or activity within the school (e.g., athletic program) without, in any way, controlling or directing any aspect of the activity being supported.*

(2) *To sponsor an activity is to accept full responsibility for controlling and managing the activity, to include purchasing; selling; accounting; paying all obligations; and complying with all federal, state, and local laws and ordinances.*⁷

³ Fairfax County Public Schools Regulation 5810.7 (2005)(I note that you indicated these regulations are either still current or substantially the same as current regulations).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Finally, you also provided a copy of another regulation concerning supervision of school volunteer programs:

School Board employees are responsible for the administration of the schools and the instructional program, and this responsibility cannot be delegated. School system administrators and program managers are responsible for the administration of the volunteer programs in their respective schools and offices and for ensuring that volunteers comply with School Board policy and regulation. School volunteers are directly supervised and overseen by principals, program managers, teachers, and/or other school system staff members; the volunteers do not have primary responsibility for the assistance they provide.

While this office has no authority to opine on school regulations or to interpret their content, it appears on the face of these regulations, without further interpretation, that the school has a duty under the regulations promulgated by the School Board to maintain the financial records you seek as they pertain to activities *supported* by the booster group. The distinction between *supported* and *sponsored* activities is very important in this context, as it appears that the school only has a duty regarding *supported* activities. While such duty to maintain records of *supported* activities is regulatory in nature rather than statutory,⁸ the reasoning to be applied is the same as when a public body has a statutory duty to maintain records: the public body remains the legal custodian of such records even when it does not have physical possession of them.

By contrast, note that *sponsored* activities, as defined in the regulation quoted above, would appear to be wholly and solely the responsibility of the booster group or other volunteer organization sponsoring them. *Sponsored* activities, and the records pertaining to such activities, appear to be separate and distinct from *supported* activities, because the school is not involved in *sponsored* activities. It appears that to the extent the booster group *sponsors* an activity, it does so entirely in its capacity as a private organization, not in conjunction with the school system. Furthermore, it does not appear that the school system has any legal responsibility to maintain records regarding such *sponsored* activities. Thus the school system would not be the custodian of records for such *sponsored* activities.

Finally, I would note that rather than problems with FOIA compliance, it appears that the difficulties you have encountered stem from failure to comply with the school's own regulations regarding financial records, and perhaps a failure of communication between the school and the various volunteer groups. You also related that the school is currently working on entering memoranda of understanding with the booster group and

⁸ While it is outside the scope of FOIA, note that pursuant to § 22.1-78, a School Board has the statutory authority to *adopt bylaws and regulations, not inconsistent with state statutes and regulations of the Board of Education, for its own government, for the management of its official business and for the supervision of schools.* See also §§ 22.1-88 through 22.1-124 regarding school boards' powers and duties regarding school funds, relevant management practices, record retention, and other provisions.

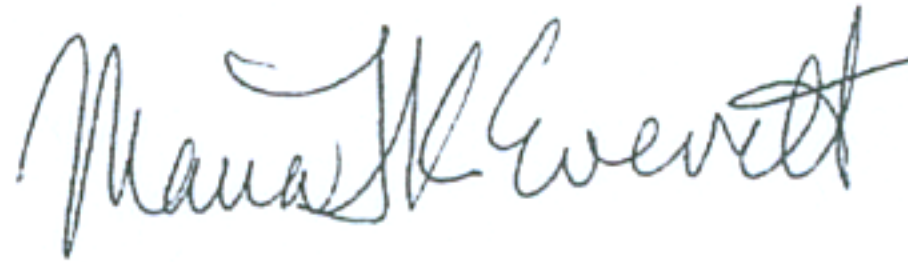
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other various volunteer groups, as well as revising the relevant regulations in order to ensure future compliance.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Maria J.K. Everett". The signature is fluid and cursive, with the first name "Maria" being the most prominent part.

Maria J.K. Everett
Executive Director



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.

**VIRGINIA FREEDOM OF INFORMATION ADVISORY
COUNCIL**

COMMONWEALTH OF VIRGINIA

AO-10-08

October 29, 2008

Jennifer Daniels
Annandale, Virginia

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 electronic mail of September 8, 2008.

Dear Ms. Daniels:

You have asked whether certain records of the Annandale Neighborhood Center (the Center), a local community center, are public records subject to disclosure under the Virginia Freedom of Information Act (FOIA). You indicated that Fairfax County (the County) provides funding to Alternative House, a 501(c)(3) nonprofit organization, to run the Center. You point out that the Center is listed on the County's website as a *Public-County* type of organization.¹ You stated that approximately 95% of the Center's funding comes from the County, and that the Center is located on land owned by Fairfax County Public Schools. You further related that approximately 60% of Alternative House's budget comes from federal, state, and local funding, based on publicly disclosed tax filings from 2005. You related that you requested copies of the sign-in sheets for two events held at the Center that were open to the public, an open house for community members and service providers, and an "Annandale Friends Coalition" meeting of local service providers. You indicated that you were initially told that these were not public documents. After you responded that they were indeed public records, the matter was referred to the County grant administrator. Your request was again denied; you were informed that the sign-in sheets had the names of all persons entering the facility, not just those attending the events in question, and that *due to the type of services provided, release of the facility sign-in-sheet would violate individual privacy*. You further indicated that your initial request was directed to the Center, but Alternative House staff referred you to the County. It appears that the County Attorney's office then informed you that Alternative House, as a contractor with the County, would not necessarily be considered a public body subject to FOIA. You then ask whether the records of a community center funded by the County that serves a public purpose should be considered public records subject to FOIA.

