



**REPORT OF THE
VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**

**COMMONWEALTH OF VIRGINIA
DECEMBER, 2001**

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OF THE
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ADVISORY COUNCIL**

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**REPORT OF THE
VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL**

**To: The Honorable James S. Gilmore, III, Governor of Virginia
and
The General Assembly of Virginia**

**Richmond, Virginia
December 2001**

INTRODUCTION

*“A popular government, without popular information, or the means of acquiring
it, is but a Prologue to a Farce or a Tragedy... .”*
-- James Madison

Established by the 2000 Session of the General Assembly¹, the Freedom of Information Advisory Council (the “Council”) was created as an advisory council in the legislative branch to encourage and facilitate compliance with the Freedom of Information Act. As directed by statute, the Council is tasked with furnishing, upon request, advisory opinions regarding the Freedom of Information Act (FOIA) to any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA.² The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is comprised of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens. Delegate Clifton A. “Chip” Woodrum of Roanoke has served as the Council’s chairman since creation of the Council in July 2000.

¹ Chapters 917 and 987 of the 2000 Acts of Assembly.

² Chapter 21 (§ 30-178 et seq.) of Title 30 of the *Code of Virginia*.

The Council provides guidance to those seeking assistance in the application of FOIA, but does not facilitate the actual receipt of documents. By issuing advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local governments. Although the Council has no authority to mediate disputes, it can be called upon as a resource to help fashion creative solutions in an attempt to remedy a dispute. The Council is a resource for the public, representatives of state and local government, and members of the media. In fulfilling its statutory charge, the Council has been quick to gain recognition as a forum for the discussion and study of FOI and related public access issues. The Council continually attempts to keep abreast of trends, developments in judicial decisions, and emerging issues. In many instances, the Council is the focal point for addressing FOIA problems and attempting to correct situations that merit change based on public policy considerations.

In its second year of operation, the Council examined the impact of electronic communications as they relate to the open records and meetings requirements of FOIA. The Council also studied several bills from the 2001 Session of the General Assembly that did not advance during the legislative process but instead were referred to the Council for study. Three bills, HB 1597 (Landes), HB 2091 (Devolites), and HB 2700 (Larrabee), would have amended the record exemption provisions of FOIA.³ The Council also reviewed the latest Virginia Supreme Court decision relating to FOIA in the matter of Connell v. Kersey, decided June 8, 2001. In that case, the Supreme Court held that attorneys for the Commonwealth are not “public bodies” as defined in FOIA. Prior to this decision, many had believed that attorneys for the Commonwealth were subject to the provisions of FOIA. To assist it in its deliberations on the bills referred to it by the 2001 Session of the General Assembly and on the effect of the Connell v. Kersey case, the Council formed workgroups of any and all interested parties to examine the implications of each issue and to make recommendations to the Council for resolution of these issues.

³ HB 1597 amends the Freedom of Information Act to include a right of access to scientific data used as the basis of new laws; HB 2091 provides a record exemption for records, documents or other information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and HB 2700 provides that the working papers exemption shall not be invoked by the mayor or chief executive officer of any political subdivision of the Commonwealth to prevent the sharing of documents or other records that are necessary to the informed deliberation of such local governing body.

WORK OF THE COUNCIL

March 14, 2001

The Council continued its deliberations on electronic communications and its effect on FOIA⁴. The Council also reviewed several bills passed by the 2001 Session of General Assembly directly impacting on FOIA as well as those bills and resolutions relating to public access to government records⁵.

Staff presented a status report to the Council on the number of requests received to date for information on the operation of Virginia's Freedom of Information Act. Since July 21, 2000, staff reported that it had received and answered 298 inquiries and had issued 40 written advisory opinions. Of the 298 inquiries (including telephone, e-mail, and letters), 144 requests were from citizens, 93 requests from state and local government officials, and 61 requests from the media.

The Council also discussed several bills from the 2001 Session of the General Assembly that did not advance during the legislative process but instead were referred to the Council for study. Three bills, HB 1597 (Landes), HB 2091 (Devolites), and HB 2700 (Larrabee), would have amended the records exemptions provisions of FOIA.⁶ The Council decided that each patron should be given an opportunity to present his bill and provide relevant background information.

Electronic Communications

The Council continued its deliberations on the treatment of electronic communications as they relate to the open records and meetings requirements of FOIA. In a records context, e-mails should not be thought of merely as an instant means of leaving or responding to messages in a manner similar to phone calls and voice mail; but equal, in actuality and legally, to a letter or memo. In consideration of public rights of access, retention, and disposal, and the functions and responsibilities of public employees, e-mails should be treated in most respects like paper records. The definition of "public record" under FOIA includes e-mails, and from a record perspective, e-mails fit easily into current FOIA language. One potential problem with electronic communications, however, derives from a general

⁴ Examination of electronic communications issues began during the Council's first year.

