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# Retention & Use of Public Records

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Grady A. Palmer, Esq.  
Poole Mahoney PC

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Stephen C. Piepgrass, Esq.  
Troutman Sanders LLP

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Dana English Sanford, Esq.  
Deputy City Attorney  
City of Chesapeake, Virginia

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## **I. The Law Regarding Retention, Maintenance and Disposal of Public Records**

### **A. Virginia Public Records Act**

#### **1. Purpose**

The Virginia Freedom of Information Act (“VFOIA”), Virginia Code § 2.2-3700 *et. seq* does not specify which public records should be preserved and which may be destroyed. Instead, records retention is addressed in the Virginia Public Records Act (“VPRA” or the “Act,” in this section), Virginia Code § 42.1-76, *et seq.* which vests “ownership and administrative control of [public] records on behalf of the Commonwealth” with the Library of Virginia. *See* Va. Code § 42.1-79.

The VPRA was enacted in 1976. The General Assembly’s stated purpose was “to establish a single body of law applicable to all public officers and employees on the subject of public records management and preservation and to ensure that the procedures used to manage and preserve public records will be uniform through the Commonwealth.”

#### **2. Definition of “Public Record”**

Virginia Code § 42.1-77 defines “public record” as “recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction or public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.”

The definition also states that “ ‘public record’ shall not include nonrecord materials, meaning materials made or acquired and preserved solely for reference use or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications.”

#### **3. Regulation and Administration**

The State Library Board (the Board) is responsible for issuing guidelines and regulations that “shall mandate procedures for records management and include recommendations for the

creation, retention, disposal, or other disposition of public records.” Virginia Code § 42.1-82(A)(2).

The Library of Virginia (“LVA”) administers the records management program consistent with the Board’s regulations and guidelines. The LVA “shall establish procedures and techniques for the effective management of public records, make continuing surveys of records and records keeping practice, and recommend improvements in current records management practices, including the use of space, equipment, software, and supplies employed in creating, maintaining, and servicing records.” Va. Code § 42.1-85(A).

#### 4. Notice Responsibilities of Local Government Attorneys or Administrators

Section 42.1-76.1 requires that any person elected, reelected, appointed, or reappointed to the governing body of any local government board, commission, department, division, institution, authority, or part thereof (i) be furnished by the public body’s administrator or legal counsel with a copy of the Act within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the Act’s provisions.

#### 5. The LVA’s Local Government Records Management Requirements in a Nutshell

- a. Identify public records.
- b. Maintain a records management program.
- c. Designate at least one records officer to serve as a liaison to the LVA for purposes of implementing and overseeing the program and coordinating legal disposition of obsolete records.
- d. Ensure the safety and accessibility of electronic records.
- e. Destroy records that have reached the end of their designated retention period.

More detailed information regarding LVA Records Management requirements is found in Part II.

## 6. Retention of Public Records

Virginia Code § 42.1-85(B) requires each locality to ensure “that its public records are preserved, maintained, and accessible throughout their lifecycle, including converting and migrating electronic records as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration. Any public official who converts or migrates an electronic record shall ensure that it is an accurate copy of the original record. The converted or migrated record shall have the force of the original.”

The VPRA requires custodians of public records to store public records in “fire-resistant, environmentally controlled, physically secure rooms designed to ensure proper preservation and in such arrangement as to be easily accessible.” *See* Va. Code § 42.1-87.

All current public records must be stored in buildings where they are ordinarily used, and agencies must consult with the Library of Virginia to determine long-term storage and archiving of public records. *Id.* Based on this requirement, the Attorney General of Virginia has advised that records of a county treasurer must be located in the same building as the county treasurer’s office and maintained in keeping with the disposition schedule established for treasurers by the Library of Virginia. *See* 2013 Op. Va. Att’y Gen. 12-052.

## 7. Disposition of Public Records

Virginia Code § 42.1-86.1 contains a number of prohibitions on disposing of public records. Specifically, no local government shall:

- a. Sell or give away public records.
- b. 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 records 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, or

renegotiation of the relevant records retention and disposition schedule pending at the expiration of the retention period for the applicable records series.

- c. Destroy any public record created before 1912 without first offering it to the LVA. *See* Va. Code § 42.1-86.1.
- d. Local governments shall ensure that records created after July 1, 2006 and authorized to be destroyed or discarded are in fact destroyed or discarded in a timely manner in accordance with the provisions of the Act and the LVA's requirements. However, note that records containing the following identifying information must be destroyed within six months of the expiration of the records retention period:
  - (i) social security numbers;
  - (ii) driver's license numbers;
  - (iii) bank account numbers;
  - (iv) credit or debit card numbers;
  - (v) personal identification numbers;
  - (vi) electronic identification codes;
  - (vii) automated or electronic signatures; or
  - (viii) passwords.

#### 8. Compliance and Enforcement

The Act contains no civil or criminal penalty or enforcement provisions. Virginia Code § 42.1-90.1 authorizes the Librarian of Virginia to conduct an audit of the records management practices of local governments, which must cooperate with the Librarian in any such audit. The Librarian must prepare a written summary of the audit findings, which shall be a public record.

Before a state agency or locality can destroy public records, the public body must designate a "records officer" by filing a Records Officer Designation and Responsibilities (RM-25) form with the Library of Virginia. Once the requisite time has elapsed, both the

designated “records officer” and an approving official must sign a Certificate of Records Destruction (RM-3 Form).

## **B. Government Data Collection and Dissemination Practices Act**

Apart from the VPRA and VFOIA (the latter of which is largely outside the scope of this presentation), there is a third statute that has a significant bearing on access and maintenance of electronic data by state agencies: The Government Data Collection and Dissemination Practices Act (“Data Act”), Va. Code § 2.2-3800 *et seq.*

The Data Act is focused mainly on protecting and preventing unauthorized access to “personal information” about citizens that is stored on government computers and computer systems.<sup>1</sup>

The Supreme Court of Virginia has stated that “[t]he purpose of the [Data] Act is to provide standards which a government agency must follow in the operation of personal information systems.” *See Carraway v. Hill*, 265 Va. 20, 23, 574 S.E.2d 274, 276 (2003).

### **1. Obligations of Government Entities Under the Data Act**

Virginia Code § 2.2-3803 outlines the specific obligations of any government entity which employs an information system. The law requires public bodies to properly categorize and accurately maintain all electronically stored personal information. *See* Va. Code § 2.2-3803(A). This section also governs the dissemination of information to other electronic systems and requires agencies to enact safeguards to protect data from foreseeable security

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<sup>1</sup> Virginia Code § 2.2-3801 defines “*personal information*” as:

all information that (i) describes, locates or indexes anything about an individual including, but not limited to, his social security number, driver's license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or (ii) affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution. “Personal information” shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information.

threats. *Id.*

Government entities must retain a record of each time that personal data covered by the Data Act has been accessed, and such records must be preserved for a period of three years. Va. Code § 2.2-3803(A)(7).

The Data Act also requires every public body which maintains a website to develop an internet privacy policy and to share this policy with the public. *See* Va. Code § 2.2-3803(B).

It is unlawful for an agency to require any individual to provide his social security number, which has not previously been disclosed “for any purpose in connection with any activity, or to refuse any service, privilege, or right to an individual” who does not disclose his social security number. Va. Code § 2.2-3808(1). It is also unlawful for any agency to collect a person’s social security number unless doing so is: (1) authorized or required by federal or state law; and (2) necessary for the performance of the agency’s duties. *Id.* § 2.2-3808(2).

## 2. Public right to access data

Under the Data Act, with certain limited exceptions, data subjects may request to inspect (a) all personal information about themselves; (b) the nature and source of that information; and (c) (except where it would jeopardize law-enforcement action) the identity of those persons who have accessed that personal information (other than those who access the information in the ordinary course of their business). Va. Code § 2.2-3806(3).

The procedure for requesting and disclosing information under the Data Act is similar to VFOIA. *See* Va. Code § 2.2-3806(4).

If a data subject identifies an error in the data collected about him, he then permitted to challenge, correct or explain why such information is inaccurate. The government body is required to investigate and correct or purge any data that is incorrect. If this does not resolve the dispute, the data subject may submit a statement setting forth his position, which must be supplied to prior and subsequent recipients of the data in question. Va. Code § 2.2-3806(5).



### 3. Remedies for Violations of the Data Act

Any aggrieved person may initiate a proceeding for injunction or mandamus for violations of the Data Act. Va. Code § 2.2-3809. If an aggrieved party is successful, “the agency enjoined or made subject to a writ of mandamus by the court shall be liable for the costs of the action together with reasonable attorneys’ fees as determined by the court.” *Id.*

Civil penalties also may be imposed on an agency for willful or knowing violations of the Data Act by an agency’s public officer, appointee or employee. Va. Code § 2.2-3809. For a first offense, the fines range from \$250 to \$1,000, and the fines range from \$1,000 to \$2,500 for second and subsequent violations. *Id.*

## **II. The Library of Virginia’s Records Management Requirements**

### **A. Primary Schedules for Local Government Attorneys**

General Schedule No. 14 – County and Municipal Attorneys

General Schedule No. 19 – Administrative Records

Local government Records Retention and Disposition Schedules are published on the LVA’s website: [http://www.lva.virginia.gov/agencies/records/sched\\_local/index.htm](http://www.lva.virginia.gov/agencies/records/sched_local/index.htm).

