



# COMMONWEALTH of VIRGINIA

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The Honorable Sam Rasoul  
Member, Virginia House of Delegates  
Post Office Box 13842  
Roanoke, Virginia 24037

Dear Delegate Rasoul:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issue Presented

You have asked for a formal opinion about disclosure of footage from police body-worn and dashboard cameras. For purposes of this opinion, I understand you to ask under what circumstances the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3700 *et seq.* (VFOIA), requires or permits local police departments to disclose recordings from body-worn and/or dashboard cameras in connection with officer-involved shootings.

## Background

You relate that, in February 2016, high school student Kionte Spencer was shot by Roanoke County Police officers and died shortly thereafter. You note that, after officer-involved shootings, families are often left wondering what happened to their loved ones, and you inquire whether local police departments have authority to release relevant footage from body-worn and/or dashboard cameras in certain circumstances.

## Applicable Law and Discussion

The General Assembly enacted VFOIA to “ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.”<sup>1</sup> Consistent with that purpose, VFOIA creates a strong presumption that “all public records shall be open to citizens of the Commonwealth” unless “otherwise specifically provided by law.”<sup>2</sup> “Any exemption from public access to

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<sup>1</sup> VA. CODE ANN. § 2.2-3700(B). This and all other citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2021 Regular Session and Special Session I of the General Assembly.

<sup>2</sup> *Id.* § 2.2-3704(A).

records . . . shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to [VFOIA] or other specific provision of law.”<sup>3</sup>

Under VFOIA, footage from body-worn or dashboard cameras recorded and maintained by a local police department is a public record.<sup>4</sup> Most of the provisions relevant to disclosure of police camera footage are located in § 2.2-3706, which addresses “[d]isclosure of law-enforcement and criminal records; limitations.”<sup>5</sup> That section defines three categories of records related to criminal law enforcement: (1) those that are “required to be released,”<sup>6</sup> (2) those that “are excluded from the mandatory disclosure provisions of [VFOIA], but may be disclosed” according to “the custodian[’s] . . . discretion,”<sup>7</sup> and (3) those for which “release[]” is “[p]rohibited.”<sup>8</sup>

A recording may fall into the first category of § 2.2-3706—under which “[r]ecords [are] *required* to be released”—to the extent an investigation of an “unattended death” has been “completed” and the records of the investigation have been requested by family members of the decedent as defined by the statute.<sup>9</sup> Under that subsection, an “unattended death” is defined as “a death determined to be a suicide, accidental or natural death where no criminal charges will be initiated.”<sup>10</sup>

In the 2021 Special Session I, the General Assembly enacted an amendment to the Virginia Freedom of Information Act, creating new code § 2.2-3706.1.<sup>11</sup> Under § 2.2-3706.1(B)(2), recordings related to an officer-involved shooting must be released as part of criminal investigative files, if the investigation is not ongoing and none of the enumerated exceptions applies.<sup>12</sup> Videos depicting a victim or where a victim is “readily identifiable” are exempt from mandatory public disclosure, but they still must be disclosed to the victim, the victim’s immediate family if the victim is deceased, or the parent or guardian of the victim if the victim is a minor.<sup>13</sup>

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<sup>3</sup> VA. CODE ANN. § 2.2-3700(B); *see also* Bergano v. City of Virginia Beach, 296 Va. 403, 408 (2018) (describing VFOIA as adopting a “broad mandate of disclosure”).

<sup>4</sup> *See* VA. CODE ANN. § 2.2-3701 (defining “[p]ublic records” to include “mechanical or electronic recording or other form of data compilation, however stored . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business”); *id.* (defining “[p]ublic body” to include “any . . . agency . . . of any political subdivision of the Commonwealth”); *see also* 2015 Op. Va. Att’y Gen. 24, 25 (“The requirements of FOIA apply to records maintained by law-enforcement agencies.”).

<sup>5</sup> VA. CODE ANN. § 2.2-3706.

<sup>6</sup> *Id.* § 2.2-3706(A).