⁵ HJR 789 (Rust); HB 2169 (Nixon); HB 2750 (Blevins); SB 884 (Stosch); SB 1096 (Mims); and SB 1322 (Hawkins).

⁶ *Ibid.* at 3.

perception that e-mails are intangible as evidenced from the practice and ease of deleting them.

But from a meeting perspective, electronic communications may be more troubling. As defined in FOIA, “meeting” means *the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body*⁷. In a meeting context, a series of electronic communications between individual members of a public body that result in a collective decision or a vote taken by e-mail would be inconsistent with law. Generally, except for certain state agencies in limited enumerated instances, any action or vote taken by a public body must occur at a meeting where a quorum is physically assembled.

With electronic communications, access advocates are concerned that the public will be left out of witnessing the operation of government. Public officials are concerned that they (i) cannot avail themselves of technology and (ii) will have to give access to their dealings beyond that contemplated by FOIA. A pertinent question in the examination of electronic communications from a meetings perspective, is when is e-mail just correspondence, and when does it cross the line and become the discussion or transaction of public business.

The director of the Division of Legislative Automated Systems reported that electronic meetings with meaningful public access are possible to achieve, although they require special considerations that are not present with traditional “physically assembled” meetings. Advantages of technology-based meetings cited were the accessibility to expertise; the ability to share detailed information; the expansion of participation because electronic meetings are not limited by location or time of day; and the ability to “capture” presentations for future use. Technology-based meetings also present several disadvantages including the loss of visual clues (i.e. body language, etc.), the expense of “technological” participation versus physically assembled meetings, the limiting/inhibiting of participation, and the complexity of electronic meeting logistics (i.e., at whom or what will people be looking, distribution of agendas and handouts, and moderation of participation, etc.). In order to ensure public access to the meetings of public bodies under FOIA, essential components must be built into the process. These essential components are open (nonproprietary) software, preservation of the historical record, and consideration of the observation versus active participation continuum (how will participation be structured). Illustrating this last point, members of the Council were encouraged to recall their own experience with conference calls where many people are talking all

⁷ § 2.2-3701 of the *Code of Virginia*.

at once. It was noted that structured interaction among participants is required to ensure meaningful exchange.

June 20, 2001

The Council discussed the development of a study plan for the FOIA bills referred from the 2001 Session of the General Assembly that did not advance during the legislative process. Delegates Landes (HB 1597) and Larrabee (HB 2700) presented their bills to the Council and explained the reasons leading to their introduction.

As introduced, HB1597 sought to amend FOIA to include a right of access to scientific data used as the basis of new laws or regulation. Delegate Landes explained that the genesis for his bill was model legislation suggested by the American Legislative Exchange Council “[t]o protect citizens from arbitrary and capricious regulations promulgated without any impetus that is justified by pertinent, ascertainable, and peer reviewed science” and to “guarantee citizens the right to access scientific data that is used to develop public policy.” Questions to the patron reflected a belief that these types of records are currently open under FOIA in accordance with the Act’s definition of “public records.” Concern was raised that amending FOIA to name records with some degree of specificity that are open would tend to suggest that other documents not so listed would no longer be public. As defined in FOIA, “public record” means “all writings and recordings which 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 business⁸.”

It was the consensus of the Council that government agencies and public universities should be surveyed to identify what types of records fall within the purview of HB 1597 and whether this data is currently available to the public under existing law. The Council directed its staff to convene a work group of interested parties to discuss the issues attendant to this bill and report its recommendations to the Council.

The next bill discussed by the Council was HB 2091, patroned by Delegate Devolites, which provides a record exemption for records, documents or other information, the disclosure of which would constitute an unwarranted invasion of personal privacy. Although Delegate Devolites was unable to attend the meeting, she was in agreement that her bill should be considered by the joint subcommittee

⁸ Ibid. at 7.

created pursuant to HJR 789 (Delegate Rust), which is studying the protection of information contained in the records, documents and cases filed in the courts of the Commonwealth. Delegate Devolites is a member of the HJR 789 joint subcommittee.

The Council then discussed HB 2700 (Larrabee), which provides that the working papers exemption under FOIA shall not be invoked by the mayor or chief executive officer of any political subdivision of the Commonwealth to prevent the sharing of documents or other records that are necessary to the informed deliberation of such local governing body. Delegate Larrabee explained that the genesis of his bill was a situation that arose in his district relating to whether a consultant's report paid for by a city council could be withheld from city council by the city manager as a working paper. Again, the Council directed its staff to convene a work group of interested parties to discuss the issues attendant to this bill and report its recommendations to the Council.

