



# COMMONWEALTH of VIRGINIA

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The Honorable Jeff Small  
Clerk, City of Fredericksburg Circuit Court  
701 Princess Anne Street, Suite 100  
Fredericksburg, Virginia 22401

Dear Mr. Small:

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 ask whether a “term jury list,” or list of potential jurors for a term of court as described in § 8.01-351 of the *Code of Virginia*, may be made available for public review, and whether the list may be copied.

## Applicable Law and Discussion

The Virginia Freedom of Information Act (“FOIA”) provides that public records generally be made available to citizens of the Commonwealth for inspection and copying.<sup>1</sup> However, jury lists are excluded from the scope of FOIA.<sup>2</sup>

Three types of jury lists are used by clerks for trials in Virginia’s circuit courts: master jury lists, term jury lists, and panel jury lists.<sup>3</sup> Each list is prepared at a separate stage in the jury selection process.

With respect to term jury lists, which are the focus of your inquiry, § 8.01-351 provides that a clerk shall prepare a list of potential jurors for civil and criminal cases pending in an upcoming term of court. It states that the list “shall be available in the clerk’s office for inspection by counsel in any case to be tried by a jury during the term.”<sup>4</sup> There is no other statute either authorizing or requiring disclosure of

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<sup>1</sup> VA. CODE ANN. § 2.2-3704(A) (2014) (providing 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”).

<sup>2</sup> See *Archer v. Mayes*, 213 Va. 633, 641 (1973) (“The jury list is not an ‘official record’ within the intent and meaning of the provisions of the Freedom of Information Act.”).

<sup>3</sup> See VA. CODE ANN. §§ 8.01-343 to -363 (2015); *Norfolk S. Ry. Co. v. Bowles*, 261 Va. 21, 27-28 (2001); see also OFFICE OF THE EXEC. SEC’Y, VA. SUPREME COURT, CIRCUIT COURT CLERK’S MANUAL—CRIMINAL, at 4-82 to 4-90 (rev. July 2015); OFFICE OF THE EXEC. SEC’Y, VA. SUPREME COURT, CIRCUIT COURT CLERK’S MANUAL—CIVIL, at 3-18 to 3-29 (rev. July 2015).

<sup>4</sup> Section 8.01-351.

this list. Therefore, the list may be made available for viewing only by counsel in jury cases held during the term. Any litigant who is preceding *pro se* in a jury case enjoys this same right, and any reference in this opinion to “counsel” shall also include *pro se* litigants.

The other question posed by your inquiry is whether counsel of record may copy a term jury list in addition to inspecting it. Section 8.01-351 requires that term jury lists be available “for *inspection* by counsel.”<sup>5</sup> It does not require the list to be available for copying by counsel. In contrast, FOIA requires that “public records shall be open to inspection *and copying*.”<sup>6</sup> The statutory canon of *expressio unius est exclusio alterius* means that the express mention of one thing excludes all others.<sup>7</sup> The General Assembly could have provided a right to copy a jury list in § 8.01-351 as it did in FOIA. It chose not to do so. I must therefore conclude that the General Assembly, in enacting § 8.01-351, did not intend to give counsel the right to copy a term jury list.

In the case of *Archer v. Mayes*, the Supreme Court of Virginia articulated the policy considerations affecting disclosure of a master jury list, stating, “[e]xposure of the list to the public could lead to tampering with and harassment of potential jurors and seriously affect their impartiality and the proper administration of justice.”<sup>8</sup> The Court further held that the “jury list be kept secret . . . unless good cause be shown.”<sup>9</sup>

While *Archer* involved master jury lists, not the term jury lists which are the subject of your inquiry, its rationale—protecting the integrity of the jury system by judicial control of access to juror information—lends further support to the conclusion that § 8.01-351 authorizes only review of a term list by counsel, but not copying, unless a court finds good cause to permit copying.<sup>10</sup>

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<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> VA. CODE ANN. § 2.2-3704(A) (2014) (emphasis added).

<sup>7</sup> *Fisher v. Tails, Inc.*, 289 Va. 69, 75 (2015) (citing *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246 (2001)).

<sup>8</sup> *Archer v. Mayes*, 213 Va. 633, 641 (1973).

<sup>9</sup> *Id.* at 640-41; *see also Prieto v. Commonwealth*, 283 Va. 149, 184-85 (2012), *cert. denied*, 133 S. Ct. 244 (2012) (observing the “good cause” standard pertinent to the release of a master jury list and holding, in part, that a circuit court did not err in denying a criminal defendant access to certain expired master jury lists). The *Prieto* decision also states, at 185, “The disclosure of an expired jury list does not raise the same tampering or harassment concerns that the disclosure of a current jury list does, but it still raises privacy concerns. A jury list contains sensitive information that should be protected. We thus believe that a good-cause standard is appropriate for the release of both a current and expired jury list.”

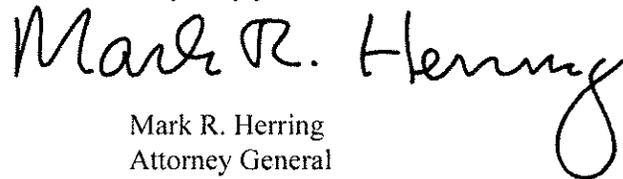
<sup>10</sup> Consistent with the *Archer* decision, a 1997 Opinion of this Office opined that a circuit clerk may not release information contained in a master jury list or jury commissioner’s questionnaires regarding potential jurors to law enforcement or the Department of Motor Vehicles without the Circuit Court finding good cause to do so. 1997 Op. Va. Att’y Gen. 27. I note that the Circuit Court Clerk’s Manual (the “Manual”), issued by the Office of the Executive Secretary of the Supreme Court of Virginia, discusses access to panel jury lists in civil and criminal jury trials. Because this opinion deals only with term jury lists, it does not affect the guidance provided by the Manual for panel jury lists. *See OFFICE OF THE EXEC. SEC’Y, VA. SUPREME COURT, CIRCUIT COURT CLERK’S MANUAL—CRIMINAL*, at 7-22 (rev. July 2015). In addition, I note that § 17.1-208 of the *Code* restricts the means of copying of records, stating, “No person shall be permitted to use the [Circuit Court] clerk’s office for the purpose of making copies of records in such manner, or to such extent, as will, in the determination of the clerk, interfere with the business of the office or with its reasonable use by the general public.”

**Conclusion**

For the foregoing reasons, it is my opinion that only counsel of record has the right to view a term jury list. Copying of the list by counsel is permitted only by leave of court upon a showing of good cause.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping underline.

Mark R. Herring  
Attorney General