Is the Freedom of Information Act (FOIA) or the Virginia Public Records Act applicable to personal cell phones used for public business?

FOIA’s definition for “public records” would most likely not include phone, internet and text bills for personal devices, but it would include actual voice mails, e-mails and text messages stored on those devices if sent or received in the transaction of public business. FOIA defines “public records” broadly as:

All writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. (Va. Code § 2.2-3701.)

Based on this definition, a strong argument can be made that phone bills are not the writings and recordings constituting the transaction of public business; they are instead just information about the transaction of public business. (There is also one AG Opinion that indicates that it generally was not the General Assembly’s intent when passing FOIA to cover records in the possession of private companies. 1995 Op. Va. Att’y Gen. 4. Invoices issued by AT&T, Sprint and Verizon invoices would not be subject to FOIA unless in a public employee’s possession.) However, any stored voice or electronic messages prepared, or in the possession of, a public employee would be subject to FOIA if they are writings and recordings sent or received for transacting public business even if the device used to prepare or receive them is a private device.

Further, the Virginia Public Records Act, which has a comparable definition for public records, states: “Ownership of the hardware, software, or media used to create, store, or access the electronic record has no bearing on a determination of whether such record is a public record.” Va. Code § 42.1-77. That Act also generally requires that records not be deleted until the applicable Library of Virginia record retention and disposition period has ended. See www.virginia.edu/recordsmanagement/Schedules/GS-101.pdf.

Generally, voice mail messages “having a bearing on actions or decisions taken or not taken” should be transferred to another electronic or paper format and kept as long as other electronic or paper records are kept. Thus, if other records exist or are created which essentially mirror the voice mail message, the voice mail message may be deleted in accordance with the Act. Routine voice mail messages only need to be retained as long as administratively necessary, and then they may be deleted.

Regarding e-mail messages, correspondence and subject files contained in an agency head’s e-mail messages should be retained by the agency for 5 years and then transferred to the Library of Virginia’s archives for permanent retention. Like paper records, all other historically significant e-mail messages must be retained by the agency permanently. Correspondence by e-mail must be kept by department heads for 3 years and then destroyed, and by all other employees for 2 years and then
destroyed. Routine and administrative e-mails need only to be retained for as long as administratively necessary and then they may be destroyed.