Staff presented a status report to the Council on the number of requests received to date for information on the operation of Virginia's Freedom of Information Act. Since July 21, 2000, staff reported that it has received and answered 526 inquiries and has issued 58 written advisory opinions. Of the 526 inquiries (including telephone, e-mail, and letters) 255 requests came from citizens, 154 requests from state and local government officials, and 117 requests from the media.

The Council also was briefed about the latest Virginia Supreme Court decision relating to FOIA in the matter of Connell v. Kersey, decided June 8, 2001. In that case, the Supreme Court held that attorneys for the Commonwealth are not "public bodies" as defined in FOIA. While acknowledging that attorneys for the Commonwealth are public officials, the court noted that FOIA distinguishes between "public officials" and "public bodies" in several instances, which clearly indicates that the terms are not synonymous. Further evidence of this is the express provision in § 2.2-3706. The definition of "law-enforcement official" includes attorneys for the Commonwealth. The court reasoned that had the General Assembly intended attorneys for the Commonwealth to be treated as public bodies under the general definition, their express inclusion under the definition of "law enforcement official" would have been unnecessary. The court, however, limited the application of its holding by stating that "their holding should not be interpreted as placing any restriction on the application of FOIA to public officials and their offices beyond the narrow focus of this opinion as it relates to FOIA requests made to a attorneys for the Commonwealth for records related to ongoing criminal investigations or prosecutions."

Because of the effect of this decision, the Council directed its staff to convene a work group of interested parties to discuss the issues attendant to this decision and report its recommendations to the Council.

September 12, 2001

The Council focused on progress reports from the workgroups established at its previous meeting on June 20, 2001. After the meeting was called to order, the Council observed a moment of silence for the victims and families of the September 11 acts of terrorism against the United States.

Roger Wiley, a member of the FOIA Council, reported on the progress of the workgroup established to discuss a statutory response to the Connell v. Kersey case. He reported that the group had met once, and that a proposal had been circulated that added a definition of "public official" to FOIA. That term is used in the policy statement of FOIA but not in the substantive sections of the act. The group expressed some concern about this proposal, and will consider other alternatives at future meetings of the workgroup. Concern was also raised at the first meeting about the use of FOIA as a discovery tool. Craig Merritt, representing the Virginia Press Association, also spoke to the Council about the progress of the Connell v. Kersey workgroup. His client thought that the workgroup should adopt a simple, direct fix to address the issues raised by the case. He suggested that the term "public official" be removed entirely from FOIA to alleviate any ambiguity, and that the definition of a public body be redefined to include constitutional officers. He praised the use of the workgroup format to help facilitate discussion about these issues.

FOIA Council Member John Edwards reported on the progress of the working papers workgroup, created to examine the issues presented in HB 2700 (2001). He reported that the workgroup met once, and concluded that the issues raised by the bill were the result of an internal, local political problem, and not the result of a problem with the exemption. The workgroup decided recommended that no action be taken on this issue.

Staff reported on the progress of the workgroup formed to examine scientific research as a result of HB 1597 (2001). Representatives from state universities and the Department of General Services were contacted to discuss the implications of the bill. Everyone contacted opposed the bill because most research that would be covered by the bill is confidential by contract or is proprietary information. The Vice-Provost for Research at Virginia Tech agreed to write a letter to the FOIA Council summarizing this viewpoint on behalf of all Virginia institutions of higher education. The Council is awaiting receipt of this letter as well a written response by the Department of General Services.

The Council discussed the sunset provision contained in its enabling legislation that provides that the Council will cease to exist on July 1, 2002. Given the volume of inquiries for advisory opinions, coupled with the frequency of requests for FOIA training, it was apparent to the Council that there was a very real need for the services provided by the Council. As a result, it was the consensus of the Council to recommend legislation for the 2002 Session of the General Assembly to remove the sunset provision, thereby making the Council permanent.

Public comment was received during the meeting. The Council was praised for reinforcing its commitment to a free and open society by holding the meeting in the face of the events of September 11. The Council was also commended for its decision to propose legislation to remove the sunset provision to make the Council permanent.

Staff presented a recap of the FOIA workshops, held at various locations around the state in July, and other activities. The workshops were well attended, and consisted of three segments -- FOIA 101, an electronic records overview, and a law-enforcement records discussion. Issues frequently encountered during the workshops included questions about who is the custodian of public records, when does the five-day statutory time limit for a response begin to run, and fees for FOIA requests. Delegate Woodrum suggested that the problems encountered with fees be monitored. Staff reported that to date, it had received and answered 634 inquiries and issued 64 written opinions. Of the 634 inquiries, 148 came from media, 282 from citizens and 204 from government. In addition, the Council's website had been expanded to include a searchable database of its written opinions. Since the creation of the website in August 2000, it had received close to 20,000 hits.

