



# COMMONWEALTH of VIRGINIA

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The Honorable H. Morgan Griffith  
Member, House of Delegates  
P. O. Box 1250  
Salem, Virginia 24153

Dear Delegate Griffith:

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 § 2.2-3703(C) of The Virginia Freedom of Information Act<sup>1</sup> ("FOIA") is applicable to patients in state mental health institutions and individuals committed pursuant to the Civil Commitment of Sexually Violent Predators Act<sup>2</sup> ("SVPA").

## Response

It is my opinion that § 2.2-3703(C) of The Virginia Freedom of Information Act, which prohibits the use of the Act by incarcerated individuals, is not applicable to patients in state mental health institutions and individuals committed to the Virginia Center for Behavioral Rehabilitation under the Civil Commitment of Sexually Violent Predators Act.

## Applicable Law and Discussion

Section 2.2-3703(C) of FOIA provides:

No provision of this chapter [Chapter 37] or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person incarcerated in a state, local or federal correctional facility, whether or not such facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.). However, this subsection shall not be construed to prevent an incarcerated person from exercising his constitutionally protected rights, including, but not limited to, his rights to call for evidence in his favor in a criminal prosecution.

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."<sup>3</sup> "The purpose for which a statute is enacted is of primary importance in its interpretation or

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<sup>1</sup>VA. CODE ANN. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (2005, Supp. 2006 & Spec. Supp. 2006).

<sup>2</sup>VA. CODE ANN. tit. 37.2, ch. 9, §§ 37.2-900 to 37.2-920 (2005 & Supp. 2006).

construction. ‘A statute often speaks as plainly by inference, and by means of the purpose that underlies it, as in any other manner.’”<sup>4</sup> Furthermore, words and phrases must be considered in context to arrive at a construction that will promote the object and purpose of the statute.<sup>5</sup>

The General Assembly does not define the term “incarcerated” as it is used in § 2.2-3703(C). Generally, when a term is not defined, it must be given its ordinary meaning.<sup>6</sup> The term “incarceration” generally means “[t]he act or process of confining someone; IMPRISONMENT.”<sup>7</sup> The term “imprisonment” means “[t]he act of confining a person, esp[ecially] in a prison” or “[t]he state of being confined; a period of confinement.”<sup>8</sup> In addition, the word “shall” used in a statute ordinarily, but not always, implies that its provisions are mandatory.<sup>9</sup> The word “shall” as used in § 2.2-3703(C) expressly prohibits a reading of FOIA to allow an individual who is “incarcerated in a state, local or federal correctional facility” to obtain public records other than those related to “evidence in his favor in a criminal prosecution.”

The General Assembly defines the terms “local correctional facility” and “state correctional facility” in § 53.1-1:

“Local correctional facility” means any jail, jail farm or other place used for the detention or incarceration of adult offenders, excluding a lock-up, which is owned, maintained or operated by any political subdivision or combination of political subdivisions of the Commonwealth.

....

“State correctional facility” means any correctional center or correctional field unit used for the incarceration of adult offenders established and operated by the Department of Corrections, or operated under contract pursuant to § 53.1-262. This term shall include “penitentiary” whenever used in [Title 53.1] *or other titles of the Code*. [Emphasis added.]

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<sup>3</sup>Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *see also* 1994 Op. Va. Att’y Gen. 114, 116.

<sup>4</sup>Norfolk S. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952) (quoting Leitner v. Citizens Cas. Co., 52 A.2d 687, 690 (1947)).

<sup>5</sup>*See Turner*, 226 Va. at 460, 309 S.E.2d at 339 (meaning of words finds expression from purport of entire phrase of which it is a part); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 265 (6th ed. 2000) (“If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.”); 1993 Op. Va. Att’y Gen. 192, 195.

<sup>6</sup>*See McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>7</sup>BLACK’S LAW DICTIONARY 775 (8th ed. 2004).

<sup>8</sup>*Id.* at 773.

<sup>9</sup>*See, e.g., Schmidt v. City of Richmond*, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using “shall” required court to summon nine disinterested freeholders in condemnation case); *cf. Ladd v. Lamb*, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court “shall forward” copy of conviction to Commissioner of Department of Motor Vehicles within fifteen days not mandatory but merely directory); *see also* 1986-1987 Op. Va. Att’y Gen. 210, 211; 17 MICHIE’S JUR. *Statutes* § 60, at 436-37 (1994).

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The General Assembly has not defined the term "federal correctional facility," nor do the federal regulations.

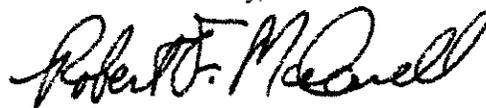
The General Assembly defines the term "state hospital" in § 37.2-100 to mean "a hospital, psychiatric institute, or other institution operated by the Department [of Mental Health, Mental Retardation and Substance Abuse Services] that provides care and treatment for persons with mental illness." An individual is admitted to a state hospital either voluntarily, pursuant to § 37.2-805, or involuntarily, pursuant to Article 5 of Chapter 7, §§ 37.2-814 to 37.2-828, or Chapter 9, §§ 37.2-900 to 37.2-920, of Title 37.2. Therefore, a person admitted to a state hospital is not incarcerated in a state or local correctional facility as defined by the General Assembly.<sup>10</sup>

### Conclusion

Accordingly, it is my opinion that § 2.2-3703(C) of The Virginia Freedom of Information Act, which prohibits the use of the Act by incarcerated individuals, is not applicable to patients in state mental health institutions and individuals committed to the Virginia Center for Behavioral Rehabilitation under the Civil Commitment of Sexually Violent Predators Act.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:213; 2:82; 1:941/06-063

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<sup>10</sup> See *Shivae v. Commonwealth*, 270 Va. 112, 123, 613 S.E.2d 570, 576 (2005) (noting that person involuntarily committed under SVPA is committed to secure mental health facility upon release from prison), *cert. denied*, 126 S. Ct. 626, 2005 LEXIS 8260 (U.S. 2005), *reh'g denied*, 126 S. Ct. 1130, 2006 U.S. LEXIS 334 (U.S. 2006). Additionally, courts have determined that a commitment under SVPA is a civil rather than a criminal proceeding. See, e.g., *id.* at 125-26, 613 S.E.2d at 577-78.