<sup>7</sup> *Id.* § 2.2-3706(B).

<sup>8</sup> *Id.* § 2.2-3706(C).

<sup>9</sup> VA. CODE ANN. § 2.2-3706(A)(3) (emphasis added).

<sup>10</sup> *Id.* Note that the mandatory disclosure requirements under § 2.2-3706(A)(1) for “[c]riminal incident information relating to felony offenses” does not require a local police department “to release actual records relating to a criminal incident, but only to provide a summary of the information available from the specified records subject to any mandatory or discretionary exemptions provided for in the statute.” *Connell v. Kersey*, 262 Va. 154, 163–64 (2001) (citing predecessor section of VFOIA).

<sup>11</sup> H.B. 2004, 2021 Gen. Assemb., Spec. Sess. I (Va. 2021) (creating VA. CODE § 2.2-3706.1, effective July 1, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> VA. CODE ANN. § 2.2-3706.1(D).

The release is only mandatory if the investigation is not ongoing, and the statute defines “ongoing” as “a case in which the prosecution has not been fully adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.”<sup>14</sup> Further, release is not mandatory if it would interfere with any ongoing criminal investigation, deprive a person of a right to fair trial or impartial adjudication, cause an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose law enforcement techniques if the disclosure could reasonably be expected to risk circumvention of the law, or endanger someone’s life or physical safety.<sup>15</sup>

If one of the exceptions does apply, then release of the video is discretionary. Police departments *may* (but are not required to) release camera footage, so long as disclosure is not otherwise “prohibited by law.”<sup>16</sup> This type of “[d]iscretionary release[]” would apply, for example, to a recording that is part of a “[c]riminal investigative file[]” as “evidence relating to a criminal investigation or prosecution.”<sup>17</sup> A department likewise may have discretion to disclose camera footage in connection with an “administrative investigation[] relating to allegations of wrongdoing by employees of a law-enforcement agency.”<sup>18</sup>

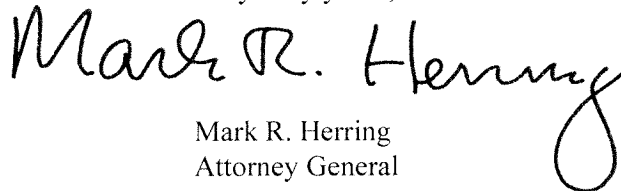
Only limited types of records fall under the third category—where “release[]” would be “[p]rohibited.”<sup>19</sup> Those are records that would disclose “[t]he identity of any individual providing information about a crime or criminal activity under a promise of anonymity.”<sup>20</sup>

### Conclusion

Accordingly, it is my opinion that the Virginia Freedom of Information Act requires local police departments to release footage from body-worn and/or dashboard cameras related to officer-involved shootings unless an exception applies. Where an exception applies, a local police department may still release the footage unless doing so is otherwise prohibited.

With kindest regards, I am,

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>14</sup> *Id.* § 2.2-3706.1(A).

<sup>15</sup> *Id.* § 2.2-3706.1(C).

<sup>16</sup> VA. CODE ANN. § 2.2-3706(B)(1); *see also* *Fitzgerald v. Loudoun Cty. Sheriff’s Office*, 289 Va. 499, 506–07 (2015) (explaining that predecessor section of VFOIA “permits, but does not mandate, disclosure” of covered records).

<sup>17</sup> VA. CODE ANN. § 2.2-3706(B)(1). Note that a criminal investigative file does not lose its character as such under VFOIA if a file is closed by the police department. *See Fitzgerald*, 289 Va. at 506–07 (“That the investigation was later closed is inconsequential for purposes of FOIA disclosure principles.”); *Stevens v. Lemmie*, 40 Va. Cir. 499, 503 (1996) (exemption for “criminal investigation” from mandatory disclosure “continues after the investigation has concluded”).

<sup>18</sup> VA. CODE ANN. § 2.2-3706(B)(9)(ii).

<sup>19</sup> *Id.* § 2.2-3706(C).

<sup>20</sup> *Id.*