



SUPREME COURT OF VIRGINIA

PATRICIA L. HARRINGTON, CLERK

SUPREME COURT BUILDING

100 NORTH 9TH STREET, 5TH FLOOR

RICHMOND, VIRGINIA 23219

(804) 786-2251 V / TDD

FAX: (804) 786-6249

DOUGLAS B. ROBELEN
CHIEF DEPUTY CLERK

Supreme Court of Virginia Press Release

Media Contact: Patricia L. Harrington, Clerk

Release Date: October 19, 2018

THE SUPREME COURT OF VIRGINIA TO CONSIDER NEW RULES RELATED TO ACCESS TO JUDICIAL RECORDS

RICHMOND – In January 2018, the Supreme Court of Virginia announced through a press release that it would adopt Rules of Court regarding access to judicial records. The need for the Court to adopt such Rules became evident in light of confusion about access to court records, including electronic case information.

Under the Constitution of Virginia, the judicial branch is a separate, co-equal branch of government. The Supreme Court is not an agency of the executive or legislative branches. The Court recognizes its responsibility and role in making sure the public is informed about how to access the public records of the judiciary. Virginia is not unique in this approach. Similar rules and policies have been adopted by the judicial branches in other states and the federal judiciary.

The purpose of these Rules is to provide the public and the Virginia judiciary with a clear understanding of what records are publicly accessible and how to access them. Although these Rules are consistent with current practice, the publication of these Rules will contribute to transparency by providing an available reference regarding access to judicial records.

The public availability of case proceedings and records has always required a delicate balance between the public's interest in judicial records, the privacy and safety interests of parties, victims, and witnesses, and the need to preserve the confidentiality of the deliberative process so critical to the proper functioning of the judicial branch of government. The proposed Rules maintain the Commonwealth's traditional balance between these sometimes competing interests.

The Office of the Executive Secretary (OES) of the Supreme Court of Virginia provides administrative support to all courts and magistrates in the Commonwealth. OES publishes extensive information, including statistics, manuals, policies, court forms, court directories, and judicial branch expenditures, on its website. In addition, requests for aggregated, electronic case information are routinely filled by OES, as are requests for specific financial records. The availability of and access to these records is not changed under the proposed Rules.

The proposed Rules are consistent with current law and practice in the Commonwealth and track closely the access policies adopted by other state judiciaries and the federal courts. The Rules summarize the current law and practice in one place, making it easier for the public to know the records that are publicly accessible and the process for accessing them.

The Supreme Court is requesting comments on the proposed Rules. The comments must be **received** by **December 3, 2018** and must be forwarded to:

Patricia L. Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, VA 23219

OR via email with the subject line "Comment on Access to Judicial Records" to:

scvclerk@vacourts.gov

PART ELEVEN ACCESS TO JUDICIAL RECORDS

Rule 11:1. Scope.

(a) Public access to records of the Virginia Judiciary, including records of judicial officers, is governed by this Part Eleven. The purpose of this Part Eleven is to provide the public with reasonable access to records of the judicial branch of government. At the same time, in order to protect privacy, confidentiality, the administration of justice, and the best interests of the Commonwealth, public access to some judicial records may be restricted in accordance with this Part Eleven or other provisions of law. In addition, this Part Eleven is intended to provide direction to judicial officers and court personnel in responding to public records requests.

(b) This Part shall apply to records of judicial officers and administrative records. This Part shall not apply to case records, including the records maintained by the clerks of the courts of record, as defined in Virginia Code § 1-212, and courts not of record, as defined in Virginia Code § 16.1-69.5. Such records are open to inspection as provided for in Titles 16.1 and 17.1 of the Code of Virginia, subject to any prohibitions or restrictions of any applicable law or court order.

(c) The provisions of this Part Eleven shall apply regardless of where and in what format the record is created or maintained.

Rule 11:2. Definitions.

As used in this Part Eleven:

(a) "*Administrative record*" means any document, information, data, or other item created, collected, received, or maintained by the Virginia Judiciary pertaining to the administration of the judicial branch of government and not associated with any particular case.

(b) "*Case record*" means any document, information, data, or other item created, collected, received, or maintained by clerks of court in connection with a particular case, including the information and records in a case management system, or online case information system, maintained by the Office of the Executive Secretary of the Supreme Court of Virginia.

(c) "*Court personnel*," for purposes of these Rules, means all persons employed by the Office of the Executive Secretary of the Supreme Court of Virginia; a court of record, as defined in Virginia Code § 1-212, except for the clerks of those courts and their employees; a court not of record, as defined in Virginia Code § 16.1-69.5, except for the clerks of those courts and their employees; and, all other persons working under the supervision of any judicial officer, judge or justice of any Virginia court.

