

PUBLIC RECORDS ACT

**INTERIM REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL
To
THE GOVERNOR
And
THE GENERAL ASSEMBLY OF VIRGINIA**



House Document No. 13

**COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1974**

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PUBLIC RECORDS ACT
Interim Report of The
Virginia Advisory Legislative Council

Richmond, Virginia
January, 1974

To: HONORABLE LINWOOD HOLTON, GOVERNOR OF VIRGINIA
and
THE GENERAL ASSEMBLY OF VIRGINIA

Virginia, at the present time, has no comprehensive public records act. Nor does Virginia have a single agency charged with control of public records. Those Code provisions which do regulate the organization, control, public access, and destruction of public records are scattered throughout the Code.

An increased awareness of the need to protect and preserve the heritage of Virginia has renewed interest in reforming the archival function of the Commonwealth. A 1971 survey conducted by the State Archivist on records-keeping procedures of courts of record found deficiencies throughout the State in security and preservation of local records. In many cases, original records had not been photographed or microfilmed and records rooms were not fireproof or secure against theft or willful destruction.

Pursuant to House Joint Resolution No. 240, the 1973 General Assembly directed the Virginia Advisory Legislative Council to study and propose a Public Records Act for the Commonwealth.

HOUSE JOINT RESOLUTION NO. 240

Directing the Virginia Advisory Legislative Council to study
and propose a Public Records Act for the Commonwealth.

Whereas, the preservation of public records is important to the Commonwealth, both for the administration of government and the study of its history; and

Whereas, the access of the public to such records shall be protected without endangering the safety of the documents; and

Whereas, the present provisions of the Code of Virginia are inadequate to accomplish such purposes; now, therefore, be it

Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council is hereby directed to make a study of public records preservation, the present provisions dealing with public records, and proposals for new provisions. All agencies of the State shall assist the Council in its study. The Council shall complete its study and submit its report to the Governor and the General Assembly not later than November one, nineteen hundred seventy-three.

The Virginia Advisory Legislative Council appointed Lewis A. McMurrin, Jr. of Newport News as Chairman, with David F. Thornton of Salem, Charles B. Cross, Jr. of Chesapeake, Walther B. Fidler of Sharps,

W. Franklin Gooding of Fairfax, W. Moscoe Huntley of Richmond and Louis H. Manarin of Richmond as members. It was thought that a wide range of expertise was necessary to ensure a complete examination of all aspects of public records, and the Committee reflects such a viewpoint by having as members, a practicing lawyer, a professor, an archivist, a legislator, a judge, and clerks of court. The Division of Legislative Services, represented by Steven L. Micas, provided staff facilities and support.

During the Committee's five months of study its members have expended considerable time and effort to acquaint themselves in detail with the administration, management, preservation, and security of all types of public records. The legislative format of other states was critically examined to see how their experience could contribute to a new public records system for Virginia. Some of the members, already highly knowledgeable in such areas as local record-keeping procedures, judicial records and preservation of records, were of considerable assistance. During the public hearings held in Richmond, numerous interested individuals testified to the Committee on such matters as the need for maintaining confidentiality for all records, the deterioration problems for data systems, the ambiguities of the Virginia Freedom of Information Act and the lack of adequate storage facilities at the State and local level.

The Committee was particularly fortunate in receiving the candid advice and guidance of the Virginia Clerk's Association on such matters as the need for uniform standards for paper and ink, storage problems, the need for accurate disposal schedules and the necessity of maintaining the security of the microfilming system. One of the members of the Committee kept all the clerks informed of the progress of the Committee by appearing before the Local Government Official's Conference. Finally, a subcommittee on clerks' records issued a comprehensive report on the impact of a Public Records Act on clerks of court records-keeping.

The Department of Health's Bureau of Vital Statistics and the Department of Automated Data Processing both prepared detailed statements explaining their records management programs. The Committee was highly impressed by the demonstrated expertise of the officials of each agency in appreciating the manifold problems of operating a responsible records system.