November 29, 2001

The Council focused on progress reports from the study workgroups and consideration of possible legislative recommendations for the 2002 Session of the General Assembly.

Roger Wiley, a member of the FOIA Council, reported on the progress of the workgroup established to discuss the issues raised by the Connell v. Kersey case. The workgroup has met three times to continue discussions on a statutory response to the Connell v. Kersey case. Areas of consensus among the workgroup, excluding representatives of the attorneys for the Commonwealth, included a recommendation that (i) the term "public official" be eliminated from FOIA to alleviate any ambiguity, (ii) the definition of "public body" be amended to clarify that all constitutional officers are subject to those portions of FOIA dealing with records production, and (iii) the criminal records section be amended to include an additional exemption for records relating to specific pending cases or ongoing investigations or prosecutions handled by attorneys for the Commonwealth.

At the last workgroup meeting, the Virginia Association of Commonwealth's Attorneys (VACA), represented by Randy Sengel (Alexandria) and Dick Trodden (Arlington), voiced their objection to inclusion of attorneys for the Commonwealth within the definition of a "public body." Mr. Trodden explained that Commonwealth's attorneys should not be included because of an expected administrative burden on their offices in fulfilling anticipated requests under FOIA. A total exemption from FOIA, similar to that of the Virginia Parole Board, was requested on behalf of the Commonwealth's attorneys.

The Council voted that a subcommittee of the Council be constituted to attempt to resolve the issues still in dispute related to the Connell v. Kersey case. Members of the subcommittee appointed by the Council chairman include Frank Ferguson and Roger Wiley, who were asked to work with representatives of the Commonwealth's attorneys and council staff to make recommendations to the Council at its next meeting.

Staff reported on the progress of the workgroup formed to examine scientific research as a result of HB 1597 (2001). Representatives from state universities and the Department of General Services were contacted and expressed their opposition to the bill because most research that would be covered by the bill is confidential by contract or is proprietary information. The Vice-Provost for Research at Virginia Tech agreed to write a letter to the FOIA Council summarizing this viewpoint on behalf of all Virginia institutions of higher education. The Council is awaiting receipt of this letter as well a written response by the Department of General Services.

During the public comment portion of the meeting, the Council heard from the Electronic Communications Coordinator of the City of Roanoke concerning a proposed amendment to FOIA to restrict the release of e-mail addresses of those citizens who furnish their e-mail addresses to the City for its "My Roanoke" service which allows citizens to subscribe to the types of information they would like to receive by e-mail, pager, or cell phone. The City was concerned that the risk of having to make citizens' e-mail addresses public would have a chilling effect on its ability to market this open government service and a general perception that it is not a fair deal for citizens to give up their e-mail privacy in exchange for receiving meeting notices. After discussion of the how the amended language should be crafted in light of comment received about whether such an exemption was needed, the Council voted to recommend that FOIA be amended to include a record exemption for individual e-mail addresses, pager or cell phone numbers furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the information not be released.

Also during the public comment portion of the meeting, the Council heard from a representative of both the Virginia Municipal League and the Virginia Association of Counties concerning a legislative proposal to help local governments deal with the FOIA issues surrounding terrorism threats. The specific language for this proposal was submitted for the Council's review. Anticipating that the 2002 Session of the General Assembly would deal with numerous pieces of legislation dealing with terrorism in light of the September 11 terrorist attacks, the Council decided to form a subcommittee to look at this issue, taking into account that needs of both state and local governments. The Council chairman appointed Council members Nolan T. Yelich, John Edwards, and Roger Wiley to begin a study of this issue and make recommendations to the Council at its next meeting.

As is the Council's practice, all persons or groups interested in the work of either of the two subcommittees created at this meeting were invited to participate. Staff was directed to send as broad a notice as possible, including press releases, to encourage participation of the work of these subcommittees.

The Council also reviewed a proposed amendment to FOIA under consideration by the Voting Registration and Election Day Processes Task Force of the Joint Subcommittee on Virginia's Election Process and Voting Technologies (HJR 681/SJR 363). The recommendation was an attempt to rectify some unique problems in complying with FOIA meeting requirements experienced by the State Board of Elections and local electoral board which have only three-member boards. The Council expressed concern over the proposal pointing to their awareness of the operational strains of electoral boards, especially on election day. However, the Council questioned whether FOIA should be restricted to alleviate these operational strains. The concern of the Council was expressed to the task force.