Note: General Schedule 14 (GS-14) is the Records Retention and Disposition Schedule for local government attorneys and is attached as **Appendix A**. There are a number of “defunct series” in GS-14. Some of those series have been included in other general schedules. For example, “Litigation Case Files: Adjudicated Claims” is a defunct series in GS-14. However, GS-19, “Administrative Records” (**Appendix B**) includes “Litigation Case Files.”

### **B. Electronic Records Management - General**

The LVA’s Records Analysis Services section has developed “Electronic Records Guidelines,” dated December 2009, which are published at:  
<http://www.lva.virginia.gov/agencies/records/electronic/electronic-records-guidelines.pdf>.

The stated purpose of the guidelines “is to provide best practices for public bodies that are developing an electronic records management strategy.” They should be reviewed by your

information technology professionals as well as records management staff. They address issues such as developing file-naming procedures, database design, electronic records management applications, file formats, methods of preservation and destruction of electronic records, and permanent electronic records. In addition, they address e-mail management and web content management.

### **C. E-mail Management**

In addition to being covered in the “Electronic Records Guidelines,” e-mail management is covered in greater detail in the LVA’s “E-mail Management Guidelines,” effective May 2009, which are published at:

<http://www.lva.virginia.gov/agencies/records/electronic/email-management-guidelines.pdf>.

1. There is no retention or disposition schedule for e-mail *per se*. E-mail is to be retained and/or disposed of based on its content and function.
2. E-mail management is a shared responsibility. This effort necessarily involves users of e-mail, records management staff, and information technology staff. For the users of e-mail, the “Electronic Records Guidelines” contain an “E-mail Record Decision Tree,” which is attached to this outline as **Appendix C**.
3. E-mail records must remain accessible during their entire retention period.
4. Auto-archiving is not recommended because e-mails are not maintained according to an approved records retention and disposition schedule.
5. Complete e-mail records must include all of the following elements:
  - a. Names and e-mail addresses of recipients, including names and addresses of all members of distribution lists;
  - b. Name and e-mail address of sender;
  - c. Time and date that the e-mail was sent;
  - d. Subject line that describes the content of the e-mail;
  - e. Text in the body of the e-mail; and
  - f. Attachments, if applicable.
6. E-mails may be printed and maintained as hard copies rather than in electronic format, as long as all of the required information is included in the paper copy.

7. Only the last e-mail in a string must be retained as long as all the e-mails in the string are reflected therein.
8. E-mail must be maintained securely and backed up regularly to prevent loss or tampering.

#### **D. Web Content Management**

The LVA's "Electronic Records Guidelines" contains a section on Web Content Management. The LVA recognizes that Web record retention is a challenge due to the fluid nature of Web communication. Nevertheless, Web content may be a record and must be managed as such. If a record is only available on a Web site, it is considered the record copy which must be retained and disposed of in accordance with the appropriate schedule.

Web pages are not considered record copies as long as the information they contain is retained elsewhere, such as posts of meeting minutes, organizational charts, photographs and maps.

#### **E. Digital Imaging**

The LVA also has published "Digital Imaging Guidelines," dated September 2008, which are available on its website:

[http://www.lva.virginia.gov/agencies/records/electronic/digital\\_imaging.pdf](http://www.lva.virginia.gov/agencies/records/electronic/digital_imaging.pdf)

These guidelines include information to help local governments implement and use a digital imaging system to ensure that it "protects the authenticity, reliability, integrity and usability of public records." They cover topics such as project planning, technical specifications and selection, system implementation, archiving and long-term maintenance.

### **III. Issues with Electronic Records Retention**

#### **A. The Latest on Electronic Records Retention in Virginia State Courts**

Like many courts around the country, Virginia state courts have been grappling with electronic records retention issues. Two recent cases, one from the Supreme Court of Virginia and one from a circuit court illustrate the pitfalls attorneys must avoid in advising clients regarding the preservation of electronic records.

# 1. Allied Concrete Co. v. Lester

In *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (2013), the plaintiff, Lester, sued a concrete company, Allied, after one of its employees driving a concrete truck too fast lost control of the vehicle and ran into Lester and his wife. The wife died from her injuries and the driver of the concrete truck subsequently pled guilty to manslaughter.

During the litigation, Lester sent a message to the attorney for Allied by Facebook, which gave the attorney access to Lester's Facebook page.

After viewing the page, Allied's attorney issued a discovery request asking Lester to produce "screen print copies on the day this request is signed of all pages from . . . Lester's Facebook page, including, but not limited to, all pictures, his profile, his message board, status updates and all messages sent or received." *Id.* at 302, 736 S.E.2d at 702.

"Attached to the discovery request was a copy of a photograph Tafuri downloaded off of Lester's Facebook account. The photo depicts Lester accompanied by a number of young adults, holding a beer can while wearing a T-shirt emblazoned with "I ♥ hot moms." *Id.*<sup>2</sup>

Concerned about how these sorts of pictures would affect the jury's view of Lester as a mourning husband, Lester's attorney instructed his paralegal to "tell Lester to 'clean up' his Facebook page because '[w]e don't want any blow-ups of this stuff at trial.'" The paralegal complied, telling Lester that "there are 'some other pics that should be deleted' from his Facebook page, . . . and '[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!'" (The paralegal's e-mail was apparently referred to as the "stink bomb" e-mail, by Lester's attorney, because he was concerned "the email would probably upset the trial court." *Id.* at 302 n.2, 736 S.E.2d at 702 n.2.)

Lester deleted his Facebook page, and one day after learning of the deletion, his attorney responded to the discovery request from Allied as follows: "I do not have a Facebook page on

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<sup>2</sup> The Supreme Court brief by Allied reveals further details about the photo, including the fact that it also showed Lester wearing a "garter belt around his head," and was "taken on the one year anniversary of [his wife's] death." *Allied Concrete Co. v. Lester*, 2012 Va. S. Ct. Briefs 20074, at \*7 (July 11, 2012).

the date this is signed.” *Id.* at 302, 736 S.E.2d at 702.

After the concrete company filed a motion to compel, Lester reactivated his page, but deleted 16 pictures from the page, consistent with his attorney’s previous instruction to “clean up” his account. *Id.* at 302-03, 736 S.E.2d at 702. Making matters worse, Lester was then deposed and testified that he had never deactivated his Facebook page. This prompted Allied to subpoena Facebook and retain an expert to determine how many photos were deleted. Eventually, Lester produced the deleted photos.

Allied also subpoenaed the paralegal who had given Lester the “clean up” instructions. The trial court ordered that a privilege log be produced of all documents being withheld. Digging his hole deeper, although a log was produced, Lester’s attorney intentionally omitted the “stink bomb” e-mail instructing Lester to “clean up” his Facebook account from the log. *Id.* at 303, 736 S.E.2d at 703.

The trial court ultimately found out about the e-mail, and sanctioned Lester and his attorney, with the attorney being required to pay \$542,000, and Lester to pay \$180,000, to cover the costs and fees associated with all of their misconduct. *Id.*

Despite all of these shenanigans, Lester ultimately won at trial, and was awarded \$6,227,000, for wrongful death (which the trial court reduced to \$2,100,000), as well as \$2,350,000 for personal injuries. *Id.* at 306, 736 S.E.2d at 704-05.

On appeal, the Allied argued that the trial court should have granted a retrial of the entire case, due to the spoliation.

The Supreme Court disagreed, holding that the trial court had not abused its discretion by refusing to grant a new trial. While “Lester’s conduct was dishonest and [his attorney’s] conduct was patently unethical,” Allied was aware of the misconduct prior to trial, and the trial court took proper steps to mitigate the misconduct by (1) allowing the spoliated evidence to be presented to the jury, (2) giving a jury instruction relating to Lester’s misconduct twice (once during his testimony, and once in the jury instructions),<sup>3</sup> and (3) awarding Allied its attorney’s fees and

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<sup>3</sup> The jury was instructed as follows: “The Court instructs the jury that the Plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the

costs associated with addressing the misconduct. *Id.* at 307, 736 S.E.2d at 705.

In a footnote, the court noted that Allied had relied heavily on Federal Rule of Civil Procedure 60(b)(3), which allows for relief from a final judgment based on fraud, misrepresentation or misconduct. Even if that rule applied, the court stated, in this case, Allied could not demonstrate that the misconduct by the other side “prevented [it] from fully and fairly presenting [its] claim or defense,” which was a prerequisite for relief under Rule 60(b)(3). *Id.* at 308 n.9, 736 S.E.2d at 705 n.9.

After the case was decided by the Supreme Court, Lester’s attorney was found to have violated Virginia Ethics Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), and Rule 8.4 (Misconduct), and his bar license was suspended for 5 years.

## 2. Dyncorp Int’l LLC v. Flowers

A circuit court case, *Dyncorp International LLC v. Flowers*, No. 2011-8117 (Fairfax County Aug. 31, 2012), similarly highlights the importance of understanding spoliation issues and the potential problems they can create for both attorneys and clients. Even when there is no intentional misconduct.

*Dyncorp* involved an allegation of theft of trade secrets by a former employee. Upon learning she was about to be terminated, defendant Flowers copied about 1,500 pages of allegedly confidential and proprietary information from her company-issued laptop to a personal thumb drive.

