

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

LIBRARIES: VIRGINIA PUBLIC RECORDS ACT.

COUNTIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

Circuit court clerk should communicate with Library of Virginia for assistance in determining whether originals of records microfilmed in accordance with archival standards recommended by Library may be destroyed. Statutory requirements for maintenance, destruction and microphotographing, of original papers in circuit court cases ended before and after January 1, 1913.

The Honorable Edward Semonian

Clerk, Circuit Court of the City of Alexandria

November 23, 1998

You ask whether the originals of documents that have been recorded by a procedural microphotographic process pursuant to § 17.1-240 of the *Code of Virginia*¹ and transferred to microfilm in accordance with the appropriate archival standards may be destroyed. You also ask whether the originals of case pleadings and orders that have been transferred to microfilm in accordance with the requisite standards may be destroyed.

The duties of a clerk of court of record regarding public records are contained generally in Chapter 2 of Title 17.1, §§ 17.1-206 through 17.1-265. Section 17.1-240 provides:

A procedural microphotographic process, digital reproduction, or any other micrographic process which stores images of documents in reduced size or in electronic format, may be used to accomplish the recording of writings otherwise required by any provision of law to be spread in a book or retained in the circuit court clerk's office, including, but not limited to, the Common Law Order Book, the Chancery Order Book, the Clerk's Order Books, the Will Book and/or Fiduciary Account Book, the Juvenile Order Book, the Adoption Order Book, the Trust Fund Order Book, the Deed Book, the Plat Book, the Land Book, the Judgment Docket Book, the Partnership or Assumed Name Certificate Book, marriage records, and financing statements. Any such micrographic, microphotographic or electronic recording process shall meet archival standards as recommended by the Library of Virginia.

This section clearly permits the clerk to use a microphotographic process for the purpose of recording writings that otherwise are required to be spread in a book or retained in the clerk's office.² The provision does not, however, address the destruction of the original writing. Consequently, either the authority to do so, or the prohibition from doing so, must be derived from other statutes.³

Additionally, the General Assembly enacted the Virginia Public Records Act⁴ "to establish a single body of law applicable to all public officers and employees on the subject of public records

management and preservation."⁵ Under the Public Records Act, the archival and records management function is vested in the State Library Board, and the Library of Virginia has administrative control of public records.⁶ The Act provides that "[n]o agency shall destroy or discard public records without a retention and disposition schedule approved by the Librarian of Virginia."⁷ Constitutional officers, such as clerks of courts of record,⁸ specifically fall within the purview of the Act.⁹ Accordingly, a clerk should communicate with the Library for assistance in determining whether original records which have been microfilmed pursuant to § 17.1-240 may be destroyed.¹⁰

Regarding your second inquiry concerning the disposition of original circuit court cases, § 17.1-213 governs the disposition of papers in ended cases. The statute provides that "case files ... ended prior to January 1, 1913, shall be permanently maintained in *hardcopy* form, either in the locality served by the circuit court where such files originated or in The Library of Virginia in accordance with the provisions of §§ 42.1-83 and 42.1-86."¹¹ For cases ending on or after January 1, 1913, § 17.1-213 details the types of case records that may be destroyed and the time frames for doing so.¹²

I am aware that § 15.2-1412 sets forth the general requirements for the microphotographing and subsequent destruction of the originals of records of "any department, agency or institution" of a locality, and provides, in part:

With the approval of the judge of the circuit court entered of record, the clerk of the circuit court and the clerk of the district court, if directed to do so by the governing body, may microphotograph records in their respective offices which are not required for current use. No record so microphotographed shall be destroyed but may be stored in a safe place.

Pursuant to the applicable rules of statutory construction, however, I am guided by the general rule that a special or specific statute supersedes a general statute insofar as there is conflict.¹³ Thus, any apparent conflict between § 15.2-1412 and the specific statutes noted above is resolved by application of this rule of construction. In addition, another rule of statutory construction requires the presumption that, in amending or enacting statutes, the General Assembly has full knowledge of existing law and interpretations thereof.¹⁴ I must, therefore, presume that the General Assembly was aware of § 15.2-1412 (and former § 15.1-8) when it enacted and/or amended the statutes discussed in this opinion, and intended to change the law accordingly.

¹Your letter references § 17-70.1 which, effective October 1, 1998, was repealed and recodified as § 17.1-240. See 1998 Va. Acts ch. 872, at 2128, 2150-2205, 2212-13 (repealing Title 17, §§ 17-1 to 17-238, and adding Title 17.1, §§ 17.1-100 to 17.1-806).

²See 1984-1985 Op. Va. Att'y Gen. 253, 254 (providing that because state highway plat book is kept for purposes of reference rather than recordation, it does not fall within [§ 17.1-240] authorization to be microphotographed, and, thus, must be maintained separately).

