

OP. NO. 03-101

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS – FEES.

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Circuit court clerk is not required to produce records from electronic database in tangible medium that is not used in regular course of business. If clerk has ability to produce requested information in proper medium and format, charge for reproduction must be reasonable and should not exceed actual costs incurred.

The Honorable Charles V. Mason
Clerk, Circuit Court of King George County
February 2, 2004

Issues Presented

You ask two questions related to The Virginia Freedom of Information Act. First, you ask whether a clerk of the circuit court must reproduce digital images contained in an electronic database on a compact disc, if so requested, when the clerk does not regularly use such format and has no capacity to make such copies. Second, you ask what amount the circuit court clerk must charge for the requested material.

Response

It is my opinion that a clerk of the circuit court is not required to produce records from an electronic database in a tangible medium that is not used in the regular course of business. If a circuit court clerk has no capacity to reproduce requested records onto the requested medium, the clerk may not be considered to regularly use such medium in the course of business. It is further my opinion that if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

Background

You relate that the clerk of the King George County Circuit Court stores land records and certain other public information on computers in digital format. Such records in the clerk's office are accessible by the public on computer terminals at fifty cents per printed page. The computer terminals are not capable of producing copies in any digital format.

Further, the clerk does not store records in any other digital format or database. The clerk's office does not regularly use, create or maintain compact discs for its public databases. You have received a request under The Virginia Freedom of Information Act requesting copies of all land records in digital format. You relate that the clerk's office has no staff or capacity to copy the records or produce

them on compact discs, and that there is no funding to hire an outside computer technician to produce the requested information.

Applicable Law and Discussion

Sections 2.2-3700 through 2.2-3714 comprise The Virginia Freedom of Information Act. Section 2.2-3704(A) provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records." A 2002 opinion of the Attorney General concludes that there is a presumption of openness of court records that has its origins in the common law, and that Virginia statutory law creates a presumption of openness with regard to requests for court records in digital format.¹ The 2002 opinion further concludes that The Virginia Freedom of Information Act and § 17.1-208 impose a duty on circuit court clerks to furnish copies of records requested by a citizen, without distinction between paper and digital formats, provided that the records are not sealed by court order or otherwise exempt from disclosure by law.²

Section 2.2-3704(G) provides that "[p]ublic records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F." Section 2.2-3704(G) further provides, in part:

Public bodies *shall produce* nonexempt records maintained in an electronic database *in any tangible medium identified by the requester*, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, *if that medium is used by the public body in the regular course of business*. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs.
[Emphasis added.]

You first ask whether a clerk of the circuit court must produce a digital format that is not regularly used by the clerk's office or that is not within the capacity of that office to produce. Specifically, you have been asked to produce a copy of a digital database on a compact disc. You indicate that you do not have the capacity to create compact discs in your office.

The clerk of the circuit court is a "public body" subject to The Virginia Freedom of Information Act.³ Records of the clerk's office include those electronic records "prepared or owned by, or in the possession of ... its officers, employees or agents in the transaction of public business."⁴ Section 2.2-3704(G) requires public bodies to produce records from an electronic database "in any tangible medium identified by the requester, ... if that medium^[5] is used by the public body in the regular course of business." A compact disc is a tangible medium that stores information. You state that your office does not have the capability to copy information onto a compact disc. Therefore, if such medium is not used by your office in the regular course of business, you are not required to produce the requested information on that medium.⁶

To the extent a public body is asked to reformat the data in a database, the plain language of § 2.2-3704(G) states that a public body is not required "to produce records ... in a format⁷ not regularly used by the public body." The public body, however, is required to "make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs."⁸ Consequently, a clerk is required to make a reasonable effort to accommodate a request for a format it does not regularly use.⁹ The payment of "reasonable costs" by the requester may include the procurement of a computer technician to make the requested copy if the clerk does not have the capability of producing the requested format and the requester is willing to pay for the services of such technician.

You next inquire concerning the amount the circuit court clerk must charge for copies if he is able to produce the requested records in the proper medium or format. Section 2.2-3704(F) allows "[a] public body [to] make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Moreover, "[a]ny duplicating fee charged by a public body shall not exceed the actual cost of duplication."¹⁰

Section 17.1-275(A), however, specifically provides:

A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees:

....