When Dyncorp sued to retrieve the files from Flowers, Flowers took the thumb drive to an attorney. The thumb drives contained both Flowers’ personal files and the files copied from her work laptop. After conferring with an IT expert who informed her that copying the files on the thumb drive would preserve information, Flowers’ attorney instructed the IT expert to split the files contained on the thumb drive. The expert put Flower’s personal files on one CD and the

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rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.” *Id.* at 304, 736 S.E.2d at 703.

company files on two other CDs. He then deleted all files on the thumb drive, at the attorney's direction.

The attorney then delivered the CDs with the company files to the company. Dyncorp's attorneys later requested additional files. Flowers' attorney found those requested files to be located among Flowers' personal files on the other CD. She instructed the expert again to segregate the files, separating the personal from the company files into two additional CDs. The attorney delivered the third CD with company files to Dyncorp and the expert destroyed the CD that had contained both.

As the dispute escalated, Dyncorp's attorneys identified Flowers' attorney as a potential witness, demanding she withdraw from the case. Dyncorp argued that it should have been obvious in a trade secrets case like this one that the thumb drive contained important metadata that would be lost or destroyed by the erasure of the original files.

The complaint detailed how a forensics investigation, using metadata, revealed some information on dates and times that Flowers allegedly copied the files from the company laptop. By directing the IT expert to wipe the thumb drive clean, the attorney destroyed any opportunity for someone to examine the metadata.

Fairfax Circuit Judge Charles J. Maxfield disqualified Flowers' attorney and her firm from representing Flowers, finding a conflict of interest between lawyer and client over spoliation of metadata.<sup>4</sup>

The *Dyncorp* case illustrates pitfalls for attorneys who are not familiar with the rules and best practices relating to the preservation and destruction of electronically stored information (ESI). The case is particularly instructive for those, like local government attorneys, who are responsible both for advising clients on adopting and implementing document retention policies and representing those same clients in litigation where document preservation and production is at the heart of the dispute.

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<sup>4</sup> For additional commentary on this case, see Peter Vieth, *Counsel deleted: Battle over erased data leads to lawyer's disqualification*, Va. Lawyer's Weekly, Oct. 15, 2012.

## **B. The Latest on Electronic Records Retention in the Federal Rules**

Rule 37 of the Federal Rules of Civil Procedure provides for sanctions for failing to make necessary disclosures or to cooperate in discovery. Rule 37(e), adopted in 2006, pertains to the failure to provide electronically stored information. Over the past several years, an Advisory Committee has been reviewing the rule and working to refine Rule 37(e) and provide greater detail.

### **1. Newly Proposed Language of Fed. R. Civ. P. 37(e)**

Federal Rule of Civil Procedure 37(e) currently provides:

**(e) Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The Committee on Rules of Practice and Procedure met in Washington, DC on May 29 and 30, 2014. The Committee has proposed an amended version of Rule 37(e), which would read as follows:

(e) If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

- (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in litigation;
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

The change to this Rule was proposed because the current version of Rule 37(e) may not provide adequate protection to litigants who act in good faith, but inadvertently fail to preserve ESI. As will be discussed further below, current Rule 37(e), has been interpreted inconsistently



in different jurisdictions, with a circuit split on the question whether sanctions should be imposed only for bad faith or even for gross negligence. Many believe this has caused litigants to undertake overly burdensome measures to preserve data. Indeed, Microsoft estimated in 2011 that it preserves 787.5 GB of data for every 2.3 MB actually used in litigation (a ratio of 340,000:1). *See* Jay Lee, “Will the newly proposed amendment to Rule 37(e) provide a true safe harbor?” *Columbia Science and Technology Law Review* (Feb. 2013), *available at* <http://www.stlr.org/2013/02/will-the-newly-proposed-amendment-to-rule-37e-provide-a-true-safe-harbor/>.

## 2. “Reasonable Steps” to Preserve

The proposed Rule requires “reasonable steps,” not perfection, be taken to preserve ESI. The reasonable steps not only apply to ESI that is used in litigation, but to ESI that *could be* used in litigation.

## 3. Restoring or Replacing Lost ESI

If ESI is lost, the proposed Rule would first require assessing whether reasonable steps were taken to preserve the ESI. If reasonable steps were not taken to preserve the lost ESI, the question then becomes whether the lost ESI can be replaced or restored.

If the ESI cannot be replaced or restored, the subsection (e)(1) of the proposed Rule requires a finding of prejudice by the court before the court can use its broad discretion to order corrective measures. The proposed Rule itself does not indicate which party has the burden of showing prejudice.

## 4. Corrective Measures

Subsection (e)(2) allows, but does not require, a court to give an adverse inference jury instruction for the loss of the ESI upon find that “the party acted with the intent to deprive another party of the information’s use in litigation.”

If adopted, the revised Rule 37(e) would resolve a circuit split as to whether a court may provide an adverse inference instruction and what the standard for doing so is.

The United States Court of Appeals for the Tenth Circuit requires a showing of bad faith. *See, e.g., Arambru v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.” (Citations omitted)).

By contrast, the Second Circuit Court of Appeals merely requires a showing of gross negligence, but does not require a demonstration of bad faith. *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) (“[A] showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party. Accordingly, where a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith *or through gross negligence* (satisfying the ‘culpable state of mind’ factor), that same evidence of the opponent’s state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the ‘relevance’ factor).” (Citation omitted, emphasis added)).

5. Factors to Consider in Assessing a Party’s Conduct under Proposed Rule 37(e)(2)

- The extent to which the party was on notice that litigation was likely and that the information would be discoverable;
- The reasonableness of the party’s efforts to preserve the information;
- Whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
- The proportionality of the preservation efforts to any anticipated or ongoing litigation; and

- Whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

#### 6. Current Law in the Fourth Circuit

There is not a great difference between current law in the Fourth Circuit regarding spoliation and proposed Federal Rule 37(e). The most recent Fourth Circuit decision discussing the issue comprehensively is *Turner v. United States*, 736 F.3d 274 (4th Cir. 2013). In that case, decided by Judge Gibney of the Eastern District of Virginia (sitting by designation), the court set out the following analysis for spoliation:

- (1) There must be a duty to preserve material evidence. The duty arises when a party reasonably should know that the evidence may be relevant to anticipated litigation. The court noted that a document preservation letter would have put the defendant on notice of the coming litigation, though in this case, one was not sent.
- (2) Negligence alone is not enough. The spoliator must have known or reasonably anticipated that evidence would be relevant, and willfully engaged in its destruction.
- (3) No showing of bad faith is required. Although the destruction of the evidence must be intentional, there is no showing of bad faith required.

The court also made clear that spoliation is not an independent cause of action; it is a rule of evidence.

#### **IV. Developing a Public Records Policy**

The VPRA, VFOIA and the Data Act all apply to electronic records. As discussed above, electronic document retention and production has recently become a focus of litigation in Virginia and it is a hot topic for the Committee tasked with updating the Federal Rules. It therefore behooves localities that have not adopted an official records retention policy to do so, and those that have adopted such policies to reevaluate them to make sure they are up to date with current law and best practices.

## **A. Issues to Address in a Public Records Policy**

The best public records policies include three components: (1) a clear and up-to-date records management policy; (2) procedures in place that implement the policy; and (3) regular dissemination and training on the policy and procedures. While this section focuses on the first of these components – adoption of a policy and some of the issues a policy should address – the other two components are just as important and will ensure that the policy, once adopted, is carried out and maintained.

### **1. Electronic Records Generally**

The Library of Virginia, which is tasked with implementing the VPRA, *see* Va. Code § 42.1-77, defines an “electronic record” as “a record created, generated, sent, communicated, received, or stored by electronic means. Electronic record formats include, but are not limited to, word processing files, spreadsheets, e-mails, instant messages, Web sites, databases, and scanned images, as well as multimedia files that may include audio, graphics, video, and animation.”<sup>5</sup>

Importantly, it is the *content* of a record rather than the medium in which it is stored that determines whether a document is a “public record.” Therefore, all provisions of VFOIA and the Virginia Public Records Act apply to electronic public records just as they would to hard-copy public documents stored in a state agency file room.

### **2. Metadata**

Although those who keep up with developments in e-discovery have been familiar with the term “metadata” for some time, recent revelations about the NSA’s data monitoring programs have brought the word into the common parlance. Despite how often the term “metadata” is thrown about, many are still confused about what it actually means. Metadata is, essentially, data about data. In other words, it is the data containing information as to the

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<sup>5</sup> In carrying out its responsibilities for preserving public records, the Library of Virginia has issued “Electronic Records Guidelines,” “E-Mail Management Guidelines,” and “Digital Imaging Guidelines,” which provide guidance to localities and agencies developing electronic records retention policies. Much of the information in this section is drawn from these authorities, which are available at: <http://www.lva.virginia.gov/agencies/records/electronic/index.htm>.

context, content, and structure of electronic records. Metadata can be extremely useful, because it can facilitate the organization and accessibility of records through database and systems searches.

The Library of Virginia suggests that state entities maintain various forms of metadata including data which describes: (1) the organization that created the record; (2) the purpose of the records; (3) the date of the record creation] (4) the relevant time period of the record; (5) the relationship to other records; and (6) any law or procedure governing the record.

