★ VIRGINIA ★
DEPARTMENT of ELECTIONS

the Handbook

Chapter 9
Records Access and Retention

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9. Records Access and Retention

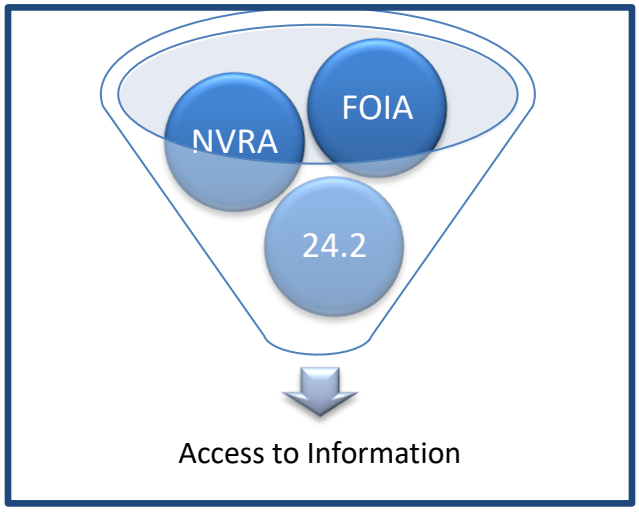
REQUIRED FORMS	ADDITIONAL RESOURCES
Library of Virginia: Blank ARC-1 Form Library of Virginia: Blank RM-3 Form	Records Retention and Disposition Schedule (GS-01) Library of Virginia: Virginia Public Records Management Manual Chapter 7 and 8 Library of Virginia: Electronic Records Guidelines Records Retention and Disposition Schedule for Localities Library of Virginia: Records Management Library of Virginia: Instructions for Completing the Certificate of Records Destruction (RM-3 Form) Library of Virginia: Instructions for Completing Archival Transfer List and Receipt (Form ARC-1)
REFERENCE	**REGULATIONS**
Virginia FOIA Council: *Taking the Shock Out of Charges: A Guide to Allowable Charges for Record Production under the Freedom of Information Act* Virginia FOIA Council: Access to Public Records Virginia FOIA Council: *Email: Use, Access & Retention* Virginia FOIA Council: Responding to Requests From Out-of-State Virginia FOIA Council: Forms and Sample Letters	**1VAC20-20-20** *Electronic Transmission of Records Containing Sensitive Personal Information; Encryption or Redaction Required* **1VAC20-40-90** *Voter Photo Identification Cards*

9.1 CHAPTER ORGANIZATION

A general registrar serves as the custodian of a wide range of both public and confidential documents. Public access to records is essential to ensure government transparency, but must be limited to protect individual security. Before releasing information, the general registrar must understand *what* is being requested, *who* is requesting the information, and the rules underlying the disclosure of that information. This chapter provides a general overview of concepts and rules that govern records access and retention.

The sources of law that touch access to records that general registrars are most often challenged with are Virginia Freedom of Information Act (FOIA), code within Title 24.2, and the National Voter Registration Act (NVRA).

§9.1 provides a brief overview of FOIA, relevant code of 24.2, and NVRA. When determining the release of information, FOIA, NVRA, and certain sections of 24.2 can act as a filter for information either through mandate or providing discretion to the general registrar. For instance, many government records are available under FOIA; however, information can be excluded or exempted from FOIA requests due to the nature of the information. §9.1.4 and §9.1.5 discuss personal information that must be redacted prior to any information release.



§9.2 dives into handling a FOIA request and discusses the elements of a request and creating a proper response. This section also provides examples of proper responses depending on the record being requested. §9.2.3 describes certain exemptions, such as, protecting security information related to voting systems and working papers of a public body. §9.2.4 and §9.2.5 briefly focus on enforcement and penalties for not fulfilling a request.

§9.3 describes what information is required to be provided under NVRA and best practice guidance on how release of information should be conducted for this act. This section is especially important as general registrars often receive requests that fall under NVRA. §9.4 closes this chapter with a brief introduction into records retention and a reference chart for localities' retention schedule.