8. For making out a copy of any paper or record to go out of the office, which is not otherwise specifically provided for, a fee of fifty cents for each page.

Section 2.2-3704(G) provides that a public body may charge "a reasonable cost" to make a copy of a computer database, "not to exceed the actual cost in accordance with subsection F." Section 2.2-3704(F) generally authorizes "reasonable charges" for duplicating an electronic database and limits such charge to the "actual cost" of duplication. As such, § 2.2-3704(F) specifically authorizes a charge to produce this particular record. Therefore, the fifty-cents-per-page charge authorized by § 17.1-275(A)(8) is inapplicable by its express terms.

"A digital database is not identified by the number of pages it contains; instead, a digital database is a set of data that may be copied and transferred from one computer to a computer disk or other storage medium."¹¹ In this instance, the electronic database contains digital images of paper records. Those images are stored as files in the database. Consequently, if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

I note, that § 2.2-3704(G) allows the requester and public body to agree on a charge for the requested information to be manipulated into a format usable to the requester. Although such a procedure is entirely different from actually producing the copy of the information requested, it is a charge that is nonetheless authorized under § 2.2-3704(G), provided that the requester agrees to payment for the reformatting.

Conclusion

Accordingly, it is my opinion that a clerk of the circuit court is not required to produce records from an electronic database in a tangible medium that is not used in the regular course of business. If a circuit court clerk has no capacity to reproduce requested records onto the requested medium, the clerk may not be considered to regularly use such medium in the course of business. It is further my opinion that if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

¹2002 Op. Va. Att'y Gen. 9, 12.

²*Id.* at 12.

³Va. Code Ann. § 2.2-3701 (LexisNexis Supp. 2003) (providing in definition of "public body" that "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").

⁴Section 2.2-3701 (defining "public records").

⁵The word "medium" is defined as "something through or by which something is accomplished, conveyed, or carried on." Webster's Third New International Dictionary of the English Language Unabridged 1403 (1993). Examples of computer storage mediums include compact discs, floppy disks, hard discs, and magnetic tapes.

⁶I note, however, that § 2.2-3704(G) also requires public bodies to produce "records maintained in an electronic database" by "posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business." Therefore, if you are requested to provide such information via the Internet by uploading a file and e-mailing it to the requestor, and you use e-mail in the regular course of your business, then § 2.2-3704(G) requires you to provide such information in this manner. Given the size of certain computer files and restrictions of your Internet service provider, however, it may be impossible to comply with a request in this manner.

⁷The word "format" is defined as a "general plan of physical organization or arrangement." Webster's Third New International Dictionary of the English Language Unabridged, *supra* note 5, at 893. "Format" is also defined in the computing context as "a defined structure for holding data, etc., in a record for processing or storage." The Oxford American Dictionary and Language Guide 380 (1999). Examples of file formats include rich text, plain text, pdf, gif, or jpeg.

⁸Section 2.2-3704(G) (LexisNexis Supp. 2003).

⁹Section 2.2-3704(G) attempts to weigh the interests of the public in having access to electronic records against the responsibility of a public body to use its

limited resources for the common benefit of all citizens. This language imposes an obligation to make reasonable accommodation in providing reformatted records. Accordingly, a public body must make a determination whether the effort in providing the information requested in a format not regularly used by the public body is "reasonable." "In ordinary use and common acceptance, the word 'reasonable' means 'fair; just; ordinary or usual; not immoderate or excessive; not capricious or arbitrary.' It means what is 'just, fair and suitable under the circumstances.'" *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 317-18, 110 S.E.2d 525, 530 (1959) (citations omitted). This requires the application of the reasonableness standard to the particular circumstances of the public body in the context of the request and available technology. Accordingly, § 2.2-3704(G) places a burden on the public body to establish that the refusal to provide reformatted records is reasonable under the circumstances.

¹⁰Section 2.2-3704(F) (LexisNexis Supp. 2003).

¹¹Va. Freedom of Info. Adv. Op. 21-03 (2003), *available at* http://dls.state.va.us/groups/foiacouncil/ops/03/AO_21_03.htm.

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