In addition to collecting and maintaining automatically generated metadata, such as the timestamp and author of a Microsoft Word document, public bodies must devote particular attention to file naming. By selecting appropriate file names, recordkeepers can maintain a structured system of electronic records. Using a common classification scheme or taxonomy allows multiple users within an agency to easily create, share, and access documents while preserving an organized records system. For example, a city council subcommittee might choose to uniformly organize its meeting reports by using a file name which contains placeholder zeroes to allow for greater ease of access:

Use this:	Not that:*
LandUseCommitteereport001 LandUseCommitteereport002 LandUseCommitteereport015 LandUseCommitteereport029	LandUseCommitteereport1 LandUseCommitteereport15 LandUseCommitteereport2 LandUseCommitteereport29

\*Failure to use placeholder zeros results in list that is out of order.

Alternatively, file names can begin with dates in reverse order (year-month-day) so that they are easily sorted chronologically:

Use this:	Not that:†
13-11-15LandUseCommitteereport 13-12-12LandUseCommitteereport 14-01-15LandUseCommitteereport 14-02-13LandUseCommitteereport	01-02-14LandUseCommitteereport 02-13-14LandUseCommitteereport 11-15-13LandUseCommitteereport 12-12-13LandUseCommitteereport

<sup>†</sup> Failure to reverse the order of dates results in files being saved out of chronological order.

### 3. E-Mail Management Guidelines

Because e-mail is merely an electronic medium and not a specific type of public record, there is no set retention period applicable to *all* e-mail. Instead, it is the content of the e-mail that determines whether or how long it should be retained.

The best practice is to categorize e-mail as correspondence covered by the General Records Retention and Disposition Schedule provided by the Library of Virginia. General Schedule (101) applies to correspondence for state agencies while General Schedule (19) governs correspondence for localities. (As noted above, these schedules are available at <http://www.lva.virginia.gov/agencies/records/retention.asp>.)

Furthermore, as discussed above, state and local government employee e-mails are subject to VFOIA disclosure, unless subject to a statutory exemption. Accordingly, systems administrators must be able to timely and effectively retrieve e-mails in keeping with the five-business-day (plus additional seven business days, if extension is provided) VFOIA timeline.

Tips for e-mail management include the following:

- E-mail records should be manually archived, because mailbox size limitations may only allow for temporary storage within the e-mail system.
- Employees should be trained as to which emails constitute public records and how to manually archive these messages.
- E-mails that need not be retained as public records (such as personal correspondence, out-of-office responses, meeting announcements, and listserv messages) should be deleted regularly.
- Retain only the final e-mail in a thread, as this should capture all prior e-mails in the thread, as well (be careful, though, not to delete threads with similar “subject” names, believing they are all the same thread).

- Regularly archive any e-mails which are public records, and be wary of the difference between manual archiving and AutoArchive within Microsoft Outlook (an automatic function of Outlook which the Library of Virginia discourages).
- Remember that Calendars and Drafts are electronic records, as well, and should be preserved.

#### 4. Websites

The Library of Virginia archives all web sites of statewide government agencies on a monthly basis. For example, these website include those of the Office of the Governor, Office of the Lieutenant Governor Office of the Attorney General, the Governor's Cabinet, the Supreme Court of Virginia, and all statewide executive, legislative, and judicial branches as listed in the Blue Book (*The Report of the Secretary of the Commonwealth*).

If a record is exclusively contained on a website, then the website, itself, is deemed a public record and must be retained. Thus, local governments (whose websites are not archived by the Library of Virginia) should preserve copies of the pages of their websites that have content that is not available elsewhere.

## 5. Imaging and Storage of Electronic Records

The Virginia Public Records Act requires agencies and localities to convert and migrate electronic records “as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration.” *See* Va. Code § 42.1-85.

The Code of Virginia permits copies of original records to be introduced as evidence. *See* Va. Code § 8.01-391; *see also Williams v. Commonwealth*, 35 Va. App. 545, 546 S.E.2d 735 (2001) (holding that § 8.01-391 is a statutory exception to the best evidence rule providing that, when properly authenticated, copies of official records by state entities are as admissible as the original records). In the context of electronic records, this means that an imaged, reformatted, or electronically maintained copy may be used as an original.

In determining the best storage medium for records, public bodies should consider the size of the records, the length of retention, and the associated costs. Generally there are three types of digital media storage: (1) magnetic (computer hard drives or magnetic tape); (2) optical (CD or DVD); and (3) solid state (flash media such as USB thumb drives). Each of these data types has advantages and disadvantages. Localities should consult with their information technology officers to determine which form of storage works best for their needs.

### **B. Template for a Public Records Policy**

Rather than reinvent the wheel, local governments seeking to adopt or update public records policies are encouraged to use the template provided by the Library of Virginia as a starting point. The template is available online in Word form at <http://www.lva.virginia.gov/agencies/records/policy.htm> and a copy is attached for your convenience as **Appendix D**. The template addresses each of the areas that typically should be covered in a records policy and can be modified to take into account the unique circumstances of each public body.

## **V. Use of Public Records in Virginia courts.**

**A. Evidentiary Use:** The evidentiary use of records is governed by statute and the rules of evidence.



1. Virginia Code Sections 8.01-390 and 8.01-391.

**§ 8.01-390. Nonjudicial records as evidence (Subdivision (10)(a) of Supreme Court Rule 2:803 derived from subsection C of this section).**

A. Copies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, shall be received as prima facie evidence provided that such copies are authenticated to be true copies either by the custodian thereof or by the person to whom the custodian reports, if they are different.

**§ 8.01-391. Copies of originals as evidence (Supreme Court Rule 2:1005 derived from this section).**

A. Whenever the original of any official publication or other record has been filed in an action or introduced as evidence, the court may order the original to be returned to its custodian, retaining in its stead a copy thereof. The court may make any order to prevent the improper use of the original.

2. Rule 2:803 (8) of the Rules of the Virginia Supreme Court.

**Rule 2:803 Hearsay Exceptions Applicable Regardless of Availability of the Declarant** (Rule 2:803(10)(a) derived from Code § 8.01-390(C); Rule 2:803(10)(b) derived from Code § 19.2-188.3; Rule 2:803(17) derived from Code § 8.2-724; and Rule 2:803(23) is derived from Code § 19.2-268.2) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) *Public records and reports.* In addition to categories of government records made admissible by statute, records, reports, statements, or data compilations, in any form, prepared by public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed within the scope of the office or agency's duties, as to which the source of the recorded information could testify if called as a witness; generally excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel when offered against a criminal defendant.

(10) *Absence of entries in public records and reports.* (a) Civil Cases. An affidavit signed by an officer, or the deputy thereof, deemed to have custody of

records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

Additional proof of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) *Domestic public records offered in compliance with statute*. Public records authenticated or certified as provided under a statute of the Commonwealth.

## **B. The Basics of Using Public Records for Evidentiary Purposes.**

### **1. Getting through the door:**

A proposed exhibit must be:

- a. A public record,
- b. That was created or prepared by a public official,
- c. Pursuant to a duty,
- d. Imposed by statute or required by the nature of the office,
- e. That has been authenticated by the custodian.

### **2. Making or surviving a hearsay objection.**

- a. Each statement in a record must be scrutinized.
- b. Only statements of fact; no opinions.
- c. Statements of fact must have been recorded based on personal knowledge of or observation by the recording official to which the recording official could testify if called as a witness.

### **3. Evidentiary weight.**

- a. The public record, i.e. statements of facts, shall be received as prima facie evidence.

- b. Prima facie evidence is evidence that on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted.  
*Babbitt v. Miller*, 192 Va. 372, 379-380 (1951).
- c. When in doubt have a witness.

## **Appendix A**



**RECORDS RETENTION AND DISPOSITION SCHEDULE  
GENERAL SCHEDULE NO. 14  
COUNTY AND MUNICIPAL GOVERNMENTS  
COUNTY AND MUNICIPAL ATTORNEYS**

EFFECTIVE SCHEDULE DATE May 24, 2010

PAGE 4 OF 5 PAGES

RECORDS SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION AND DISPOSITION
<b><i>Defunct Series</i></b> Litigation Case Files: Adjudicated Juvenile Claims	9a	Retain 5 years after the final disposition of the case by the court and then for as long as administratively or legally required; then destroy.
<b><i>Defunct Series</i></b> Litigation Case Files: Adjudicated Claims	9b	Retain 5 years after the final disposition of the case by the court and then for as long as administratively or legally required; then destroy.
<b><i>Defunct Series</i></b> Litigation Case Files: Non-adjudicated Claims	9c	Retain 5 years after the out-of-court settlement is reached, or the expiration of liability (as determined by the relevant statute of limitations), and then for as long as administratively or legally required; then destroy.
<b><i>Defunct Series</i></b> Litigation Case Files: Injunctive, declaratory or administrative proceedings	9d	Retain 5 years after termination of proceeding then destroy.
<b><i>Defunct Series</i></b> Litigation Case Files: Possible claims	9e	Retain until applicable statute of limitations expires then destroy.
<b><i>Misdemeanor and Appeal Files</i></b> This series documents misdemeanor offenses committed against the locality. This series may include, but is not limited to: correspondence and police reports.	000503	Retain 1 year after final disposition of case by the court then destroy.
<b><i>Defunct Series</i></b> <u>Opinion Files</u>	11	Retain permanently in locality.