As a result of its work and study, consideration of testimony, and much deliberation, the Committee concluded and the Council agreed that a comprehensive Public Records Act would be highly beneficial to the Commonwealth. Such legislation would not only ensure consistent preservation of Virginia's heritage, but also result in substantial cost savings due to more efficient storage and destruction. The Chairman of the Library Board and the State Librarian both testified to the need for a Public Records Act. Although the State Library Board favors a Public Records Act, it has not finalized an exact form. The Chairman of the Library Board suggested that the Committee issue a progress report and recommend that more time be given for study. A hastily conceived scheme could not intelligently provide for all the goals deemed necessary by the Committee.

Any legislation should, as a minimum, include an omnibus definition of "public records" and requirements for the custodian in the care, management, preservation of public records and relinquishment of his records to his lawful successor. The most appropriate mechanism for overall control over public records is a Public Records Commission with authority to issue rules, regulations and standards for the purpose of establishing

uniform guidelines for the management and preservation of public records throughout the State. Such a State regulatory commission should have continuing input from the clerks of courts of record throughout the State and State agencies by establishing subcommittees.

A Public Records Act should also contain more adequate guidelines defining when custodians may destroy records. The scheduling, that is, putting a time limit on a public record, and the classification process could be accomplished through the Public Records Commission. The scheduling would cover a series of records and could describe the content, title and length of retention of the document. It is also the sense of the Council that standardized record-keeping procedures are a worthwhile goal for the State in such matters as recording of plats, standards for instruments, and standards for physical security of documents. Currently the State is unnecessarily spending money to repurchase documents in the hands of private citizens which properly belong to the localities throughout the State. A legislated summary repossession procedure would allow a judicial order compelling the return of public records wrongfully in the hands of private citizens.

It was the consensus of the Council that the proliferation of illegal trafficking in historical documents justifies an increased penalty to deter such crimes. The existing penalty for theft or destruction of public records of up to one year in jail and a one thousand dollar fine is inadequate to ensure preservation of public records in the localities where they belong. Therefore, the Council recommends legislation (see Appendix I) which would increase the penalty for theft and destruction of public records from a misdemeanor to a felony and provide for imprisonment for a period up to ten years in the State penitentiary. The existing provision for a fine is left unchanged.

The traditional system of recording releases on existing deeds of trusts and mortgages, although convenient and relatively inexpensive, compromises the microfilm security program and needlessly increases the clerk's responsibility of maintaining proper control over public documents. The alternative system proposed by the recommended bill (see Appendix II) eliminates marginal releases and substitutes a "Certificate of Satisfaction" or "Certificate of Partial Satisfaction". All marginal releases prior to the effective date of the bill would be validated, but those after the effective date would be prohibited. Although neither legislative change advocated in this report need necessarily be part of a Public Records Act, nevertheless, it is the feeling of the Council that a comprehensive approach to public records warrants parallel changes in the Code of Virginia to ensure satisfactory preservation of the Commonwealth's heritage.

The Council further recommends that adequate appropriations be approved by the Governor and the General Assembly to permit rapid completion of the Department of Health's record management and preservation program for health and vital records.

As can be seen by the preceding catalog of Council decisions, an appropriate Public Records Act, though it need not be lengthy or intricate, must be tightly drawn and planned with a great deal of care and thought. Many policy issues remain to be "hammered out" such as the exact powers and responsibilities of a public records commission and its relationship to the State Library Board, where the overriding authority for public records should rest and major difficulties with the practical effect of the Freedom of Information Act. Although the time and study expended by the members in independent research and self-education were substantial,

the Council is not yet prepared to present to the General Assembly the kind of complete legislative plan which would most efficiently control Virginia's numerous generators of public records. More research, and particularly more active participation by State agencies, local units of government and interested professionals in the information gathering process are necessary in the coming months.

For these reasons, the Council recommends that the life of its Public Records Act Committee be extended, so that model legislation may be conceived for presentation to the General Assembly in 1975. We would anticipate that a final report with recommended legislation should be ready by the Fall of 1974. Since the present membership has invested considerable time in self-education and research, which would needlessly be repeated if new members were appointed, they should continue to serve.

Respectfully submitted,

Lewis A. McMurrin, Jr.