First, it appears that there may be some confusion regarding Alternative House, the Center, their relationship with each other, and their relationship with the County. The County website that lists the Center as a *Public-County* organization² also lists Alternative House as a *Private-Nonprofit organization*.³ The website also lists different administrators, different addresses, and different contact information for the Center and Alternative House. Alternative House is described as operating a crisis shelter and hotline for teens and providing programs for teens at various Family Resource Centers in Fairfax.⁴ The equivalent description of the Center states that *Fairfax County Government and Fairfax County Public Schools have partnered to open a Neighborhood Center in Annandale....the Center is operated by Alternative House*.⁵ Based upon the information you provided and the information on the County website, it therefore appears that Alternative House is a private nonprofit organization that provides services for at-risk teens to the County on a contractual basis, among other activities. Based upon the same information, the Center is a community center facility created by the County and the Fairfax County Public Schools (the County

Schools), which is run by Alternative House by contract with the County. The terms of the contract were not presented.

FOIA defines a *public body* to include not only traditional government entities such as state agencies, local governments, and school boards, among others, but also *other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds*. This office has previously opined that each such entity must be examined on a case-by-case basis, but as a general rule of thumb, an entity that receives two-thirds or more of its funding from public sources would be considered *supported...principally by public funds*.⁶ Alternative House is listed as a *Private-Nonprofit* organization, and you indicated it receives approximately 60% of its funding from local, state, and federal sources. Based on the characterization of Alternative House as a *contractor* by the County Attorney's office, it appears that at least some of that money is received pursuant to contract, rather than as a government appropriation or through government largesse. As previously opined by this office, money received from competitive contracts or grants is generally not to be considered *public funds* when determining whether an entity is a *public body* subject to FOIA.⁷ If such monies were considered *public funds*, it would have a chilling effect on the willingness of private companies to contract with government, as it would require them to open their records to public scrutiny solely because they entered into a contract with government. As expressed in § 2.2-3700, FOIA was enacted to ensure *the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted*. Opening private company records to public scrutiny in this manner would impair government's ability to contract without furthering those stated goals of FOIA. When a public body contracts with a private entity, contract records can be obtained from the public body. In that fashion, the public can be apprised of what government is doing and how the taxpayers' money is being spent, without needlessly opening the records of private entities to public scrutiny. Additionally, in the case of tax-exempt entities, it appears that federal law requires public disclosure of certain financial information.⁸ In this instance, it appears that Alternative House is a private nonprofit corporation that contracts with government; approximately 60% of its budget comes from government sources, but it is unclear how much of that is under the terms of the contract with the County. Stated differently, something less than two-thirds of Alternative House's budget comes from public sources, information on its finances is available through its publicly disclosed IRS filings, and information on its contractual agreement(s) with the County would be available through the County. Given this factual background, it appears that Alternative House is not *supported wholly or principally by public funds*, and is not a *public body* subject to FOIA.

Turning next to the definition of *public record* in § 2.2-3701, it includes *all writings and recordings...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*. Alternative House itself may not be a public body, but if it is acting as an agent of the County in conducting the Center's programs, then records it prepares, owns, or possesses concerning that public business also would be public records.⁹ Similarly, any records held by the County concerning the transaction of public business - including the business of the Center - would also be *public records* subject to FOIA. Therefore, it appears that the sign-in sheets you requested concerning the events held by the Center would be public records concerning the transaction of the Center's public business. In other words, the sign-in sheets are *public records* because they are prepared, possessed, and owned by a public body (the County) or its agent (Alternative House) in the transaction of public business (operating programs at the Center). Therefore under FOIA, those records are subject to disclosure upon request, unless an exemption applies.

You stated that you were informed that the sign-in sheets had the names of all persons entering the facility, not just those attending the events in which you were interested, and that *due to the type of services provided, release of the facility sign-in-sheet would violate individual privacy*. While this statement may be true, standing alone, it does not comply with the procedural requirements of FOIA. Subdivisions B 1 and B 2 of § 2.2-3704 address the

procedural requirements when a request is denied in whole or in part, respectively. In either case, the denial must be in writing and it must *identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records*. If the request is denied entirely, the denial must also identify the volume of the withheld records. It is possible that there are exemptions that may apply to portions of the sign-in sheet, however, it does not appear that any exemptions were cited or that the subject matter or volume of the withheld records was identified. As such, the response appears, at best, to be incomplete.

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

Sincerely,

Maria J.K. Everett
Executive Director

¹The Center is listed on the Fairfax County website at <http://www.fairfaxcounty.gov/rim/organizationdetail.asp?stringName=ANNANDALE+NEIGHBORHOOD+CENTER&Orgsrn=2047> (last visited October 23, 2008).

²*Id.*

³Alternative House is listed on the Fairfax County website at <http://www.fairfaxcounty.gov/rim/organizationdetail.asp?stringName=ALTERNATIVE+HOUSE&Orgsrn=215> (last visited October 23, 2008).

⁴*Supra*, n.1.

⁵*Supra*, n.3.

⁶*See*, e.g., Freedom of Information Advisory Opinions 07 (2007), 09 (2005) and 36 (2001).

⁷*See* Freedom of Information Advisory Opinions 07 (2007), 07 (2006), 28 (2004), and 6 (2004).

⁸While federal tax matters are outside the purview of this office, the Internal Revenue Service (IRS) provides an overview of what tax information an exempt entity must disclose publicly on the IRS website at <http://www.irs.gov/charities/article/0,,id=135008,00.html> (last visited October 22, 2008).

⁹*See* Freedom of Information Advisory Opinion 19 (2003)(addressing the determination of whether an entity is acting as the agent of a public body).