The Council discussed the sunset provision contained in its enabling legislation that provides that the Council will cease to exist on July 1, 2002. The Council reviewed the most recent statistical summaries of the services provided by it and found that in its first 16 months of operation, more than 840 inquiries, including requests for 71 written opinions, had been answered by Council staff. Given the volume of inquiries for advisory opinions, coupled with the frequency of requests for FOIA training, the Council recommended legislation for the 2002 session to remove the sunset provision, thereby making the Council permanent.

SERVICES RENDERED BY THE COUNCIL

The Council offers advice and guidance orally and in writing to the public, representatives of state and local government, and members of the news media. Since its creation, with its staff of two, the Council has responded to more than 840 telephone and e-mail inquiries and prepared 71 written advisory opinions. In

addition, staff has conducted over 40 training sessions for citizens, state and local government, and news media organizations. A listing of these presentations follows as Appendix B.

Statistical Summaries

At the direction of the Council, the staff has kept logs regarding telephone inquiries. In an effort to identify the users of the Council's services, the logs have characterized callers as members of the public, state and local government officials, and members of the news media. A similar breakdown has been developed with respect to requests for written advisory opinions.

For the period July 2000 to November 30, 2000, the staff of the Council has prepared 71 written advisory opinions. A listing of these opinions and a brief description of the opinions follow as Appendix C. With respect to telephone and e-mail inquiries, the number was 840. Based on the number of inquiries received during the first four months, the Council anticipated that it would provide FOIA advice and guidance orally and in writing to approximately 500 citizens of the Commonwealth by the end of its first year.⁹ This prediction proved accurate, with the Council responding to more than 580 requests for FOIA assistance in its first year. By comparison, the New York Committee on Open Government, the statutory model for the Council, generally fields between 800 and 900 inquiries each year, after having been in operation for 25 years.

The statutory charge of the Council to issue advisory opinions in an "expeditious manner" has meant that telephone and e-mail inquiries are answered generally on the day of their receipt, but may, depending on the complexity of the issue, be answered within two or three days of receipt. Turn around times for written advisory opinions is generally two weeks to one month, again depending on the complexity of the issue and the number of pending requests for written opinions.

Written Advisory Opinions

Among the opinions, the total by group is as follows:

Members of the Public	41
State and Local Government Officials	20
Members of the News Media	10

⁹ This number also includes advice to state and local government officials and media representatives.

Telephone and E-mail Inquiries

The profile among those callers is as follows:

Members of the Public	324
State and Local Government Officials	275
Members of the News Media	169

All Inquiries to the Council

Total number of inquiries (via phone, letter, e-mail) 840

Number of inquiries received by:

Public:	365
Media:	179
Government:	295

Number of pending responses (as of 11/29/01): 1

Number of formal responses via written opinion: 71

Number of inquiries received about each of the following:

Mechanics of FOIA-records (i.e. making a request, responding to a request, custodian of records, etc.)	97
Definition of a public body	36
Role of FOIA Council	33
Outside the scope of FOIA	45
Request for document review	2
Request for FOIA materials	33
Remedies	19
Charges	35
Law-enforcement records	78
Medical records	11
Personnel records	43
Investigative records of public bodies (non-law enforcement)	3
Salary	8
Draft records	6
School records	12

Working papers	21
Licensing records	11
Inmate requests for records	2
Court records	11
Tax records	14
Electronic Records (including e-mail)	17
Records prepared for litigation and attorney-client privilege	10
Other records	103
Definition of a meeting	19
Meeting requirements (closed sessions, voting, minutes, notices, etc.)	59
Personnel discussions	20
Privacy issues	5
Consultation with Legal Council	4
Property discussions	5
Prospective business discussions	2
Other meeting discussions	29
Suggestions	7

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. Since launching the website on August 1, 2000, the Council has received over 30,000 "hits," averaging 65 hits per day. The Council's website provides access to (i) the Freedom of Information law, (ii) the Council's meeting schedule, including meeting summaries and agendas, (iii) the membership and staff lists of the Council, (iv) reference materials and sample forms, (v) the Council's annual reports, (vi) information about Council studies, and (vii) links to other Virginia resources, including the Virginia Public Records Act, FOIA overview with frequently asked questions, and FOIA summary and compliance tips from the Office of the Attorney General. Written advisory opinions have been available on the Council's website since January 2001 and are searchable.