Willard J. Moody

Russell M. Carneal

Joseph V. Gartlan, Jr.

Jerry H. Geisler

Arthur R. Giesen, Jr.

Edward E. Lane

C. Hardaway Marks

Stanley A. Owens

William V. Rawlings

D. French Slaughter, Jr.

James M. Thomson

Lawrence Douglas Wilder

Edward E. Willey

APPENDIX I

A B I L L

To amend and reenact § 18.1-308, as amended, of the Code of Virginia, relating to the penalty for theft or destruction of public records.

Be it enacted by the General Assembly of Virginia:

1. That § 18.1-308, as amended, of the Code of Virginia is amended and reenacted as follows:

§ 18.1-308. Theft or destruction of public records by others than duly authorized officers.—If any person steal or fraudulently secrete or destroy a public record or part thereof, he shall, if the offense be not embraced by § 18.1-306, be confined in *the penitentiary jail* not exceeding *ten years* ~~one year or one~~ fined not exceeding one thousand dollars, *either or both*.

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APPENDIX II

B I L L

To amend and reenact, §§ 55-66.3, 55-66.4, 55-66.5, 55-66.6 and 55-66.7, as severally amended, of the Code of Virginia; and to further amend the Code of Virginia by adding § 2.1-66.4:1, the amended and added sections relating to releases of liens.

Be it enacted by the General Assembly of Virginia :

1. That §§ 55-66.3, 55-66.4, 55-66.5, 55-66.6 and 55-66.7, as severally amended, of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding § 55-66.4:1 as follows:

§ 55-66.3. Release of deed of trust or other lien.—When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendor's lien, or other lien, or when any one or more of the obligations representing at least twenty-five percent of the whole amount secured by any such lien, but less than the whole number of such obligations so secured, when the debt secured thereby is evidenced by two or more separate written obligations sufficiently described in the instrument creating the lien, shall have been fully paid, the lien creditor, unless he shall have delivered a proper release deed, shall cause such full payment or satisfaction, or partial payment or satisfaction, as the case may be, to be recorded on a certificate of satisfaction or certificate of partial satisfaction in the clerk's office ~~to be entered on the margin of the page of the book where such encumbrance is recorded~~; and for any failure so to do after five days' notice, if the obligation, or obligations, secured by such lien, and fully paid as aforesaid, shall be left with the lien creditor, or with the clerk in whose office such encumbrance is recorded, until the lien is released as provided by this chapter, shall forfeit twenty dollars.

Such *certificate of satisfaction or certificate of partial satisfaction* ~~entry of payment or satisfaction~~ shall be signed by the creditor or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release and if such debt be evidenced by a separate obligation the note, bond or other evidence of debt secured by such lien, duly cancelled, shall be produced before the clerk in whose office such encumbrance is recorded, or an affidavit shall be filed, by the creditor, or his duly authorized agent, attorney or attorney-in-fact, with such clerk, to the effect that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney-in-fact, who was, when the debt was so satisfied, entitled and authorized to receive the same, and that such note, bond or other evidence of the debt secured by the lien has been cancelled and delivered to the person by whom it was paid or has been lost or destroyed and cannot be produced as herein required; or in the event the creditor or his duly authorized agent, attorney or attorney-in-fact is unable to make the affidavit above referred to and after the creditor or his duly authorized agent, attorney or attorney-in-fact has executed the entry of payment or satisfaction above referred to, an affidavit may be filed with the clerk by the lien debtor, or such other person as may have paid the same, to the effect that he fully paid such note, bond or other evidence of debt and that the same was duly cancelled and delivered to him and has been lost or destroyed and cannot be produced.

If such debt is not evidenced by a separate obligation an affidavit shall be filed by the creditor, his duly authorized agent or attorney or attorney-in-fact with such clerk to the effect that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney-in-fact, who was, when such debt was so satisfied, entitled and authorized to receive the same.