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ARCHIVAL AND RECORDS MANAGEMENT SERVICES DIVISION  
(Form RM-2 April 2009)

**RECORDS RETENTION AND DISPOSITION SCHEDULE  
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COUNTY AND MUNICIPAL GOVERNMENTS  
COUNTY AND MUNICIPAL ATTORNEYS**

EFFECTIVE SCHEDULE DATE May 24, 2010

PAGE 5 OF 5 PAGES

RECORDS SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION AND DISPOSITION
<b><u>Defunct Series</u></b>		
<u>Ordinance and Resolution Files</u>	12	Retain original governing body approved ordinances and resolutions permanently in locality. Retain duplicates and rejected ordinances and resolutions for as long as administratively required then destroy.
<u>Real Estate and Personal Property Delinquent Tax Suit Files</u>	000504	Retain 5 years after the final disposition of case by the court then destroy.
<u>Real Estate Title Files</u>	000505	Retain permanently in agency.
<u>Street Closure Files</u>	000506	Retain permanently in agency.
<u>Zoning and Rezoning Files</u>	000507	Retain as long as administratively necessary then destroy.

## **Appendix B**

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## RECORDS RETENTION AND DISPOSITION SCHEDULE

### GENERAL SCHEDULE NO. GS-19

#### COUNTY AND MUNICIPAL GOVERNMENTS

##### Administrative Records

The schedule on the attached page(s) is approved with agreement to follow the records retention and disposition policies listed below:

APPROVED:



EFFECTIVE SCHEDULE DATE: 8/21/2014

#### POLICIES FOR RECORDS RETENTION AND DISPOSITION

1. This schedule is continuing authority under the provisions of the Virginia Public Records Act, § 42.1-76, et seq. of the Code of Virginia for the retention and disposition of the records as stated on the attached page(s).
2. This schedule supersedes previously approved applicable schedules.
3. This schedule is used in conjunction with the Certificate of Records Destruction (RM-3 Form). A signed RM-3 Form must be approved by the designated records officer and on file in the agency or locality before records can be destroyed. After the records are destroyed, the original signed RM-3 Form must be sent to Library of Virginia (LVA).
4. Any records created prior to 1913 must be offered, in writing, to LVA before applying these disposition instructions. Offered records can be destroyed 60 days after date of the offer if no response is received from LVA. A copy of the offer must be attached to the RM-3 Form when it is submitted to LVA.
5. All known audits and audit discrepancies regarding the listed records must be settled before the records can be destroyed.
6. All known investigations or court cases involving the listed records must be resolved before the records can be destroyed. Knowledge of the subpoenas, investigations, or litigation that reasonably may involve the listed records suspends any disposal or reformatting processes until all issues are resolved.
7. The retentions and dispositions listed on the attached page(s) apply regardless of physical format, i.e., paper, microfilm, electronic storage, optical imaging, etc. Unless prohibited by law, records may be reformatted at agency or locality discretion. Microfilming must be done in accordance with 17VAC15-20-10, et seq. of the Virginia Administrative Code, "Standards for the Microfilming of Public Records for Archival Retention." All records must be accessible throughout their retention period in analog or digital format. Whether the required preservation is through prolongation of appropriate hardware and/or software, reformatting, or migration, it is the obligation of the agency or locality to do so.
8. Custodians of records must ensure that information in confidential or privacy-protected records is protected from unauthorized disclosure through the ultimate destruction of the information. Ultimate destruction is accomplished through shredding, pulping, burning, and overwriting or physically destroying media. Deletion of confidential or privacy-protected information in computer files or other electronic storage media is not acceptable. Records containing Social Security numbers must be destroyed in compliance with 17VAC15-120-30.
9. Under the Virginia Public Records Act, § 42.1-79, LVA is the official custodian and trustee of all state agency records transferred to the Archives, Library of Virginia. LVA may purge select records in accordance with professional archival practices in order to ensure efficient access.
10. Unless otherwise directed, files are closed out at the end of each calendar or fiscal year as appropriate. Retention periods start at that time.





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## RECORDS RETENTION AND DISPOSITION SCHEDULE GENERAL SCHEDULE NO. GS-19 COUNTY AND MUNICIPAL GOVERNMENTS Administrative Records

EFFECTIVE SCHEDULE DATE: 8/21/2014

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Acknowledgment and Referral Files</u>  This series documents receipt of an item or forwarding of an item to another office when no other action is taken or expected of the forwarding office.	010021	3 Months after end of calendar year	Non-confidential Destruction
<u>Agenda and Supporting Documentation Files</u>  This series documents the publishing of public notices of meetings and proposed schedules. This series may include, but is not limited to: materials reviewed or used by the board, commission, or conference, and items presented to or introduced by the board, commission, or conference. COV 2.2-3707	010024	3 Years after end of calendar year	Non-confidential Destruction
<u>Agreements, Memorandums of Understanding (MOU) and Non-Fiscal Contracts</u>  This series documents agreements, other than contracts involving procurement or payment of monies, between departments within the locality, other localities, other government agencies, business entities or an individual or group of individuals.	010025	3 Years after termination	Non-confidential Destruction
<u>Annexation/Consolidation Files</u>  This series documents locally arguments, fact finding, and actions on agreements or disputes among counties, cities and towns, or decisions of the Commission on Local Government boundary changes to cities and towns. COV 15.2-3200 - 3244f	010002		Permanent, In Agency
<u>Annual Disclosure of Economic Interests</u>  This series consists of the disclosure of economic interest forms filed by members of governing bodies, commissions, and boards. COV 2.2-3115; COV 2.2-3117; COV 2.2-3115C	010008	5 Years after end of calendar year	Confidential Destruction
<u>Appointment Calendars</u>  This series documents the agenda of public officials. This series may include, but is not limited to: printed or published calendars intended for limited or general distribution.	010027	1 Year after end of calendar year	Non-confidential Destruction



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EFFECTIVE SCHEDULE DATE: 8/21/2014			
RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Approved Forms Masters and Supporting Documentation</u>	010091	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
This series documents the development, design, approval, and use of forms.			
<u>Citizen Complaint Files</u>	010004	1 Year after last action	Confidential Destruction
This series documents citizen complaints, preliminary investigations, findings, background material and responses.			
<u>Citizen Petitions</u>	010005		Permanent, In Agency
This series documents receipt of a petition from citizens, preliminary research and responses. COV 15.2-301			
<u>Consultants' Reports and Related Documents</u>	010033	5 Years after end of calendar year	Non-confidential Destruction
This series documents the work of consultants hired by the locality. This series may include, but is not limited to: consultant reports and notes.			
<u>Contract Records</u>	200101	5 Years after termination	Confidential Destruction
This series documents the performance and conformance of contractual obligations of the locality or owed to the locality.			
<u>Correspondence/Subject Files: Board Members - Except Chairpersons</u>	100893	3 Years after end of calendar year	Non-confidential Destruction
This series documents incoming and outgoing letters, memoranda, faxes, notes, and their attachments, in any format including, but not limited to, paper and e-mail.			
<u>Correspondence/Subject Files: Board/Council - Mandated by Code of Virginia or Virginia Administrative Code - Chairpersons</u>	100891		Permanent, Archives
This series documents the correspondence of code mandated boards. This series may include, but is not limited to: letters, memoranda, faxes, notes, e-mail and attachments.			



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RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Correspondence/Subject Files:</u> <u>Boards/Commissions/Conferences</u>  This series documents incoming and outgoing letters, memoranda, faxes, notes, and their attachments, in any format including, but not limited to, paper and e-mail.	100892	3 Years after end of calendar year	Non-confidential Destruction
<u>Correspondence/Subject Files: City Manager/County Administrator</u>  This series consists of incoming and outgoing letters, memorandum, faxes, notes and their attachments, in any format including, but not limited to, paper and electronic mail.	010006		Permanent, In Agency
<u>Correspondence/Subject Files: Department or Division Heads</u>  This series consists of incoming and outgoing letters, memoranda, faxes, notes, and their attachments, in any format including, but not limited to, paper and e-mail.	010037	3 Years after end of calendar year	Non-confidential Destruction
<u>Correspondence/Subject Files: Other Officials</u>  This series consists of incoming and outgoing letters, memoranda, faxes, notes, and their attachments, in any format including, but not limited to, paper and e-mail.	010038	2 Years after end of calendar year	Non-confidential Destruction
<u>Correspondence/Subject Files: Routine. Administrative - Not Specified Elsewhere</u>  This series consists of incoming and outgoing letters, memoranda, faxes, notes, and their attachments of a routine administrative nature, in any format including, but not limited to, paper and e-mail.	010039	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Deeds and Property Files</u>  This series documents local government ownership of real property. COV 15.2-1800 to 1814	010007	10 Years after equipment, facility, or property sold or no longer in use	Non-confidential Destruction