FOIA Workshops

For the second year, statewide FOIA training workshops were conducted by the Council for two week in July at the following locations: Virginia Beach, Richmond, Fredericksburg, Lynchburg, and Abingdon. In addition to the FOIA Council, these statewide workshops were sponsored by the Virginia Administrative Law Advisory Committee, the Virginia Association of Broadcasters, the Virginia Association Chiefs of Police, the Virginia Association of Counties, the Virginia Bar Association, the Virginia Coalition for Open Government, the Virginia Local Government Attorneys Association, the Virginia Municipal League the Virginia

Press Association, the Virginia Sheriff's Association, and the Virginia School Boards' Association. The workshops reached approximately 400 persons statewide and offered continuing legal education (CLE) credit required for attorneys by the Virginia State Bar to sustain their licenses to practice law and criminal justice credits as required by the Virginia Department of Criminal Justice Services for law-enforcement officials.

Educational Materials

The Council, in cooperation with the Virginia Coalition on Open Government, produced a public service poster titled *Open Government—It's your call. 1-866-448-4100*. The poster has been distributed to state and local officials to publicize the existence and role of the Council to encourage and facilitate compliance with FOIA.

The Council, in cooperation with the Library of Virginia, has published a brochure titled Privacy vs. Public Access.

The Council is currently working on additional educational materials, including publication of a handbook on public access laws and FOIA request and response forms.

CONCLUSION

The Council continually attempts to keep abreast of trends, developments in judicial decisions, and emerging issues. In many instances, the Council serves as the focal point for solving problems and correcting situations that merit change based on public policy considerations. During its second year of operation, the Council continued to serve as a resource for the public, representatives of state and local government, and members of the media. It formed workgroups to examine FOI and related access issues, and encouraged the participation of many individuals and groups in Council studies. Through its website, the Council provides increased public awareness of, and participation in, its work and publishes a variety of educational materials on the application of FOIA. Its commitment to facilitating compliance with FOIA through training continued in the form of annual statewide FOIA workshops and other specialized training sessions. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

Clifton A. Woodrum, *Chairman*
R. Edward Houck, *Vice-Chairman*
David E. Anderson
John Stewart Bryan, III

John B. Edwards
Frank S. Ferguson
David H. Hallock, Jr.
W. Wat Hopkins
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Appendix A

A BILL to repeal the second enactment of Chapters 917 and 987 of the 2000 Acts of Assembly, relating to the Freedom of Information Advisory Council.

Be it enacted by the General Assembly of Virginia:

1. That the second enactment of Chapters 917 and 987 of the 2000 Acts of Assembly of the Code of Virginia is repealed.

#

Appendix B

Training/Education Presentations

An important aspect of the Council's work involves efforts to educate by means of seminars, workshops, and various public presentations.

From July 21, 2000 through the end of November 2001, the staff gave approximately 40 presentations, which are identified below by interest group in chronological order.

August 12, 2000	Richmond City School Board City Hall Richmond, VA
October 12, 2000	College Communicators Association James Madison University Harrisonburg, VA
October 23, 2000	Virginia Municipal League Annual Conference Arlington, VA
October 24-27, 2000	<i>Statewide FOIA Workshops</i> Norfolk, Richmond, Wytheville, and Charlottesville, VA
November 3, 2000	Virginia Coalition for Open Government Access 2000 Stratford Hall, VA
November 13, 2000	Virginia Association of Counties 66th Annual Conference Warm Springs, VA
November 14, 2000	Tidewater Mediation Network Virginia Beach, VA
November 28, 2000	WVTF Public Radio Roanoke, VA
March 3, 2001	Virginia Press Association Winter Conference 2001 Norfolk, VA

March 9, 2001	Virginia Tech Blacksburg, VA
March 10, 2001	Local Government Attorneys Conference Richmond, VA
March 17, 2001	Professional Investigators and Security Association Annual Conference Charlottesville, VA
March 22, 2001	Shenandoah County School Board Woodstock, VA
May 9, 2001	Water and Waste Authorities Association Charlottesville, VA
June 15, 2001	Loudoun Times Mirror Loudoun, VA
June 21, 2001	Bowling Green Sheriff's Office Bowling Green, VA
June 22, 2001	New Member Training, Compensation Board Richmond, VA
June 27, 2001	The Freelance Star Fredericksburg, VA
July 10-18, 2001	<i>Statewide FOIA Workshops</i> Fredericksburg, Richmond, Virginia Beach, Abingdon, and Lynchburg
July 16, 2001	Damascus Town Council Damascus, VA
August 13, 2001	Local Government Officials Conference Charlottesville, VA
August 14, 2001	Virginia Government and Law Class Charlottesville, VA