And when so signed and the signature thereto attested by such clerk, with a certificate that such note, bond or other evidence of debt duly cancelled was produced before such clerk, or that the affidavit hereinbefore required has been duly filed with such clerk, the ~~same certificate of satisfaction or certificate of partial satisfaction~~ shall operate as a release of the encumbrance as to which such payment or satisfaction is entered and, if the encumbrance be by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectually as if such ~~certificate of satisfaction or certificate of partial satisfaction~~ ~~marginal entry~~ were a formal deed of release duly executed and recorded.

Any and all marginal releases made prior to July one, nineteen hundred seventy-four, in any county or city of this State, in conformity with the provisions of the Code of Virginia, either of one or more separate pieces or parcels of real estate or any part of the real estate covered by such lien, or as to one or more of the obligations secured by any such lien, or as to all of the real estate covered by such lien instrument, are hereby validated and declared to be binding upon all parties in interest; but this provision shall not be construed as intended to disturb or impair any vested right. Any and all marginal releases made subsequent to July one, nineteen hundred seventy-four shall be a nullity and of no force or effect.

As used in this section, the terms "lien creditor" and "creditor" shall be construed as synonymous and shall embrace the lien creditor or his successor in interest as evidenced by proper endorsement or assignment, general or restrictive, upon the note, bond or other evidence of debt.

§ 55-66.4. Partial satisfaction or release.—It shall be lawful for any such lienor to make a ~~marginal release certificate of satisfaction or certificate of partial satisfaction~~ of any one or more of the separate pieces or parcels of property covered by such lien. It shall also be lawful for any such lienor to make a ~~marginal release certificate of satisfaction or certificate of partial satisfaction~~ of any part of the real estate covered by such lien if a plat of such part or a deed of such part is recorded in the clerk's office and a cross-reference is made in the ~~release certificate of satisfaction or certificate of partial satisfaction~~ to the book and page where the plat or deed of such part is recorded. Such ~~partial release or satisfaction certificate of satisfaction or certificate of partial satisfaction~~ may be accomplished in manner and form hereinbefore in this chapter provided for making ~~marginal releases certificates of satisfaction or certificates of partial satisfaction~~, except that the creditor, or his duly authorized agent, shall make an affidavit to the clerk that such creditor is at the time of making such release the legal holder of the obligation, note, bond or other evidence of debt, secured by such lien, and when made in conformity therewith and as provided herein such partial satisfaction or release shall be as valid and binding as a proper release deed duly executed for the same purpose.

Any and all partial marginal releases made prior to July one, nineteen hundred sixty-six, in any county or city of this State, in conformity with the provisions of this chapter, either of one or more separate pieces or parcels of real estate or any part of the real estate covered by such lien,

or as to one or more of the obligations secured by any such lien, or as to all of the real estate covered by such lien instrument, are hereby validated and declared to be binding upon all parties in interest; but this provision shall not be construed as intended to disturb or impair any vested right.

§ 55-66.4:1. Permissible form for Certificate of Satisfaction or Certificate of Partial Satisfaction.—Any release by a certificate of satisfaction or certificate of partial satisfaction shall be in conformity with §§ 55-66.3 and 55-66.4 shall conform substantially with the following forms:

CERTIFICATE OF SATISFACTION

Place of Record
Date of Deed of Trust
Deed Book Page
Name(s) of Maker(s)
Name(s) of Holder(s) of Note(s)
Amount Secured

I/We, holder(s) of the above mentioned note(s) secured, produced before the clerk, do hereby certify that the same has/have been paid in full and the above mentioned deed of trust is released of record. The amount so secured by said note shall be credited on the back thereof in evidence of the release of this deed of trust.

Given under my/our hand(s) this day of 19.....

.....
.....
(Note Holders)

State of Virginia

County/City of to-wit:

*Subscribed, sworn to and acknowledged before me by
this day of 19.....*

My Commission Expires:

.....
Notary Public

or:

CERTIFICATE OF PARTIAL SATISFACTION

Place of Record
Date of Deed of Trust
Deed Book Page
Name(s) of Maker(s)
Name(s) of Holder(s) of Note(s)
Amount Secured

The lien of the above mentioned deed of trust hereby secured is released insofar as the same is applicable to Lot Subdivision..... in the Plan as shown on a plat of such subdivision recorded in deed book at page in clerk's office of this court. The amount so secured by such note shall be credited on the back thereof in evidence of the release of this deed of trust.