(d) "*Judicial officer*" means any justice, judge, or magistrate, including active, retired and senior justices and judges of any court of record, as defined in Va. Code § 1-212, and any court not of record, as defined in Va. Code § 16.1-69.5, substitute judges appointed pursuant to Va. Code § 16.1-69.9:1, special justices appointed pursuant to Va. Code § 37.2-803, judges pro tempore authorized under Va. Code § 17.1-109, Commissioners in Chancery appointed pursuant to Va. Code § 8.01-607, and Commissioners of Accounts appointed pursuant to Va. Code § 64.2-1200.

(e) "*Sealed*" means access to the record is restricted to the judge, court personnel as required to perform their official duties, and persons authorized by law or written order of the court.

(f) "*Virginia Judiciary*" includes all judicial officers, the Office of the Executive Secretary of the Supreme Court of Virginia, all district courts, all circuit courts, the Court of Appeals of Virginia, the Supreme Court of Virginia, the State Law Library, the Judicial Conference of Virginia, the Judicial Conference of Virginia for District Courts, the Judicial Council, the Committee on District Courts, and all work groups, advisory committees, commissions and any other committees or subcommittees of any of these entities. For purposes of these Rules, "Virginia Judiciary" shall not include the clerks of the courts of record, as defined in Virginia Code § 1-212, and clerks of the courts not of record, as defined in Virginia Code § 16.1-69.5.

Rule 11:3. Records of Judicial Officers.

(a) In order to protect the administration of justice, the deliberative process, and the privacy and safety interests of judicial officers, court personnel, jurors, and the public, records of judicial officers are not publicly accessible.

(b) Records of judicial officers include, but are not limited to (i) memoranda, notes, or drafts prepared by or under the direction of any judicial officer that relate to the adjudication, resolution, or disposition of any past, present, or future case, controversy, or legal issue; (ii) legal research and analysis prepared or circulated by judicial officers or court personnel; (iii) written communications or discussions relating to procedural, administrative, or legal issues that have or may come before any judicial officer; (iv) information entered into and maintained in an electronic system used to create and issue judicial process; (v) subject to applicable state and federal laws and policies, personnel information concerning identifiable individuals; (vi) telephone numbers, telephone records and email addresses for justices and judges; (vii) documents or information that could compromise the safety of judicial officers, court personnel, jurors, or the public, or jeopardize the integrity of judicial facilities or any information technology or recordkeeping systems; (viii) communications among court personnel and judicial officers, and communications among judicial officers; (ix) legal documents created or received by magistrates that have not been filed with the appropriate clerk of court; and (x) records, documents, information, data or other items that are sealed, confidential, privileged, or otherwise protected by federal or state law, common law, court rule, or court order.

Rule 11:4. Records of the Office of the Executive Secretary.

(a) Except as otherwise provided by law or by this Part Eleven, administrative records maintained by the Office of the Executive Secretary of the Supreme Court of Virginia shall be publicly accessible. Copies of administrative records may be requested as provided in Rule 11:5, and may include: (i) financial records; (ii) statistical information derived from the aggregation of a subset of individual case records; (iii) policies other than those determined to be confidential pursuant to subsection (b)(ii) of this Rule; and (iv) court forms in a format approved by the Executive Secretary.

(b) In order to protect the administration of justice, the deliberative process, and the privacy and safety interests of judicial officers, court personnel, jurors, and the public, the following administrative records maintained by the Office of the Executive Secretary shall not be publicly accessible: (i) legal research, analysis and work product of any attorney, law clerk, or intern working for any person or entity within the Virginia Judiciary; (ii) records or information collected, notes, correspondence, memoranda, drafts, and work product generated in the process of developing policies or providing guidance relating to the operation of the Virginia Judiciary, and all policies determined to be confidential by the Executive Secretary in consultation with the Chief Justice of the Supreme Court of Virginia; (iii) preliminary and draft versions of reports, documents, records, evaluations, investigations, and audits or compliance reviews, including materials prepared by a consultant; (iv) written communications among court personnel, including those maintained either in the Office of the Executive Secretary, or in chambers or offices of judicial officers; (v) subject to applicable state and federal laws and policies, personnel information concerning identifiable individuals; (vi) telephone numbers, telephone records or email addresses for justices and judges; (vii) infrastructure records that expose vulnerability in security of critical systems, including building security, personnel, recordkeeping, information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems; (viii) training materials, test questions, scoring keys, examination data, and other materials used for employment or certification purposes; (ix) test scores of a person if the person is identified by name and has not consented to the release of his or her scores; (x) information created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100; (xi) records, documents, information, data, or other items that are sealed, confidential, privileged, or otherwise protected from disclosure by federal or state law, common law, court rule, or order.