³Section 20-20 requires a clerk to whom a marriage license and certificate are returned to "file and preserve the *original* [license] in his office." (Emphasis added.) Conversely, § 8.9-403(3) authorizes the clerk to destroy the original of a financing statement upon certain conditions. With respect to adoption records, § 63.1-235 provides that "[s]uch records shall be retained permanently ... in original form *or* on microfilm." (Emphasis added.)

⁴Tit. 42.1, ch. 7, §§ 42.1-76 to 42.1-91.

⁵Section 42.1-76.

⁶See § 42.1-79.

⁷Section 42.1-86.1.

⁸See Va. Const. art. VII, § 4 (1971) (providing for election of "a clerk who shall be clerk of the court in the office of which deeds are recorded").

⁹See § 42.1-77 (defining "agency" as used in Chapter 7 as including "offices of constitutional officers"; "public official" as including "all persons holding any office created by the Constitution of Virginia").

¹⁰See 1975-1976 Op. Va. Att'y Gen. 60, 60 (concluding that Commonwealth's attorney may destroy official records determined by State Library to have no permanent value and which attorney has determined have no enduring legal significance to his successor); see *id.* at 284, 286 (concluding that city police department may destroy arrest and investigative records when State Library has determined they have no permanent value and are not necessary for efficient operation of department).

¹¹Section 17.1-213(A) (emphasis added).

¹²Section 17.1-213 provides the following guidelines for disposing of circuit court records in ended cases:

"B. The following records for cases ending on or after January 1, 1913, may be destroyed in their entirety at the discretion of the clerk of each circuit court after having been retained for ten years after conclusion:

"1. Conditional sales contracts;

"2. Concealed weapons permit applications;

"3. Minister appointments;

"4. Petitions for appointment of trustee;

"5. Name changes;

"6. Nolle prosequi cases;

"7. Law and chancery matters that are voluntarily dismissed, including nonsuits, cases that are dismissed as settled and agreed, cases that are dismissed with or without prejudice, cases that are discontinued or dismissed under § 8.01-335 and district court appeals dismissed under § 16.1-113 prior to 1988;

"8. Misdemeanor and traffic cases, including those which were commenced on a felony charge but concluded as a misdemeanor;

"9. Suits to enforce a lien;

"10. Garnishments;

"11. Executions except for those covered in § 8.01-484;

"12. Miscellaneous oaths and qualifications, but only if the order or oath or qualification is spread in the appropriate order book; and

"13. Civil cases pertaining to declarations of habitual offender status and full restoration of driving privileges.

"C. All other records or cases ending on or after January 1, 1913, may be destroyed in their entirety at the discretion of the clerk of each circuit court subject to the following guidelines:

"1. All civil and chancery case files to which subsection D does not pertain may be destroyed after twenty years from the court order date.

"2. All criminal cases dismissed, including those not a true bill, acquittals and not guilty verdicts, may be destroyed after ten years from the court order date.

"3. All criminal case files involving a felony conviction may be destroyed (i) after twenty years from the sentencing date or (ii) when the sentence term ends, whichever comes later.

"D. Under the provisions of subsections B and C, the entire file of any case deemed by the local clerk of court to have historical value, as defined in § 42.1-77, or genealogical or sensational significance shall be retained permanently as shall all cases in which the title to real estate is established, conveyed or condemned by an order or decree of the court. The final order for all cases in which the title to real estate is so affected shall include an appropriate notification thereof to the clerk.

"E. Except as provided in subsection A, the clerk of a circuit court may cause (i) any or all ended records, papers, or documents pertaining to law, chancery, and criminal cases which have been ended for a period of three years or longer and (ii) any unexecuted search warrants and affidavits for unexecuted search warrants, provided at least three years have passed since issued, to be destroyed if such records, papers, or documents no longer have administrative, fiscal, historical, or legal value to warrant continued retention, provided such records, papers, or documents have been microfilmed. Such microfilm and microphotographic process and equipment shall meet state archival microfilm standards pursuant to § 42.1-82 and such microfilm shall be placed in conveniently accessible files and provisions made for examining and using same. The clerk shall further provide security negative microfilm copies of such ended cases for storage in The Library of Virginia."

¹³ See *City of Roanoke v. Land*, 137 Va. 89, 119 S.E. 59 (1923) (local ordinance adopted under general charter powers that conflicts with specific statute empowering court to grant or refuse pawnbroker license to applicant is void); Op. Va. Att'y Gen.: 1987-1988 at 276, 277; 1985-1986 at 65, 68.

¹⁴ See *Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); Op. Va. Att'y Gen.: 1996 at 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change law); 1995 at 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law).