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## RECORDS RETENTION AND DISPOSITION SCHEDULE

### GENERAL SCHEDULE NO. GS-19

#### COUNTY AND MUNICIPAL GOVERNMENTS

##### Administrative Records

EFFECTIVE SCHEDULE DATE: 8/21/2014

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
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<u>Directives</u> This series documents directives from the city council, city manager, county administrator, or board of supervisors outlining policy to lower levels of authority.	010040		Permanent, In Agency
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<u>Directory Listings and Files</u> Lists of current or former employees and/or phone listings, office listings or lists of contacts or service providers.	010041	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
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<u>Drafts</u> This series consists of materials produced during the planning, designing and composing of a public record. This series includes recordings of meetings used to create minutes.	200102	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
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<u>Employee Suggestion Program Files</u> This series documents the implementation and control of an employee suggestion plan.	010043	3 Years after last action	Non-confidential Destruction
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<u>Environmental Impact Studies</u> This series documents the environmental impact of major projects proposed by localities or reviewed by locality officials. COV 15.2-2202	010044		Permanent, In Agency
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<u>Executive Orders</u> This series documents orders of the city manager or county administrator.	010045		Permanent, In Agency
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<u>Feasibility Studies</u> This series documents feasibility studies created by or for a locality.	010046		Permanent, In Agency
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<u>Finding Aids or File Locators</u> This series consists of lists created to locate files, records, or artifacts.	010047	0 Years after no longer administratively useful	Non-confidential Destruction
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RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Freedom of Information Act (FOIA) Requests</u>  This series documents responses to requests to view official records or retrieve information from official records. This series may include, but is not limited to: requests, response, and billing information. COV 2.2-3700 to 3714	010049	3 Years after last action	Non-confidential Destruction
<u>Grant Records: Funded</u>  This series documents grant acceptance or approval, completion and conformance with grant stipulations that are not of a fiscal nature.	010051	5 Years after project completion	Confidential Destruction
<u>Grant Records: Unfunded</u>  This series documents grant proposals that did not receive funding. This series may include, but is not limited to: letter of intent, application, budget, and notification of denial.	000182	1 Year after decision	Non-confidential Destruction
<u>Hearings: Administrative</u>  This series documents administrative hearings not listed on another records retention schedule.	010054	3 Years after last action	Non-confidential Destruction
<u>History Files</u>  This series documents the history of the locality, its government, its accomplishments, its officials, or employees. This may include material of an exceptional nature that is listed as disposable in this or other general schedules. This series may include, but is not limited to: scrapbooks; photographs; articles; program notes; documentation of events sponsored or funded by the locality; narratives; and printed, audio, or audiovisual histories.	010064		Permanent, Archives
<u>Indexes, Checklists, and Control Lists</u>  This series consists of forms, books, or computer records used for internal control of a process or action that does not act as the only record of final approval of the action or process.	010055	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction



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## RECORDS RETENTION AND DISPOSITION SCHEDULE GENERAL SCHEDULE NO. GS-19 COUNTY AND MUNICIPAL GOVERNMENTS Administrative Records

EFFECTIVE SCHEDULE DATE: 8/21/2014

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Industrial/Economic Development Authority</u>  This series documents the work of the authority to acquire, own, lease, and dispose of property, as well as make loans, to promote industry and develop trade. This series may include, but is not limited to: bond transcripts, correspondence, and legal documents.	200131	6 Years after final payment	Confidential Destruction
<u>Information and Public Education Records: Other Records</u>  This series documents public information or education campaigns and materials or items collected from various sources about the locality.	010057	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Information and Public Education Records: Pamphlets, Visual Aids and/or News Clippings Regarding Historically Significant Events</u>  This series documents public information or education campaigns and materials or items about the locality, collected from public sources.	010056		Permanent, In Agency
<u>Investigative Reports</u>  This series documents internal investigations of incidents, local officials, employees, departments or operations and policies not covered by another general or specific schedule.	010058	3 Years after last action	Non-confidential Destruction
<u>Legal Case Files</u>  This series documents status of legal cases involving the locality, its officials, employees, or departments.	010061	10 Years after last action	Confidential Destruction
<u>Legal Opinions</u>  This series consists of opinions requested by the locality, its officials, employees, or departments, from the city or county attorney or the Attorney General's office on matters of law.	010059		Permanent, In Agency



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### GENERAL SCHEDULE NO. GS-19

#### COUNTY AND MUNICIPAL GOVERNMENTS

##### Administrative Records

EFFECTIVE SCHEDULE DATE: 8/21/2014

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Locality Annual Reports</u>  This series consists of reports prepared by or for the locality addressing the "state" of the locality, including goals, targets, objectives, and finances.	010063		Permanent, Archives
<u>Management Reports</u>  This series consists of reports created for internal control or management of a specific function of the local government.	010065	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Microform Records: Inspection Reports</u>  This series documents the inspection and approval of microform prepared by or for locality. This series may include, but is not limited to: copies of background densities and inspection reports. 17VAC15-20-70	010093	3 Years after end of calendar year	Non-confidential Destruction
<u>Microform Records: Processing or Methylene Blue Tests</u>  This series documents testing required to validate the correct processing and development of microform. 17VAC15-20-70	010094	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Minutes: Entity Having Enforcement, Regulatory, or Decision Powers</u>  This series documents the proceedings of meetings of boards, councils, conferences, committees, offices, and other groups having enforcement, regulatory or decision powers. This series includes indexes to minutes.	010029		Permanent, In Agency
<u>Minutes: Entity Without Enforcement, Regulatory or Decision Powers</u>  This series documents proceedings of various meetings of advisory boards, councils, conferences, committees, offices, and other groups that do not have enforcement, regulatory, or decision making powers.	010030	3 Years after end of calendar year	Non-confidential Destruction



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EFFECTIVE SCHEDULE DATE: 8/21/2014

RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Motion Pictures: Locality Produced or Sponsored</u>	010068		Permanent, In Agency
This series documents motion pictures or videos, other than training material and temporary recordings of minutes, prepared by or for locality for a specific purpose.			
<u>Office Instructions or Procedures</u>	010069	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
This series documents internal guidelines, policies, or instructions for the operation of an office or a function.			
<u>Ordinances and Resolutions</u>	010017		Permanent, In Agency
This series documents the adoption of ordinances and resolutions by the board of supervisors or city/town council. COV 15.2-1433; COV 15.2-1425			
<u>Organization Files: Administrative Structure and Management</u>	010070		Permanent, In Agency
This series documents organization or functions of the locality's major administrative units; also, material about the reorganization of the departments or management structure.			
<u>Organization Files: Other Records</u>	010071	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
This series consists of files not directly related to the organization or reorganization of the locality's management structure.			
<u>Photographs and Negatives: Historically Significant</u>	010073		Permanent, Archives
This series documents the locality's organization, special ceremonies, occasions, events, and facilities. This series includes photographs or negatives created by or for locality.			
<u>Photographs and Negatives: Other Material</u>	010075	0 Years after no longer administratively useful	Non-confidential Destruction
This series consists of photographs, negatives, image files, filmstrips, or slides produced by the locality, not considered historically significant.			





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### COUNTY AND MUNICIPAL GOVERNMENTS

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RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Photographs and Negatives: Personnel Identification</u>  This series documents photographs used for identification of employees, contractors, or vendors. This series may include, but is not limited to: negatives, imaging files, requesting paperwork or documentation.	010074	1 Year after separation	Non-confidential Destruction
<u>Planning Files: Administrative</u>  This series documents the planning of administrative changes or projects, major purchases, significant events or occasions not requiring board or council approval of the details.	010076	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Policy and Procedure Records</u>  This series documents guidance issued or approved by the city council, city manager, board of supervisors and/or county administrator.	010018		Permanent, In Agency
<u>Presentation Materials</u>  This series documents presentations given by locally employees. This series may include, but is not limited to: slides, overheads, flip charts, and handouts.	010079	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Proclamations</u>  This series documents the honoring of specific groups, associations, or people by the Mayor or Board of Supervisors. The series consists may include, but is not limited to: formal proclamation signed by the Mayor or Board of Supervisors.	101211	2 Years after end of calendar year	Non-confidential Destruction
<u>Project Documentation Files</u>  This series documents the design, development, control, or monitoring of a specific project or group of projects.	010082	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction



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RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Public Hearing Notices</u>  This series documents issuance and publication of notices of public hearings, other than board of supervisors or city/town council meetings. COV 2.2-3707	010019	1 Year after last action	Non-confidential Destruction
<u>Public Relations Files: Historically Significant</u>  This series documents information provided to the public at large or specific elements of the public, business, or government communities. This series may include, but is not limited to: pamphlets, speeches, visual aids, news releases and clippings, and publications.	010083		Permanent, In Agency
<u>Public Relations Files: Other Items</u>  This series documents routine information provided to the public at large or specific elements of the public, business, or government communities. This series may include, but is not limited to: speeches and graphic arts material.	010084	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Publication or Duplication Masters or Proofs</u>  This series consists of materials used to produce publications.	010086	0 Years after superseded, obsolete, or rescinded	Non-confidential Destruction
<u>Publications: Locality Produced or Sponsored</u>  This series consists of official publications of locality meant for public distribution or general internal distribution. COV 42.1-94	010085		Permanent, In Agency
<u>Recordings, Audio and Visual: Historically Significant</u>  This series consists of audio or visual recordings, created by or for a locality, that are of an enduring historically significant nature or that describe the current function or organization of the locality's major administrative units.	010087		Permanent, In Agency