9.1.1 FOIA: Definition of a "Public Record"

Virginia's Freedom of Information Act (FOIA) defines public records broadly to include all records a public body or officer creates, owns, or possesses in the course of their appointment, employment, or public duties.[1] Drafts and preliminary versions of documents are considered public records and available for public access under FOIA.[2]

Best Practice
Electronic records, including e-mails, are covered by FOIA, unless some content based exemption applies (e.g., attorney client privilege). The Virginia Freedom of Information Advisory Council published a useful guide called *E-Mail: Use, Access & Retention* which explains public access to local government officials' and employees' email and discusses how email correspondence must be saved.

9.1.1.1 What is Not a Public Record?

Public records do not include certain personnel records unless protection is waived by the individual in writing.[3] FOIA does not require creating a record that does not exist at the time of the request.[4] Additionally, FOIA may provide other exemptions (discussed later in the chapter). For example, a government body may withhold personal contact information such as home or business address, email, or telephone number.[5]

[1] See the Code of Virginia §2.2-3701.
[2] Virginia FOIA Advisory Council AO-3-00.
[3] See the Code of Virginia §2.2-3705.1.
[4] See the Code of Virginia §2.2-3704.
[5] See the Code of Virginia §2.2-3705.1(10).

9.1.2 Title 24.2 and Election and Registration Records

Election law restricts access to voter registration and election records.[6] "*The Virginia Freedom of Information Act shall not apply to records about individuals maintained in this system [VERIS].*"[7] Voter records in VERIS are not available to the public, even under a FOIA request, as per the Code of Virginia §24.2-404(B).

Often, requests for information regarding an individual's voting history will come to a registrar; this information cannot be released and the request should be denied. Further, lists of registered voters are not available under FOIA. As will be discussed later in this chapter, §§24.2-405 and 24.2-444 govern access to lists of registered voters. Similarly, lists of those who voted are also not available under FOIA, but may be available to certain groups under §§24.2-406 and 24.2-407.

If you are not sure whether a particular record is addressed by election law or FOIA, you should contact your local commonwealth's attorney. Once it is determined that no election law or FOIA exemption applies, the records are open to inspection and copying. Reasonable costs are allowed, including time required to redact protected information.[8]

It is important to be aware of what code section is providing or restricting access. For instance, absentee ballot applications are not NVRA but rather Va. Code §24.2-706 which permits the inspection of absentee ballot applications only by a registered Virginia voter during regular office hours.

9.1.3 National Voter Registration Act and Registration Records

Protecting voter privacy requires strict compliance with statutory restrictions. The National Voter Registration Act (NVRA) established mandates for states regarding the voter registration process and the maintenance of related records. Prior to July 20, 2011 voter registration applications were not publically available. As a result of *Project Vote v. Long*, voter registration applications submitted on or after July 20, 2011 are available for public disclosure if confidential information is properly redacted.

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[6] *See* the Code of Virginia §2.2-3703(B).
[7] *See* the Code of Virginia §24.2-404(B). *See* also the Code of Virginia §2.2-3700 *et seq.* (the Virginia Freedom of Information Act).
[8] *See* the Code of Virginia §24.2-107 as amended in 2014 allows the registrar to determine a reasonable charge not to exceed the fee imposed by the clerk of the circuit court.

Law Note

The *Project Vote* Consent Decree outlines requirements general registrars must follow regarding maintenance and public inspection of voter registration applications. General registrars are required to:

- Maintain for at least two years and make available for public inspection (including photocopying) completed voter registration applications,
- Redact social security numbers of all completed voter registration applications, and
- Redact the residence address of individuals permitted to provide a post office box address in lieu of residence address due to protected voter status under Va. Code §24.2-418(B).

9.1.4 Generally Redacted Information

Sensitive information is often collected as part of the process of administering elections. Public access to information is important but it must be balanced with an individual's right to privacy; as a result, state and federal laws restrict public access to sensitive personal information.

Before sending any records that contain sensitive personal information electronically through email or fax you should review the contents of each record. You must encrypt or redact sensitive information per 1VAC20-20-20: Electronic Transmission of Records Containing Sensitive Personal Information; Encryption or Redaction Required. Sensitive personal information includes: (1) more than four digits of a social security number or other unique identifier **other than voter identification number**; (2) day and month of birth; or (3) the residence address of voters qualified for protective status under Va. Code §24.2-418.

