



# Operating Procedure

<b>Effective Date</b> January 1, 2019	<b>Number</b> 040.1
<b>Amended</b>	<b>Operating Level</b> Department
<b>Supersedes</b> Operating Procedure 040.1 (11/1/15)	
<b>Authority</b> COV §2.2-507, §2.2-2817, §8.01-195.1 et seq., §53.1-10, §53.1-17	
<b>ACA/PREA Standards</b> 5-1A-4023, 5-1B-4041, 5-1C-4048; 4-4023, 4-4041, 4-4048; 4-ACRS-7D-28, 4-ACRS-7E-07; 4-APPFS-3D-20, 4-APPFS-1C-08; 2-CO-1A-28, 2-CO-1B-11; 1-CTA-1A-16, 1-CTA-1B-09	
<b>Office of Primary Responsibility</b> Director of Administrative Compliance	

**Subject**

**LITIGATION**

**Incarcerated Offender Access**  
Yes  No

**Public Access** Yes  No   
**Attachments** Yes  No

## I. PURPOSE

This operating procedure establishes actions to be taken by employees and supervisors when an event occurs that could result in liability to the Department of Corrections (DOC); or when a writ, summons, subpoena, criminal charge, or criminal conviction is received by an agent of the DOC.

## II. COMPLIANCE

This operating procedure applies to all units operated by the Department of Corrections (DOC). Practices and procedures must comply with applicable State and Federal laws and regulations, ACA standards, PREA standards, and DOC directives and operating procedures.

## III. DEFINITIONS

**Criminal Conviction** - A finding of guilt for a formal criminal charge which has been adjudicated in a Circuit Court, Juvenile and Domestic Relations Court, or General District Court (or equivalent in another state or federal jurisdiction), except for those traffic infractions which are defined as violations of public order and are classified as neither a felony nor a misdemeanor.

**Criminal Offense Charge** - A formal allegation that a specific person has committed an offense defined as either felony or misdemeanor under Code of Virginia Title 18.2 or statutes applicable to the charging jurisdiction

**Moving Traffic Violation** - A citation received for any violation of driving laws that occurs while a vehicle is in motion

**Organizational Unit** - A DOC unit, such as a correctional facility, regional office, probation and parole office, Virginia Correctional Enterprises (VCE), Academy for Staff Development, Corrections Construction Unit, Agribusiness Unit, and individual headquarters unit (i.e. Human Resources, Offender Management, Internal Audit)

**Organizational Unit Head** - The person occupying the highest position in a DOC organizational unit

**Subpoena** - A written order issued by a judicial officer requiring a specified person to appear in a designated Court as a witness or to bring material to the Court or to provide the material to a designated person

**Suit** - A civil action or process in a Court for the recovery of a right or claim (This may be in the form of a complaint, a motion, such as a motion for judgment, a petition, such as a petition for a writ of habeas corpus, for a writ of mandamus, or for an injunction, etc. and may be filed in either a state or federal Court.)

**Summons** - A warning or citation to appear in Court; a written notification signed by the proper officer, to be served on a person, warning that person to appear on a day specified, to answer to charges, testify as a witness, or other proceeding.

**Tort** - A negligent or intentional civil wrong not arising out of a contract

**Writ** - An order issued by a Court for the purpose of compelling a person to do or to stop doing something

mentioned therein, such as an order of protection

#### IV. PROCEDURE

##### A. Notifications

1. Employees must notify their Organizational Unit Head immediately upon any of the following:
  - a. Receipt of a judicial writ, summons, or subpoena related to actions against the DOC or against the employee in matters connected to their official duties; see the *Summons or Notice of Suit or Criminal Charges related to Official Duties* section of the operating procedure for additional requirements.
  - b. Receipt of a charge or conviction of a criminal offense or a moving traffic violation; notification to be documented on a [Criminal Offense/Moving Traffic Violation Notification](#) 040\_F1.
  - c. Receipt of charges or the employee has been found liable in a civil or disciplinary proceeding to have engaged or attempted to engage in sexual activity by force (overt or implied threats of force, coercion, or if the victim did not consent or was unable to consent); notification to be documented on a [Criminal Offense/Moving Traffic Violation Notification](#) 040\_F1.
  - d. Any technical or administrative suspension, censure, or failure to renew any license, certification, or professional membership that is required as a part of an employee's position.
2. If received during non-working hours, employees must notify their Organizational Unit Head the next working day.
3. If the affected employee is the Organizational Unit Head, they must immediately notify their Supervisor.
4. Failure to comply with any notifications as required in this operating procedure may be handled as a disciplinary issue under Operating Procedure 135.1, *Standards of Conduct*.