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<u>Recordings. Audio and Visual: Other Recordings</u>	010089	0 Years after no longer administratively useful	Non-confidential Destruction
This series consists of audio or visual recordings created by or for the locality that are not historically significant.			
<u>Records Management Files: Approved Certificates of Records Destruction (RM 3 Form)</u>	010090	3 Years after end of calendar year	Non-confidential Destruction
This series documents the locality's records destruction. This series includes Records Officer's copies of approved destruction certificates.			
<u>Records Management Files: Archival Transfer Forms</u>	200081		Permanent, In Agency
This series documents the transfer of permanent records to the Archives at the Library of Virginia. This series includes: Archival Transfer List and Receipt (ARC-1 Form), Archival Transfer Folder List (ARC-2 Form), and Archival Microform Transfer List and Receipt (ARC-3 Form).			
<u>Release Forms: Adults</u>	010022	5 Years after end of calendar year	Confidential Destruction
This series documents individual liability release statements for adults that are required for participation in various programs.			
<u>Release Forms: Minors</u>	010026	23 Years after birth	Confidential Destruction
This series documents individual liability release statements for children under the age of 18 required for participation in various programs.			
<u>Reports</u>	010096	0 Years after no longer administratively useful	Non-confidential Destruction
This series documents routine reports not listed on any general or special schedule.			
<u>Safety Records</u>	010097	3 Years after last action	Non-confidential Destruction
This series documents accident investigations. This series may include, but is not limited to: accident reports and safety policy statements except those records required by OSHA or the Department of Labor and Industry.			



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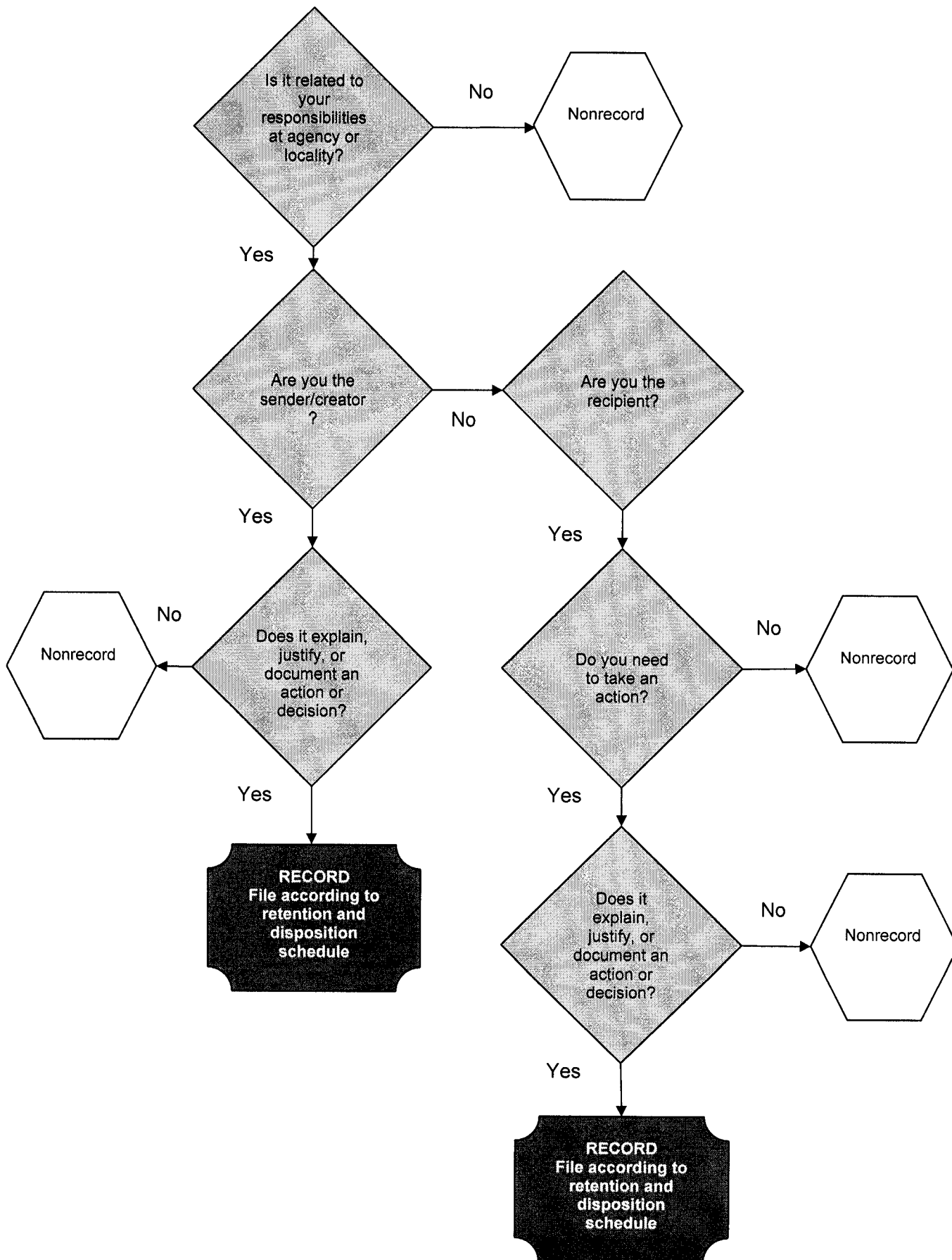
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RECORD SERIES AND DESCRIPTION	SERIES NUMBER	SCHEDULED RETENTION PERIOD	DISPOSITION METHOD
<u>Schedule of Daily Activities: Required by Law or Regulation</u> This series documents the control or recording of the activities of employees other than payroll/hourly-wage records. This series may include, but is not limited to: diaries, logs, and registers.	010099	2 Years after end of calendar year	Non-confidential Destruction
<u>Surveys: Administrative</u> This series documents surveys produced by or for the locality for administrative, informational, or research purposes.	010105	2 Years after end of calendar year	Non-confidential Destruction
<u>Telephone Logs and Messages</u> This series documents incoming or outgoing routine telephone calls. This series may include, but is not limited to: message slips, voicemail messages, and call logs.	010106	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Vacation or Work Schedules</u> This series documents employee's time off from work, not created specifically for payroll purposes.	010109	2 Years after end of calendar year	Non-confidential Destruction
<u>Voice Mail/Answering Machine Messages: Relevant to Specific Actions</u> This series consists of recordings and message slips documenting incoming telephone calls. These messages have a bearing on actions or decisions taken or not taken.	010111	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Work or Production Control Records</u> This series consists of records, not related to any other existing locality records series, created to project, monitor, control, tabulate, or report the daily work activities of an individual or group other than payroll records.	010113	0 Years after no longer administratively useful	Non-confidential Destruction
<u>Work Orders: Administrative Copies</u> This series documents work orders or production orders submitted by locality employees.	010114	3 Years after end of calendar year	Non-confidential Destruction

## **Appendix C**

**ELECTRONIC RECORDS GUIDELINES**  
**APPENDIX A: E-MAIL RECORD DECISION TREE**



## **Appendix D**

APPENDIX D

RECORDS MANAGEMENT POLICY  
SAMPLE TEMPLATE  
Library of Virginia

A. Statement of Intent

This policy establishes the general responsibilities for management, retention, and disposition of AGENCY records as mandated by the Virginia Public Records Act (VPRA), Code of Virginia § 42.1-76–§ 42.1-91. This policy applies to all employees (including part-time and per diem) and authorized agents of the AGENCY and its affiliates.

The AGENCY is committed to effectively managing its records, regardless of media type, by adhering to best practices and following a systematic and logical plan developed by the organizational units that maintain the records. The successful implementation and ongoing effectiveness of this policy is dependent on the cooperation of each organizational unit to ensure that permanent records are preserved and nonpermanent records are destroyed in a timely and orderly manner.

The policy will provide guidance for achieving the following objectives:

1. Comply with the Virginia Public Records Act (VPRA), Code of Virginia § 42.1-76–§ 42.1-91, which governs the creation, maintenance, and disposition of public records
2. Develop and implement procedures, guidelines, systems, and business practices that facilitate the creation, backup, preservation, filing, storage, and disposal of records of all formats
3. Create a network of personnel throughout the AGENCY trained to manage records of all types
4. Reduce risks associated with unintended disclosure of sensitive information
5. Protect essential and historical information about the AGENCY



## Table of Contents

- I. Responsibilities Under the Virginia Public Records Act (VPRA)
- II. Public Records
- III. Roles and Responsibilities
- IV. Records Retention and Disposition Schedules
- V. Electronic Records
- VI. Disposition of Public Records
- VII. Destruction of Public Records
- VIII. Storage, Retrieval, and Disaster Recovery
- IX. Legal Matters, Audits, and Investigations
- X. Data Privacy

## I. Responsibilities Under the Virginia Public Records Act (VPRA)

### Records Management Program

The AGENCY will implement a sound records management program in accordance with the Virginia Public Records Act (VPRA) § 42.1-76 et seq. An effective records management program will implement Library of Virginia–approved records retention and disposition schedules, document destruction of scheduled records, train employees, and create and disseminate records management procedures.