You are required to redact the following information when providing the following information:

- All of an individual's social security number;[9]
- The birth month and date;[10]
- The residence address of an individual with protected status authorized by §24.2-418(B);[11]

9.1.5 Social Security Numbers

State and local governments are prohibited from collecting social security numbers without statutory authorization.[12] Election law authorizes collection of all or part of social security numbers for certain purposes, including voter registration.[13] The release of social security

[9] See the Code of Virginia §24.2-405 and §24.2-444
[10] See the Code of Virginia §§24.2-444.
[11] See the Code of Virginia §§24.2-405, 24.2-406, and 24.2-444.
[12] See the Code of Virginia §2.2-3808. *See also* Privacy Act of 1974, 5 USC §552a.
[13] See the Code of Virginia §24.2-418.

information in election records is strictly regulated.[14] Unauthorized release of a voter's or registration applicant's social security number or a part thereof is a Class 5 felony.[15]

If the SSN (or part) appears on a record or list open for inspection or copying, the number must be covered so it cannot be read. Marking out the SSN may not be sufficient protection when copying records as the numbers may still be visible after copying.

You must **completely obscure** the social security number. Please remember to take care to

- cover the information manually before photocopying, or
- complete "Black Out" formatting if using Adobe Acrobat.

9.2 HANDLING A FOIA REQUEST FOR INFORMATION

This section discusses how a FOIA request for information should be handled and the elements of a request. An information request that looks intimidating at first glance can be narrowed to a reasonable volume by working with the requestor to determine what the requestor really wants, and letting her know what is available that meets their need. FOIA is largely a matter of *customer service,* i.e., good communication. Requestors often may not know what report or document to request but they do have an idea of what information they want to find.

9.2.1 Elements of a FOIA Request

FOIA requests for state and local records can be made only by Virginia residents or representatives of print or broadcast media reaching Virginia.[16] Requests from non-Virginians or other media representatives may be granted or denied at your discretion.[17]

9.2.1.1 The Request

The request does not have to be in writing. If the request is made by mail, it will contain the requestor's name and address. If the request is made in person, the office may require the requestor to provide his name and legal address. Nothing in FOIA defines the way in which the requestor must provide his name and legal address, either by stating it or in writing (such as signing a log book). If the request, name, and address are not provided in writing, record them for the office's information and protection.

The request for records does not need to reference FOIA in order to invoke the requirements of the Act. If the request is from a qualified requestor (a Virginia citizen or reporter, with both categories broadly interpreted), and is a request for information, it should be considered a FOIA request.

9.2.1.2 "Reasonable Specificity"

The request should include enough information for the recipient to identify whether there are any records in the office (or the official's possession) that satisfy the request. If there is any question about what is being requested, contact the requestor to discuss the request and response. Keep notes (or emails) on these discussions and file them

[14] See the Code of Virginia §§24.2-405, 24.2-406, and 24.2-444. See also
[15] See the Code of Virginia §24.2-1002.1.
[16] See the Code of Virginia §2.2-3704.
[17] See *McBurney v. Young,* U.S. Sup. Ct. Slip. Op. No. 12-17 (4/29/2013). See also Virginia FOIA Council, Responding to Requests from Out-of-State.

with the request in the office FOIA file in case there is ever any question about the request and response.[18]

9.2.2 Responding to a Request

Under FOIA, the general rule is that the public official or employee must respond to the requestor within five working days of receiving the FOIA request. You may request an extension for providing information.

9.2.2.1 Responses

As a public body, your office is subject to FOIA requests. As the custodian of the requested records, you must respond within five working days of receiving the request. If the response is made within five working days, you will have an additional seven work days in which to provide one of the following responses:

- The requested records are being entirely withheld,
- The requested records are being provided in part and are being withheld in part,
- The requested records could not be found or do not exist, or
- It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period.[19]

Refer to the Virginia FOIA Advisory Council for response letters.

9.2.2.2 Charges

Under the Code of Virginia §2.2-3705, "a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. **No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.** Any duplicating fee charged by a public body shall not exceed the actual cost of duplication."