##### B. Summons or Notice of Suit or Criminal Charges Related to Official Duties

1. Whenever an employee of the DOC receives a summons or documents related to suits against the DOC, or against the employee as an agent of the DOC, the employee must immediately notify the Organizational Unit Head who will send (fax, scan and email, hand deliver, etc.) the documents to the Office of the Attorney General on the day of receipt, with a copy of the title page forwarded to the Office of the Director.
2. [COV §2.2-507](#) provides for the Attorney General to provide legal services in all civil matters against the Department of Corrections and members, agents, and employees thereof in matters connected with their official duties. (5-1A-4023; 4-4023; 4-ACRS-7E-07; 4-APPFS-3D-20; 2-CO-1A-28; 1-CTA-1A-16)
  - a. If, in the opinion of the Attorney General, it is impracticable for such legal service to be rendered by the Attorney General's Office, a special counsel may be employed for this purpose.
  - b. The compensation for such special counsel will be fixed by the Attorney General and paid from funds appropriated to the DOC.
3. [COV §2.2-2817](#) provides for defense counsel for any criminal action against employees of the DOC related to discharge of the employee's official duties upon preliminary finding by the DOC that the employee did not violate any law, ordinance, or regulation and the employee will not be terminated as a result of such act. Such counsel must be approved by the Attorney General and paid by the DOC, subject to approval by the Attorney General. (5-1A-4023; 4-4023; 4-ACRS-7E-07; 4-APPFS-3D-20; 2-CO-1A-28; 1-CTA-1A-16)
4. [COV §53.1-17](#) permits the Director to, in certain cases and with the Governor's approval, pay for an employee's representation in matters connected to the discharge of their official duties and provided the employee is neither convicted nor terminated from employment as a result.

##### C. Torts against the Commonwealth (Virginia Tort Claims Act, [COV §8.01-195.1](#) et seq.)

1. Torts
  - a. The DOC must investigate the occurrence of any event for which it may be liable.
  - b. All information within the investigation, including *Incident Reports*, is confidential and must not be disclosed to potential claimants or their attorneys.
  - c. Supervisors should make appropriate notifications in accordance with Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*.
  - d. Notice of the event must be forwarded to the Virginia Department of Treasury, Division of Risk Management (TRS/DRM) within 72 hours of the event.
  - e. Copies of the notice must also be forwarded to the Office of the Attorney General and to the DOC Office of Risk Management.
  - f. Serious Injury - TRS/DRM and the Office of the Attorney General must be notified whenever an event occurs that results in a serious injury such as the following:
    - i. Fatality
    - ii. Paraplegia
    - iii. Amputations
    - iv. Multiple fractures
    - v. Severe internal injuries
    - vi. Severe burns
    - vii. Severe lacerations
    - viii. Serious back injury
    - ix. Brain injury or brain damage prognosis
2. Notice of Claim
  - a. Employees of the Department of Corrections must not accept notices of claims for damage.
  - b. All claims must be made by the claimant or claimant's representative in accordance with the Virginia Tort Claims Act (see COV §8.01-195.6), directly to the Director of TRS/DRM or the Office of the Attorney General.
  - c. At the Unit Head's request, the DOC Risk Manager may respond to the potential claimant.
3. Notice of Litigation Reporting Process for Claims Brought under the Virginia Tort Claims Act.
  - a. When notice of litigation is filed with any DOC organizational unit, or one of the above referenced injuries occurs, the notice or *Incident Report* must be forwarded immediately to the appropriate Regional Administrator and Regional Operations Chief or appropriate Deputy Director, as well as the DOC Office of Risk Management.
  - b. The Regional Operations Chief will immediately notify the Chief of Corrections Operations and forward a copy of the notice to the Director's Office and the Office of the Attorney General.
  - c. Any relevant information concerning the suit or injury (*Incident Report*, accident investigation, etc.) will be forwarded with the notice or as soon thereafter as possible. Information forwarded with the notice should be factual and should not attempt to draw any legal conclusions concerning liability or negligence.
  - d. If there is any uncertainty or question as to whether or not an *Incident Report* should be filed, it is the better practice to file the *Incident Report*.

#### D. Confidentiality

1. Employees must not discuss or disclose confidential information to potential claimants or their attorneys.

Example - John Doe employee seriously injured his back while on the job. Jane Smith employee witnessed the accident and created an *Incident Report* as a result. A few weeks later, John Doe's attorney submitted a request to both Jane Smith and John Doe for a copy of their *Incident Reports*. Pursuant to this section, both are prohibited from providing their reports and should forward the

request to the Director of Administrative Compliance.

2. Any requests for such information must be referred to the Director of Administrative Compliance.

E. Liability Protections (5-1B-4041, 5-1C-4048; 4-4041, 4-4048; 4-ACRS-7D-28; 4-APPFS-1C-08; 2-CO-1B-11; 1-CTA-1B-09)

1. The Virginia Department of the Treasury, Division of Risk Management, administers a risk management plan for public liability that protects the Commonwealth's departments, agencies, institutions, boards, commissions, officers, agents, or employees against liability imposed by law for damages.
2. The plan provides protection against tort liability, public officials liability, law enforcement liability, medical malpractice, automobile liability, aviation liability, and watercraft liability.

V. REFERENCES

Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*

Operating Procedure 135.1, *Standards of Conduct*

VI. FORM CITATIONS

[Criminal Offense/Moving Traffic Violation Notification](#) 040\_F1

VII. REVIEW DATE

The office of primary responsibility shall review this operating procedure annually and re-write it no later than three years after the effective date.

*Signature Copy on File*

*12/5/18*

Joseph W. Walters, Deputy Director for Administration

Date