August 27, 2001	Department of Information Technology Richmond, VA
October 9, 2001	Department of Social Services, Virginia Beach Virginia Beach, VA
October 12, 2001	Research and Committee Staff Section National Conference of State Legislatures Richmond, VA
October 15, 2001	Virginia Municipal League Virginia Beach, VA
October 19, 2001	Virginia Library Association Richmond, VA
November 2, 2001	Harrisonburg City Schools Harrisonburg, VA
November 8, 2001	Virginia Association of Government Archives & Records Administration Hampton, VA
November 9, 2001	Parent Teacher Association/Parent Teacher Student Association Williamsburg, VA
November 26, 2001	Bedford County Officials Bedford, VA
November 28, 2001	Department of Human Resource Management Virginia Beach, VA
November 30, 2001	Virginia Coalition for Open Government Access 2001 Richmond, VA

**ADVISORY OPINIONS ISSUED
December 1, 2000 through November 30, 2001**

<u>Opinion No.</u>	<u>Issue(s)</u>
December 2000	
AO-10-00	Status of the Virginia School Boards Association (VSBA) as a public body; attendance of school board members at VSBA conferences; public access to documents obtained at VSBA conference or provided to VSBA by public official.
AO-11-00	Request for public body to compile information from multiple databases; format of records requests; public body's response to request for electronic records.
AO-12-00	Vote by public body to proceed with action negates working papers exemption; application of working papers exemption; dissemination of working papers.
AO-13-00	Notice requirements for special meetings.
AO-14-00	Access to information concerning complaints filed against public officials; application of personnel records exemption; access to amount of settlement paid out of public funds; access to amount paid to private attorney out of public funds.
AO-15-00	Access to sealed divorce records.
AO-16-00	Definition of a public body.
AO-17-00	Access to records containing job classification information.
AO-18-00	Access to death certificate.
AO-19-00	Closed meeting to discuss religious exemption from attending private school; procedures to hold closed meeting; attendance of nonmembers at closed meetings; discretion of public body to hold closed meeting; remedies.

AO-20-00 Access to documents prepared and used by commission to study and develop new compensation plan; access to annual report of the Department of Personnel and Training concerning compensation system.

AO-21-00 Access to complaints relating to a criminal investigation by the Natural Tunnel Soil and Water Conservation District.

2001

AO-1-01 City's proposed e-mail network for council members constitutes an electronic meeting.

AO-2-01 Access to list of applicants applying for licensure by board governed by the Department of Health Professions.

AO-3-01 Application of notice and agenda provisions for open meetings; remedies.

AO-4-01 Access to identity, qualifications, and resumes of candidates for city manager position.

AO-5-01 Definition of a meeting; chance meetings.

AO-6-01 Access to noncriminal police reports; access to telephone directory of city employees.

AO-7-01 Access to school bus videotapes; Family Educational Rights and Privacy Act (FERPA).

AO-8-01 Application of attorney-client privilege exemption.

AO-9-01 Status of local Neighborhood Corrections Office as a public body.

AO-10-01 Access to audit information from the Virginia Employment Commission for unemployment compensation hearing.

AO-11-01 Access to lists of names and addresses of businesses to whom licenses have been issued; access to lists of businesses or individuals on a locality's tax rolls.

AO-12-01 Costs for copying public records.

- AO-13-01 Access to records indicating whether an individual attended school in locality; Family Educational and Privacy Rights Act (FERPA).
- AO-14-01 Requirements of motion to enter into closed session to discuss litigation.
- AO-15-01 Access to records concerning the qualifications of a public official.
- AO-16-01 Access to list of concealed handgun permit holders.
- AO-17-01 FOIA exemptions relating to economic development prospects; application of FOIA to the Governor's Development Opportunity Fund.
- AO-18-01 Notice requirements for a change in location of a public meeting.
- AO-19-01 Access to presentence reports.
- AO-20-01 Application of FOIA of meetings of a two-person subcommittee.
- AO-21-01 Explanation of a public body concerning costs accrued in searching for and providing public records; obligation of a public body to respond to a new FOIA request if the requestor has not paid costs associated with a prior request.
- AO-22-01 Freedom of Information Advisory Council lacks authority to conduct investigations; application of attorney-client privilege exemption.
- AO-23-01 Application of FOIA to student government at state college.
- AO-24-01 Status of a citizen's advisory group as a public body.
- AO-25-01 Costs for copying public records.
- AO-26-01 Open meeting exemptions for discussion of prospective business or industry, negotiation of siting agreements.
- AO-27-01 Access to name and address of firm or corporation transacting business under a fictitious name from local tax officials; access to tax information.