When you assess charges, you should choose the method that is the most cost effective for producing the records. Charges may include the time needed to access, find, copy, and mail/ship the documents, and the actual cost of the copies and the mailing/shipping. The costs of fringe benefits or other overhead expenses may not be added to the charged personnel costs.[20] If the FOIA request is a repeat of a previous FOIA request, charge the amount to reproduce the previous records not the amount charged for the previous request. Reasonable charges not exceeding actual cost may be assessed for searching, accessing, supplying, and duplicating public records.

If the resident requests an advance estimate, all charges for supplying the requested records must be estimated in advance.[21]

- **For requests above $200**, you may ask the requestor to pay in advance, and you do not have to fulfill the request until receipt of this advance payment.[22]

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[18] See the Code of Virginia §2.2-3704.
[19] See the Code of Virginia §2.2-3704.
[20] For more information about allowable costs under FIOA, see Virginia Freedom of Information Advisory Council's *Taking the Shock Out of Charges: A Guide to Allowable Charges for Record Production under the Freedom of Information Act*.
[21] See the Code of Virginia §2.2-3704.

- **For requests under $200**, the office may *not* require the requestor to pay the charges before turning over the requested documents. If any requestor does not pay in a reasonable time, report the bill to the office that handles normal debt collection for the local government.

Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.[23]

9.2.3 FOIA Exemptions

FOIA must 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."[24] Unless a public body, its officers, or employees expressly invoke a specific exemption provided by FOIA or another statute, all public records are available for inspection and copying upon request. Any exemption from public access to records must be narrowly construed, and no record can be withheld unless specifically made exempt by FOIA or other specific law.[25] The Virginia Freedom of Information Advisory Council's website includes an excellent summary and discussion about records exemptions of general applicability; this guide addresses most of the exemptions that might ever be needed by a local electoral board or a general registrar.[26]

Below is a brief overview of certain records that are exempted from FOIA, but may be provided at the discretion of the custodian, unless disclosure is prohibited by law. Prior to making any decision to withhold information the general registrar should discuss FOIA access with their local legal counsel.

9.2.3.1 Records Regarding Computer Software and Electronic Security

"Computer software developed by or for a state agency, public institution of higher education in the Commonwealth, or political subdivision of the Commonwealth."[27]

"Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system."[28]

Election law provides an exemption for plans relating to voting equipment security.[29] The exemption is applicable for "protocols for maintaining the security of ballots or

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[22] See the Code of Virginia §2.2-3704.
[23] See the Code of Virginia §2.2-3704.
[24] See the Code of Virginia §2.2-3700.
[25] See the Code of Virginia §2.2-3700 *et seq.*
[26] See Access to Public Records. See also Virginia Freedom of Information Advisory Council's Records Exemptions of General Applicability
[27] See the Code of Virginia §2.2-3705.1(7).
[28] See the Code of Virginia §2.2-3705.2.
[29] See the Code of Virginia §24.2-625.1.

voting and counting equipment…." And any information that reveals "the results of risk assessments of specific local electoral procedures."[30]

9.2.3.2 *Records compiled in lawfully closed meetings*

Records created in or compiled *exclusively* for use in closed meetings lawfully held under the Code of Virginia §24.2-3711 are excluded from mandatory disclosure.[31] Disclosure is at the discretion of the general registrar unless prohibited by law. This rule may be applicable to certain documents produced exclusively for the local electoral board's provisional ballot meeting as this meeting is a closed meeting.

NOTE: No record that is otherwise open to inspection under FOIA will be considered exempt because it was reviewed or discussed in a closed meeting.[32]

9.2.3.3 Working Papers of a Public Body

"Working papers" means records prepared by or for any of the following named public official for his personal or deliberative use.[33]

- Office of the Governor;
- Lieutenant Governor;
- Attorney General;
- the members of the General Assembly (and legislative aides working on a member's behalf);
- Division of Legislative Services;
- mayor or chief executive officer of any political subdivision of the Commonwealth; or
- the president or other chief executive officer of any public institution of higher education in Virginia.[34]

However, no record, which is otherwise open to inspection under FOIA, will be determined exempt by virtue of the fact that it was attached to or incorporated within any working paper or correspondence.

NOTE: This exception does not extend to local electoral boards or the general registrar unless they are involved in preparing working papers for a named state or local official.

