



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

July 26, 2013

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The Honorable Dana T. Bundick
Treasurer, County of Accomack
Post Office Box 296
Accomac, Virginia 23301

Dear Ms. Bundick:

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

Issues Presented

You present several distinct questions concerning matters related to your duties as treasurer. First you ask whether Accomack County ("County") can appropriate funds to certain fire departments and rescue squads, specifically companies that allegedly have lost non-profit status for failure to file Form 990 with the Internal Revenue Service ("IRS") and companies that allegedly provide compensation to individual members. You then ask, in the event a particular company is ineligible to receive such funds, how you are to respond to your board of supervisors if it directs you to provide funds to the company in question. Next, you seek guidance regarding the proper storage of treasurers' records: you specifically inquire who is responsible for their storage, and where and for how long the records should be stored. Finally, you inquire whether other County offices have the authority to release delinquent tax information.

Response

It is my opinion that a Virginia locality may provide appropriations to certain organizations providing fire or emergency medical services regardless of their classification as IRS non-profit entities and regardless of whether they provide compensation to individual members.¹ It is further my opinion that a county treasurer's records must be located in the same building as that county treasurer's office, and that the county treasurer should maintain, store, and retain his records in accordance with the disposition schedule established for treasurers by the Library of Virginia ("LVA"). Finally, it is my opinion that, to the extent that other county offices are in possession of public records, such county offices may be required to produce information contained in these records pursuant to the Virginia Freedom of Information Act ("FOIA").²

Background

Your first inquiries arise from matters brought to your attention by an association of concerned citizens. The association first questions the eligibility of certain fire departments and rescue squads to

¹ By answering this question in the affirmative, this Opinion need not address your inquiry as it relates to any direction the board of supervisors might give you to provide these appropriations.

² VA. CODE ANN. §§ 2.2-3700 through 2.2-3714 (2011 & Supp. 2013).

receive County monies obtained through property taxation. In a document you provide, the association expresses concern that a company that allegedly lost its non-profit tax status due to a failure to file Form 990 with the IRS and another company that allegedly provided compensation to individual members of the department may not be entitled to such funds. The concern focuses on the charitable status of such organizations. Your questions regarding the storage and retention of treasurers' records stem from another document you provide, in which the association outlines its concerns regarding records preservation. With respect to your final inquiry, you report that the County Attorney, in response to a FOIA request, released a taxpayer's personal delinquent tax information to that same taxpayer.³ You question whether the County Attorney, as well as other County offices, possess the authority to release such delinquent tax information.

Applicable Law and Discussion

I. Appropriations to Fire Departments and Rescue Squads

"In Virginia, the powers of [county] boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication."⁴ As one of the documents you provide notes, local governments expressly are authorized pursuant to § 15.2-953 to "make gifts and donations of property, real or personal, or money, to . . . any association or other organization furnishing voluntary fire-fighting services" as well as "any nonprofit lifesaving crew or lifesaving organization, or rescue squad, within or outside the boundaries of the locality . . ."⁵ Thus, to the extent an organization provides voluntary fire-fighting services or constitutes a non-profit rescue squad, it is eligible to receive funds from the local governing body.⁶

Nonetheless, and irrespective of the authority granted under § 15.2-953, the General Assembly has provided another method for appropriating money to organizations providing local fire or emergency medical services. Specifically, § 27-23.1 of the *Code of Virginia* authorizes local governments to designate geographical fire and emergency medical services ("EMS") zones or districts, within which fire and EMS departments may operate. The statute further allows a locality that has created such zones or districts to "contract with, or secure the services of, *any individual corporation, organization or municipal corporation, or any volunteer fire fighters or emergency medical services personnel for such fire or emergency medical services protection as may be required.*"⁷ Although the locality may utilize the services of volunteer companies, the authority afforded under the plain language of this provision is not limited to their use. Moreover, the statute does not require that an organization providing fire or emergency medical services maintain a non-profit status for the purposes of the IRS or that its members serve without compensation. Accordingly, such an organization is eligible to receive appropriations from the County consistent with an agreement entered into under § 27-23.1.