- AO-28-01 Exemption for personnel records; access to information concerning position and salary of public employees.
- AO-29-01 Access by parent to child's scholastic records.
- AO-30-01 Access to records maintained in case file of the Board of Social Work by subject of the records.
- AO-31-01 No FOIA requirement that a board of supervisors conduct a public hearing before it may sell a piece of real property .
- AO-32-01 Access to budget proposals submitted by city departments to city council for preparation of city's annual budget.
- AO-33-01 Access to directory information of students; application of the Federal Educational Rights and Privacy Act.
- AO-34-01 Definition of a public body and application of definition to New Market Financial Control Board; access to documents held by town council's finance committee.
- AO-35-01 Public body not required to adhere to a standing request for public documents that are not in existence at the time the request is made.
- AO-36-01 Analysis of "supported wholly or principally by public funds" language in the definition of a public body.
- AO-37-01 Virginia Workers' Compensation Commission is the custodian of "proof of coverage" information for purposes of FOIA even though the records are actually collected and maintained by a third party, because the Commission is required by law to collect such information.
- AO-38-01 Motion passed in closed session does not become official until public body votes on it in open session; a motion to enter into closed session must identify the subject matter, state the purpose of the meeting, and make specific reference to the applicable exemption.
- AO-39-01 Public body may make reasonable charges for its actual costs in responding to a FOIA request.

- AO-40-01 Discussion or transaction of public business by three or more members of a public body constitutes a meeting under FOIA.
- AO-41-01 Application of FOIA to a tourism program run by a local chamber of commerce for the city council.
- AO-42-01 Access to list of the names of individuals who have made a FOIA request to a public body.
- AO-43-01 FOIA requires that notice of public meetings be posted in two physical locations.
- AO-44-01 Name of physician at a state correctional facility is available under FOIA.
- AO-45-01 A motion offered by a public body to enter into a closed meeting must contain three procedural requirements of FOIA, in that it states specific statutory exemption, the subject, and the purpose of the closed meeting. A public body may properly enter into closed meeting to discuss a potential request for financial assistance relating to the expansion of an existing business or industry.
- AO-46-01 Where three or more members of a public body continue discussions of public business after a public meeting has adjourned, such a gathering is a meeting under FOIA, even if the members are discussing the business with staff. The procedural requirements for conducting a meeting would not be invoked if three or more members attend a function that was not arranged for the purpose of discussing or transacting public business (i.e. dinner), so long as no public business is actually discussed.
- AO-47-01 A public body's requirement to provide two-business days' notice to review scholastic records is consistent with the five-day statutory deadline.
- AO-48-01 Receiving a line of credit from a public body does not make a non-profit hospital a public body. The removal and reappointment of a hospital's directors by a board of supervisors does not make the hospital a public body.

Appendix D

2001 Meetings of the Freedom of Information Advisory Council

Wednesday, March, 14, 2001, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Review of FOIA and related access legislation passed by 2001 General Assembly and bills referred by General Assembly to the Council for study: HB 1597, Landes. FOIA; access to scientific data from state-funded studies; HB 2091, Devolites. FOIA; record exemption for unwarranted invasion of personal privacy; HB 2700, Larrabee. FOIA; use of working papers exemption.

Topic: Electronic communications. Presentations by: Maria J.K. Everett, *Executive Director*—review of issues and Bill Wilson, *Director, Division of Legislative Automated Systems (DLAS)* –Electronic Communication Systems; inclusion of public access component.

Wednesday, June 20, 2001, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Presentation of bills referred by General Assembly to the Council for study: Delegate Landes, HB 1597, FOIA; access to scientific data from state-funded studies; Delegate Devolites, HB 2091, FOIA; record exemption for unwarranted invasion of personal privacy; and Delegate Larrabee, HB 2700, FOIA; use of working papers exemption.

Discussion and development of study plan.

Wednesday, September 12, 2001, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Progress Reports from Study Workgroups and other Study Issues: Connell v. Kersey Workgroup; Working Papers Workgroup (HB 2700, 2001); Access to scientific research (HB 1597, 2001).

Discussion of possible legislative recommendations. Recap of FOIA Workshops held statewide in July, 2001. Update of latest number of inquiries to the Council for opinions (oral and written).

Identification of specific issues for inclusion in annual report due in December.

Thursday, November 29, 2001, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Progress Reports from Study Workgroups: Connell v. Kersey Workgroup; Access to scientific research (HB 1597, 2001).

Discussion of possible legislative recommendations--removal of July 1, 2002 sunset, Other business. Presentations by: Mark Flynn, *VML and VACO*, concerning a

legislative proposal to help local governments deal with the FOIA issues surrounding terrorism threats.

Craig Fifer, *Electronic Communications Coordinator, City of Roanoke*, concerning a proposed amendment to FOIA to restrict the release of e-mail addresses of those citizens who furnish their e-mail addresses to the City for its "My Roanoke" service which allows citizens to subscribe to the types of information they would like to receive by e-mail, pager, or cell phone.

Review of Council's draft annual report.