9.2.3.4 Inmates and Criminal Information

Historically, Virginia has closed criminal records but increasingly criminal record information is available online through the courts and law enforcement offices. Any information a general registrar receives regarding criminal records must be kept confidential unless permitted by code.[35] The Division of Central Criminal Records Exchange provides felony information to Department of Elections only for the purposes

[30] See the Code of Virginia §24.2-625.1.
[31] See the Code of Virginia §2.2-3705.1.
[32] See the Code of Virginia §2.2-3705.1.
[33] See the Code of Virginia §2.2-3705.7.
[34] See the Code of Virginia §2.2-3705.7.
[35] See the Code of Virginia §24.2-409 and §19.2-389.

of allowing registrars to cancel the registration of any voter known to be a convicted felon.[36]

Requests for information regarding criminal records should be referred to the State Police.

9.2.4 Enforcement

In any action to enforce FOIA, the public body bears the burden of proof to establish an exemption by a preponderance of the evidence.[37] Any failure by a public body to follow the procedures established by FOIA is presumed to be a violation.[38]

9.2.5 Penalties

If you violate FOIA, you may be held **personally liable**. The civil penalty imposed will be no less than $500 nor more than $2,000.[39] For a second or subsequent violation, the civil penalty will be no less than $2,000 or more than $5,000.[40] The public body can also be required to pay the requestor's attorneys' fees.[41]

9.3 HANDLING AN NVRA REQUEST FOR INFORMATION

The National Voter Registration Act does not specify a deadline or procedures for responding to requests. ELECT recommends the following best practices for responding to requests for voter registration applications under the NVRA:

- NVRA requests should be acknowledged promptly with an estimate of the cost for responding. You may ask for advance payment if estimated costs exceed $250 before proceeding with the request.
- Within 10 working days after acknowledging the request, copies of requested applications held by your office that were **submitted on or after July 20, 2011**, should be provided with confidential information redacted; such as, social security number, the identity of the voter registration agency through which a particular voter registered, and, where applicable, the residence street address of any individual that provides a post office box address in lieu of his street address under §24.2-418(B). The time involved to redact may be charged to the first request for which the redacted copies are prepared.
- If a request involves an extraordinary volume or lengthy search, you should make reasonable efforts to reach an agreement with the requester concerning the production of the applications requested. Additionally, you should consult your local government attorney or Commonwealth's Attorney if you are unable to reach an agreement to prepare for possible enforcement action under NVRA. Under 52 USC §20510(b)(3), no prior notice is required to bring suit for alleged violations within 30 days of a federal election.

[36] See the Code of Virginia §§24.2-409 and 24.2-427.
[37] See the Code of Virginia §2.2-3713.
[38] See the Code of Virginia §2.2-3713.
[39] See the Code of Virginia §2.2-3714.
[40] See the Code of Virginia §2.2-3714.
[41] See the Code of Virginia §2.2-3713.

9.3.1 Voter Registration Applications

Individuals or organizations may request to see voter registration applications and as general registrar, you should supply these documents in compliance with NVRA. Moreover, applications for voter photo ID cards are considered a part of registration records under 1VAC20-40-90.

Regulation Note

1VAC20-40-90: Voter Photo Identification Cards. Applications for voter photo ID cards are considered "registration records" as defined in §24.2-101. The public inspection requirements of §24.2-444 apply to them, but the social security number and day and month of the birth date must be redacted and must be retained by the registrar in compliance with §24.2-114(8) and the applicable Library of Virginia retention schedule for local election records.

Voter registration applications received before July 20, 2011 are not available to anyone other than the voter or authorized law enforcement.

9.3.2 Information to Provide for an NVRA Request

A FOIA request is distinct from an NVRA request. Where information may not be available under FOIA, it may be available under NVRA. NVRA makes available for public inspection and photocopying "*all* records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the registration records pursuant §§24.2-427, 24.2-428, and 24.2-428.1…" (emphasis added). These records available under NVRA do not include voter registration applications submitted *before* July 20, 2011.

Virginia Code §24.2-444(C) outlines what information must be redacted when providing these records:

- All of an individual's social security number;
- The residence address of an individual who has provided a post office box address in lieu of her residence address due to protected voter status as authorized by Va. Code §24.2-418(B);
- The declination by an individual to register to vote and related records;
- The identity of the voter registration agency an individual registered through; and
- The day and month of birth of an individual.