³ You state that the FOIA request the taxpayer submitted to the County Attorney did not pertain to taxes. The actual FOIA request made, which need not be in writing, *see* 1998 Op. Va. Att'y Gen. 5, 6, is not before me; thus, I cannot comment on its scope.

⁴ *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁵ VA. CODE ANN. § 15.2-953(B) (2012).

⁶ This Opinion cannot address your request to the extent that it would require a finding on whether a particular fire department or rescue squad is indeed "volunteer" or "non-profit." The Attorney General "refrain[s] from commenting on matters that require additional facts[.]" 2010 Op. Va. Att'y Gen. 56, 58.

⁷ *Id.*, emphasis added. The Accomack County Board of Supervisors has created fire and rescue districts pursuant to § 27-23.1. *See* COUNTY OF ACCOMACK, VA., Code §§ 42-101 42-103; 42-126 through 42-128; 42-151 through 42-153; 42-176 through 42-178, available at <http://library.municode.com/index.aspx?clientId=13191>.

II. Records Storage and Retention

“[T]o establish a single body of law applicable to all public officers . . . [for] public records management and preservation . . . [,]”⁸ the General Assembly enacted the Virginia Public Records Act (“Records Act”).⁹ The Records Act provides, with respect to where records used in the transaction of business should be located, that “[c]urrent public records should be kept in the buildings in which they are ordinarily used.”¹⁰ Thus, a treasurer’s records should be stored where his offices are located.¹¹

The Records Act further directs the Library of Virginia (“LVA”) to “establish procedures and techniques for the effective management of public records.”¹² All agencies, including constitutional officers,¹³ holding public records are required to comply with any applicable LVA records retention and disposition schedules.¹⁴ The LVA, in General Schedule No. GS-28, has issued a records retention and disposition schedule applicable to county treasurers.¹⁵ This schedule comprehensively lists the retention period and disposition method for various types of records.¹⁶ I therefore conclude that a treasurer should abide by this schedule in retaining and disposing of his records.

III. Disclosure of Delinquent Tax Information

FOIA provides that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.”¹⁷ FOIA further requires that:

[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or

⁸ VA. CODE ANN. § 42.1-76 (2012).

⁹ VA. CODE ANN. §§ 42.1-76 through 42.1-91 (2002 & Supp. 2012).

¹⁰ Section 46.2-87(A) (Supp. 2012).

¹¹ Although the county may have provided the treasurer his office space, *see* § 15.2-1639 (2012), as a constitutional officer, the treasurer remains independent from the local governing body and, unless otherwise directed by statute, retains complete discretion in the day-to-day operations of his office, which would include the management of his files and records. *See, e.g.*, 1987-88 Op. Va. Att’y Gen. 161, 162 and opinions cited therein. Nonetheless, although the treasurer is deemed the custodian responsible for maintaining his records, the Records Act clearly contemplates that certain records may be stored by another party by agreement. *See* § 42.1-87(A). Thus, although the treasurer is not required to turn over these records to the county for storage, he may choose to do so.

¹² Section 42.1-85(A) (Supp. 2012).

¹³ For purposes of the Records Act, “agency” is defined to include “the offices of constitutional officers,” § 42.1-77 (Supp. 2012), and therefore encompasses the office of county treasurer. *See* VA. CONST. art. VII, § 4.

¹⁴ Section 42.1-86.1(A) (Supp. 2012) (“No agency shall destroy or discard a public record unless . . . the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and the record’s retention period has expired . . .”). *See* VA. CODE ANN. § 58.1-3129(C) (2009) (“The treasurer may cause records to be destroyed after audit . . . in accordance with retention regulations for records maintained by the treasurer established under the Virginia Public Records Act”).

¹⁵ LIBRARY OF VIRGINIA, *Records Retention & Disposition Schedule, Gen. Schedule No. GS-28, Cnty. & Mun. Gov’ts: Treasurer* (Apr. 16, 2013), available at http://www.lva.virginia.gov/agencies/records/sched_local/GS-28.pdf.