### Designated Records Officer

The AGENCY will designate at least one records officer to oversee the AGENCY's records management program in accordance with the Virginia Public Records Act (VPRA) § 42.1-85. The designated records officer(s) will serve as a liaison(s) to the Library of Virginia for the purposes of implementing and overseeing a records management program, and coordinating legal disposition, including destruction of obsolete records.

The AGENCY will identify the person or persons who will serve as records officer(s) by submitting the Records Officer Designation and Responsibilities Form (RM-25) to the Library of Virginia.

### Delivery of Records to Successor

At the end of a records custodian's term of office, appointment, or employment, all records should be turned over to his/her successor. In the event that the AGENCY ceases to exist and there is no successor, all records should be transferred to the Library of Virginia per the Code of Virginia § 42.1-88.

## II. Public Records

### Public Records

Public records are those that document the transaction of business by the AGENCY. The format in which the information is presented, as well as the medium on which the information is contained, have no bearing on the determination of whether the record is a public record. (Code of Virginia § 42.1-77)

### Non-records

Public records shall not include materials made or acquired and kept solely for reference or exhibition purposes, copies of records kept only for convenience or reference, and stocks of publications. These are considered "non-records." (Code of Virginia § 42.1-77)

## Copy of Record

The “copy of record” shall be construed to mean the “official” copy of a particular public record, with no regard as to whether it is an original, copy, or reformatted version. All work units within the AGENCY shall work with the designated records officer to establish in writing the ownership of and responsibility for copies of record.

## Confidential Records

Public records that are restricted from disclosure by statute, court order, or legally adopted rules and regulations are considered confidential. AGENCY records that are deemed confidential are still considered to be public records even though they are not publicly available. AGENCY records management procedures will contain references to all applicable regulations and statutes affecting AGENCY records.

## III. Roles and Responsibilities

### Agency Head or Designee

The head of the AGENCY or his/her designee is responsible for establishing and approving the AGENCY records management program and identifying to the Library of Virginia the person(s) to serve as the designated records officer(s).

### Department, Division, or Section Heads

The heads of departments, divisions, and/or sections are responsible for ensuring that procedures and programs within their areas of responsibility meet the requirements of the AGENCY’s records management program relative to record identification, generation, control, maintenance, processing, storage, and disposition.

### Agency-designated Records Officer

The designated records officer is responsible for the development, implementation, and ongoing coordination of the records management program to meet regulatory requirements.

Responsibilities of the records officer include:

- Developing procedures to implement the AGENCY’s records management program in coordination with the Library of Virginia
- Providing training in records management procedures and practices, including the use of appropriate forms
- Implementing systems to meet program requirements for completeness, legibility, reproducibility, retrievability, distribution, control, security, storage, and disposition of records, regardless of format or media type

- Advising staff members on where to access and how to use Library of Virginia– approved retention schedules
- Coordinating and/or assisting staff in the surveying of records
- Ensuring that essential, archival, and permanent records are identified, properly maintained, protected, and accessible for the length of time cited in an applicable retention schedule
- Maintaining contact and connections with AGENCY records coordinators

### Records Coordinators

Records coordinators are responsible for assisting in the design, implementation, and management of the AGENCY records management program by serving as liaisons between their respective work units and the AGENCY'S designated records officer.

Responsibilities of a records coordinator include:

- Being familiar with the AGENCY'S internal records management policy
- Developing the unit's records management procedures and practices, consistent with this policy
- Educating staff within the organizational unit in understanding sound record management practices
- Restricting access to confidential records and information
- Coordinating the destruction of records with the records officer as provided in the applicable procedures

### IV. Records Retention and Disposition Schedules

Records retention and disposition schedules are created and maintained by the Library of Virginia. Retention schedules are approved sets of clearly identified, related records series that dictate the length of time a series must be kept and its required disposition.

All AGENCY records must be managed in accordance with the most current Library of Virginia–approved records retention and disposition schedules.

If a new category of records is created, and no applicable series is found on an existing retention schedule, then the AGENCY's designated records officer must contact the AGENCY's assigned records analyst at the Library of Virginia so that the records may be scheduled.

## V. Electronic Records

The AGENCY will manage its electronically stored information (ESI) consistent with the Library of Virginia–approved records retention and disposition schedules and any legal obligations that may apply. The retention schedules govern retention of electronic records in the same manner as paper records. Content, not format, drives records retention.

The destruction of electronic records must be documented through submission of the Certificate of Records Destruction (RM-3 Form). (See section VII of this policy.)

## VI. Disposition of Public Records

There are two options for public records disposition: permanent retention or destruction. Use the records retention and disposition schedules to determine whether a series is permanent or when it should be destroyed.

### Permanent Records

A public record is considered permanent when it has been determined to have “continuing and enduring value useful to the citizens of the Commonwealth and necessary to the administrative functions of public agencies in the conduct of services and activities mandated by law.” (Code of Virginia § 42.1-77)

Permanent records held by the AGENCY are identified on a Library of Virginia–approved records retention and disposition schedule as having sufficient informational value to be permanently maintained by the Commonwealth. The retention schedules will identify whether a record must be maintained by the AGENCY or may be offered to the Archives at the Library of Virginia. Permanent records of the AGENCY cannot be given away, sold, or loaned to any outside person, organization, or business entity.

AGENCY staff or work units in possession of permanent records that may be offered to the Library of Virginia must contact the AGENCY designated records officer when the records are no longer active. The records officer will contact the Library to begin the transfer process.

### Non-permanent Records

All AGENCY records that have not been deemed permanent must eventually be destroyed. The records retention and disposition schedules identify when a set of records has reached the end of its usefulness. A retention schedule may also state whether records must be destroyed in a certain manner. Retention schedules constitute a legal timeline for the destruction of records from which the AGENCY must not deviate unless in the midst of a legal hold. (See section IX of this policy.)

## VII. Destruction of Public Records

All records destruction performed by the AGENCY must be done in accordance with written procedures and documented on a Certificate of Records Destruction (RM-3 Form). The RM-3 Form is required when destroying public records, in all formats, that are deemed copies of record. The original RM-3 Form must be submitted to the Library of Virginia. The AGENCY must retain a copy of the RM-3 Form for three (3) years.

AGENCY records must be destroyed in the manner identified by the appropriate series on a general or specific records retention and disposition schedule. All AGENCY records must be destroyed once the applicable retention period has expired. No records may be maintained past the end of their stated retention unless involved in current litigation, investigation, or audit. (Code of Virginia § 42.1-86.1)

AGENCY records may not be destroyed because of lack of space or funding for storage. Do not report the destruction of materials that are not public records, such as copies, personal items, and reference materials on an RM-3 Form.

### Non-confidential Destruction

Acceptable methods of destruction for non-confidential AGENCY records include trash, recycling, or deletion of electronic records. Destruction must be done in a timely manner, construed by the Library of Virginia to be one (1) year from retention expiration.

### Confidential Destruction

Acceptable methods of destruction for confidential AGENCY records include cross-cut shredding, pulping, incinerating, physical destruction of electronic storage media, "wiping" of electronic records with appropriate software, and degaussing of magnetic material. Destruction of confidential records containing personally identifying information must be done within six (6) months of retention expiration. (Code of Virginia § 42.1-86.1)

## VIII. Storage, Retrieval, and Disaster

### Recovery Storage

All AGENCY records shall be maintained in such a way that they are identifiable and accessible for the entirety of their assigned retention period.

All AGENCY records must be stored in areas with consistent temperatures and humidity levels. Ideal conditions are a temperature maintained in the 65–70° range and humidity maintained at 40% +/- 5%.

All AGENCY records must be:

- Protected from fire by the installation of smoke detectors, water sprinklers, and fire extinguishers
- Free of vermin and insects
- Far from water pipes

If records are of a confidential nature, they should be stored in a secure area that is locked and has controlled access for select personnel only. Strict procedures must be in place for retrieval, use, and re-filing of confidential records. Access to confidential records in electronic formats will be limited by assigning appropriate log-in credentials.

#### Retrieval

All work units must have procedures in place for the retrieval of records, their use, and re-filing.

#### Disaster Recovery

The AGENCY will have in place a Records Emergency Action Plan (REAP) that clearly communicates the procedures for records recovery in the event of a natural disaster, fire, or other catastrophic event affecting the AGENCY.

### IX. Legal Matters, Audits, and Investigations

Any AGENCY record that is relevant to pending or anticipated action, i.e., litigation, claim, audit, agency charge, investigation, or enforcement action, shall be retained until final resolution of the matter. In these circumstances, the work unit involved with the ongoing action will notify all other relevant organizational units and work with staff to identify and retain any records (including electronic records) and other information that could be relevant to the matter. This will include a directive that the relevant work unit's normal document destruction procedures be suspended temporarily.

AGENCY employees who become aware that an action, investigation, or legal proceeding has commenced or is anticipated against their department or work unit must promptly notify the manager of the affected organizational unit, as well as the agency-designated records officer, so that all records with potential relevance to the investigation or legal proceeding can be retained as necessary. After matter is closed, records should be maintained according to appropriate records series retention and disposition.

### X. Data Privacy

All records created and maintained by the AGENCY that contain personal or other confidential information must be kept in accordance with the Government Data Collection and Dissemination Practices Act, Code of Virginia § 2.2-3800 et seq. (See section VIII of this policy for information on the storage of and access to confidential records).