Rule 11:5. Procedure for Public Access to Records of the Office of the Executive Secretary.

(a) All requests for publicly accessible records maintained by the Office of the Executive Secretary of the Supreme Court of Virginia shall be in writing and shall describe with reasonable specificity the record(s) requested. All requests shall be addressed to Office of the Executive Secretary, Attn. Director of Legislative and Public Relations, 100 N. 9th Street, Richmond, VA 23219. The Office of the Executive Secretary may require the requester to provide his or her name and legal address. The Office of the Executive Secretary shall respond, pursuant to this Rule, within five working days of receiving a written request.

(b) The Office of the Executive Secretary shall notify the requester if the requested records cannot be found or do not exist. If the Office of the Executive Secretary does not have custody or control of the record(s) requested, the requester shall be notified and furnished the name and contact information of the person or entity having custody of the records, if known. The Office of the Executive Secretary shall not be required to compile information or create a record if one does not exist.

(c) The Office of the Executive Secretary may assess reasonable charges not to exceed its actual costs incurred in accessing, duplicating, supplying, reviewing or searching for the requested records. All charges for the supplying of requested records shall be estimated in advance upon the request of the requester. Any charges shall be assessed at the hourly rate of the person(s) engaged in any work necessary to respond to a request for records, even if no records are found. If the Office of the Executive Secretary determines in advance that charges for producing the requested records are likely to exceed \$200, it may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination. Such deposit shall be credited toward the final cost of supplying the requested records.

(d) A response denying, in whole or in part, production of the requested records, shall include a statement of the specific reason for withholding of the records.

(e) If it is not practically possible to provide the requested records or to determine whether they are available within the five-working day period, the response shall specify the conditions that make a response impossible. The Office of the Executive Secretary shall have an additional seven working days in which to provide a response.

Rule 11:6. Access to Records of Other Entities of the Virginia Judiciary.

(a) Except as otherwise provided by law or court order, records that have been submitted to or approved by the Committee on District Courts, the Judicial Conference of Virginia for District Courts, the Judicial Council, and the Judicial Conference of Virginia, shall be publicly accessible, with the exception of records related to matters discussed in closed sessions. All other records of these judicial policy making bodies shall be governed by Rule 11:6(b).

(b) Except as otherwise provided under these Rules, records of all work groups, conferences, advisory committees, and commissions established or chaired by the Chief Justice or the Executive Secretary shall not be publicly accessible absent a contrary determination by the Chief Justice of the Supreme Court of Virginia.

(c) The Chief Justice may authorize the public release of any final report or recommendations submitted to the Supreme Court by any work group, conference, advisory committee, commission, or judicial policy making body described in subsections (a) and (b) of this Rule 11:6.

Rule 11:7. Reconsideration of Denial of Public Access to Records of the Office of the Executive Secretary.

(a) A request for reconsideration of a decision denying public access to a record maintained by the Office of the Executive Secretary of the Supreme Court of Virginia may be made to the Executive Secretary of the Supreme Court of Virginia. Such request shall be made in the form of a detailed letter, within 30 days from the date of the letter denying access. Failure to submit a request for reconsideration on or before the 30-day deadline shall result in denial of the request for reconsideration.

(b) If the Executive Secretary sustains the decision denying public access, a request for reconsideration may be made to the Chief Justice of the Supreme Court of Virginia, in the form of a letter, within 10 days from the date of the Executive Secretary's letter denying access. Failure to submit a request for reconsideration on or before the 10-day deadline shall result in denial of the request for reconsideration. If the Chief Justice sustains the decision denying public access, a petition for reconsideration may be filed with the Supreme Court of Virginia within 30 days from the date of the Chief Justice's letter denying access.

Rule 11:8. Reconsideration of Denial of Public Access to Records of Judicial Officers or Other Entities of the Virginia Judiciary.

A request for reconsideration of a decision denying public access to a record of a judicial officer or other entities of the Virginia Judiciary may be made to the Chief Justice of the Supreme Court of Virginia. Such request shall be made in the form of a detailed letter, within 30 days from the date of the letter denying access. Failure to submit a request for reconsideration on or before the 30-day deadline shall result in denial of the request for reconsideration. If the Chief Justice sustains the decision denying public access, a petition for reconsideration may be filed with the Supreme Court of Virginia within 30 days from the date of the Chief Justice's letter denying access.