¹⁶ Because your request does not refer to any particular type of record, I can offer only general guidance here.

¹⁷ Section 2.2-3704(A) (2011).

meetings shall be narrowly construed and no record shall be withheld . . . to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.^{18]}

The Supreme Court of Virginia has acknowledged that the policy behind FOIA is to promote the disclosure of public records, and that there is a general presumption in favor of the release of such information.¹⁹

Nonetheless, FOIA expressly excludes from disclosure “[s]tate income, business, and estate tax returns, personal property tax returns . . . and confidential records held pursuant to § 58.1-3.”²⁰ Pursuant to § 58.1-3(A), it is a Class 2 misdemeanor²¹ for any “state or local tax or revenue officer or employee . . . [to] divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.” This Office previously has clarified that although the identity of a delinquent taxpayer is releasable, the amount of the tax delinquency may not be disclosed.²²

Finally, “public records” are defined for purposes of FOIA as “all writings and recordings . . . prepared or owned by, or *in the possession of* a public body or its officers, employees or agents in the transaction of public business.”²³ FOIA defines a “public body” in part as “any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, [and] governing bodies of counties” and specifies that constitutional officers also are considered “public bodies” for the purposes of FOIA.²⁴ Therefore, to the extent that a “public body,” or any of its officers, employees or agents, including a county attorney, is in possession of delinquent tax information not excluded from disclosure by law, the public body or person has a duty to produce such information. If, on the other hand, disclosure of particular information is prohibited by § 58.1-3, then it may not be released by the official or employee possessing it.²⁵

Conclusion

Accordingly, it is my opinion that: (1) localities may secure and provide funding for the services of an organization providing fire or emergency medical services irrespective of whether such an organization is an IRS non-profit entity or if its members serve without compensation; (2) the records of a county treasurer

¹⁸ Section 2.2-3700(B) (2011).

¹⁹ See *City of Danville v. Laird*, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982) (“[T]he Act shall be liberally construed to enable citizens to observe the operations of government and . . . the exemptions shall be narrowly construed ‘in order that no thing which should be public may be hidden from any person.’” (quoting § 2.1-340.1, the predecessor statute to § 2.2-3700)).

²⁰ Section 2.2-3705.7(1) (Supp. 2013).

²¹ See VA. CODE ANN. § 18.2-11(b) (2009) (“The authorized punishments for conviction of . . . Class 2 misdemeanors [are] confinement in jail for not more than six months and a fine of not more than \$1,000, either or both.”).

²² See 1993 Op. Va. Att’y Gen. 217, 220 (“[Section] 58.1-3 does not prohibit a local tax official from revealing the identity of a taxpayer who is currently delinquent in the payment of the locality’s business license tax as long as the amount of the delinquency is not disclosed.”). See also Ops. Va. Att’y Gen. 1999 at 211; 1992 at 157; 1989 at 304. You relate that the County Attorney disclosed the amount of the delinquency, but that such disclosure was to the delinquent taxpayer himself. Because the secrecy provisions of § 58.1-3 are intended to protect the taxpayer from disclosure of confidential tax information to third parties, releasing to a taxpayer his own information does not constitute a violation of § 58.1-3. See Ops. Va. Att’y Gen. 1975-76 at 394; 1984-85 at 297A, 298; 1985-86 at 312, 313; 1987-88 at 5, 8.

²³ Section 2.2-3701 (2011) (emphasis added).

²⁴ *Id.*

²⁵ “[FOIA’s] disclosure requirements generally are superseded by the secrecy provision of 58.1-3.” 2005 Op. Va. Att’y Gen. 147, 148.

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must be located in the same building as that county treasurer's office, and such records must be retained according to the LVA's records retention and disposition schedules applicable to county treasurers; and (3) a county attorney in possession of delinquent tax information that is not excluded from disclosure under FOIA is responsible for producing such information pursuant to a relevant FOIA request, except as provided for in § 58.1-3.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General