9.3.3 The Precinct List

A general registrar may receive a request for a list of registered voters for a locality. This list is also known as the "record precinct list" and should be made available for public inspection in each office of the general registrar.[42] This list does not provide voter history. In providing this information, check that all sensitive personal information is redacted, including:[43]

- All of an individual's social security number;
- The residence address of an individual who has provided a post office box address in lieu of her residence address due to protected voter status authorized by Va. Code §24.2-418(B);

[42] See the Code of Virginia §24.2-444.
[43] See the Code of Virginia §24.2-444.

- The declination by an individual to register to vote and related records;
- The identity of the voter registration agency an individual registered through; and
- The day and month of birth of an individual.

9.3.4 The Voter History List

The Department of Elections is required to furnish, "at a reasonable price," lists of registered voters and persons voting in elections to certain authorized individuals and organizations for specific purposes.[44] Persons interested in purchasing lists of registered voters and history should be referred to ELECT for information on eligibility and cost.

9.4 RECORDS RETENTION

The Library of Virginia provides numerous schedules to assist state and local government agencies in maintaining and disposing of records in compliance with applicable legal requirements. The Library of Virginia Records Retention Schedule GS-01 for Local Election Records was updated and made effective May 26, 2010. The shared Retention Schedule for the State Board and Department of Elections is available on the Library of Virginia website. In the event that any schedule conflicts with federal or state election law requirements, the statutory requirements must be followed.

While reformatting records is at the discretion of the locality, the Department of Elections strongly encourages localities to digitalize records for accessibility, storage, and preservation purposes. **Both permanent and non-permanent records may be digitalized.** After records are digitalized, inspected, and approved according to established standards, the ***originals may be destroyed***, unless specifically prohibited by law. **The digital version will be considered the official copy of record.**

Below is a quick reference chart for records retention for localities. General registrars and staff should review the Library of Virginia's full schedule on the website.

[44] See the Code of Virginia §§24.2-405- 24.2-407.1.

GUIDELINES: RETENTION OF RECORDS

The following chart is taken from the Library of Virginia's (LVA) Records Retention and Disposition Schedule. Refer to the LVA's Virginia Public Records Management Manual Chapter 7 and 8, Electronic Records Guidelines, and Records Retention and Disposition Schedule for full guidance.

TYPE OF RECORD (Non-Permanent)	RETENTION SCHEDULE
Administrative Management Records: Registrar (EX: policies, reference materials, management assessments, and reports)	5 years or until superseded, whichever is longer
Ballots: Counted and Uncounted (Federal)	2 years by Circuit Court after election
Ballots: Counted and Uncounted (Non-Federal)	1 year by Circuit Court after election
Ballots: Unused	Retain by Circuit Court until time has expired for initiating a recount, contest, or other proceeding
Candidate Campaign Finance Forms	1 year after the final report is filed or through the next general election for that office, whichever is later
Candidate Qualification Forms: Non Campaign Finance	5 years or through the next general election for that office, whichever is later
Change of Address Confirmation Records (NVRA)	2 years after deadline for response
Damaged Applications: Voter Registration Applications	4 years after date received
Election Materials (EX: copies of absentee ballot applications, poll books and pollbook count sheets, election day logs)	2 years after applicable election
Electoral Board: Administrative Records (EX: Action plans, accessibility audit reports, cert. of training programs)	Retain as long as administratively necessary
Officers of Election List: Appointments (Form SBE 115)	Retain until superseded with a new list
Receipts and Certificates for Ballots (Forms SBE 616 - 621)	2 years after applicable election
VERIS: Database and Documentation	Retain database reports as long as administratively necessary
Voter/ Election Mail: Returned	2 years after receipt
Voter Registration Applications: Approved, Cancelled, Transferred Out	4 years after cancellation
Voter Registration Application: Denied	4 years after denial

TYPE OF RECORD (Permanent)	Any original records with permanent retention or records created before 1913 must be offered in writing to the Library of Virginia before destruction of the originals.
Abstracts	
Electoral Board: Minutes	
List of Those Who Voted (LTWV): Pre-1970	
Precinct Redistricting Materials	
Voting Rights Act/ USDOJ Correspondence	