Given under my/our hand(s) this day of 19.....

.....
.....
(Note Holders)

State of Virginia,

County/City of , to-wit:

Subscribed, sworn to and acknowledged before me by
..... this day of 19.....

My Commission Expires

Notary Public

§ 55-66.5. Releases made by court.—(a) Any person who owns or has any interest in real estate or personal property on which such encumbrance exists may, after twenty days' notice thereof to the person, entitled to such encumbrance, apply to the circuit ~~or corporation~~ court of the county or corporation in whose clerk's office such encumbrance is recorded or to the Chancery Court of the City of Richmond, if it be in the clerk's office of such court, to have the same released or discharged; and upon proof that it has been paid or discharged or upon its appearing to the court that more than twenty years have elapsed since the maturity of the lien or encumbrance, raising a presumption of payment which is not rebutted at the hearing, such court shall order the same to be ~~entered~~ recorded by the clerk on the margin of the page in the book wherein the encumbrance is recorded a certificate of satisfaction or a certificate of partial satisfaction, which ~~entry~~ certificate of satisfaction or certificate of partial satisfaction, when so made, shall operate as a release of such encumbrance.

All releases made prior to June twenty-fourth, nineteen hundred and forty-four, by any court under this section upon such presumption of payment so arising and not rebutted shall be validated.

(b) If it be made to appear to the court that the person entitled to such encumbrance cannot with due diligence be located, and that notice has been given such person in the manner provided by § 8-76 or that tender has been made of the sum due thereon but the same has been refused for any reason by the party or parties to whom due, the court may in its discretion order the sum due to be paid into court, to be there held as provided by law, and to be paid upon demand to the person or persons entitled thereto, and thereupon the court shall order the same to be recorded as provided in subsection (a) hereof, which ~~entry~~ certificate of satisfaction or certificate of partial satisfaction shall operate as a release of the encumbrance.

§ 55-66.6. Marginal note Certificate of satisfaction or certificate of partial satisfaction required when release of lien recorded.—Whenever a release of a deed of trust or other obligation shall be admitted to record in the office of the ~~county~~ clerk of any circuit court ~~county~~ or in the office of the clerk of the corporation court of any city, or of the Chancery Court of the City of Richmond, or of any other court in which deeds are authorized to be admitted to record, such clerk shall make a memorandum on the margin of the page of the book upon which such deed or other obligation is recorded record a certificate of satisfaction or certificate of partial satisfaction, stating that such deed or other obligation is released and referring to the page and number of the deed book upon which such release is recorded. If any clerk fail for ten days to do anything required of him by this section, he shall be liable for any damage which any person may sustain by reason of such failure and shall pay a fine of not less than twenty-five nor more than one hundred dollars.

§ 55-66.7. Clerk's fee for release.—The clerk's fee for a release, under the preceding sections of this chapter, on the margin of the page of the book by a certificate of satisfaction or a certificate of partial satisfaction wherein the encumbrance or lien is recorded shall be two dollars and fifty cents, which shall be paid by the lien debtor.

APPENDIX III

HOUSE JOINT RESOLUTION NO. —

Continuing the Virginia Advisory Legislative Council's study of a Public Records Act for the Commonwealth.

Whereas, the 1973 General Assembly recognized the duty of the legislature to modernize the Code of Virginia to preserve the Commonwealth's public records for the administration of government and the study of its history and to protect the access of the public to such records without endangering the safety of the documents by directing the Virginia Advisory Legislative Council to study the desirability of a public records act; and

Whereas, the Virginia Advisory Legislative Council, has made an exhaustive study and has concluded that, a carefully drafted omnibus Public Records Act would be beneficial to the Commonwealth; and

Whereas, the Council concludes that additional time for research and study is necessary to formulate a workable legislative design; now, therefore, be it

Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council is hereby directed to continue its study of public records preservation, the present provisions dealing with public records, and proposals for new provisions. All agencies of the State shall assist the Council in its study. The Council shall complete its study and submit its report to the Governor and the General Assembly not later than November one, nineteen hundred seventy-four.

