

REPORT OF THE

**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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DECEMBER 2009**





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OF THE  
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Delegate H. Morgan Griffith, Chair  
Senator R. Edward Houck  
Ralph L. "Bill" Axselle  
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# REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**To: The Honorable Timothy M. Kaine, Governor of Virginia  
and The General Assembly of Virginia**

**Richmond, Virginia  
December 2009**

## INTRODUCTION

*The more a government chooses to provide information to its citizens on a 'need to know' basis, the more citizens probably need to know what their government is up to."*

Editorial  
Detroit Free Press  
2002

Established by the 2000 Session of the General Assembly<sup>1</sup>, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA). As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon the request of 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<sup>2</sup>. 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 composed 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.

The Council provides guidance to those seeking assistance in the understanding and application of FOIA; although the Council cannot compel the production of documents or issue orders. By rendering 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 government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of FOIA disputes and to foster compliance and a better understanding of FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council serves as a forum for the discussion, study, and resolution of FOIA and related public access issues and is known for its application of sound public policy to resolve disputes and clarify ambiguities in the law. Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.

## **EXECUTIVE SUMMARY**

The Council continues to fulfill its role to the Virginia General Assembly by serving as a clearinghouse for public access issues. For the ninth straight year, the Council has conducted in-depth reviews of legislation concerning the FOIA and other public access issues referred to it by the General Assembly. In 2009, five bills were referred to the Council by the General Assembly for further study.<sup>3</sup>

The Personal Identifying Information Subcommittee (PII Subcommittee), created in 2007, continued its work on public access to personal identifying information contained in public records, including Social Security Numbers (SSNs), credit card and other financial account information, and individual citizens' home addresses, telephone numbers, and email addresses. The PII Subcommittee also examined the specific issues raised by HB 2471 (Hugo), HB 2630 (Crockett-Stark), and SB 880 (Stuart). HB 2471 would have eliminated the requirement for disclosure of the names of individual teachers in response to a request for the official salary or rate of pay of employees of a local school board. The PII Subcommittee recommended no action be taken on HB 2471 on the basis that protecting the names of only one segment of public employees was not good public policy. This assessment was also shared by the Virginia Municipal League, the Virginia Association of Counties, the Virginia Coalition for Open Government, and the Virginia Press Association. HB 2630 (Crockett-Stark) would have allowed a law-enforcement officer to request that personal information about him be withheld from disclosure in public records. For purposes of the HB 2630, "personal information" included the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer. Upon further investigation, the PII Subcommittee learned that the issue stemmed from the online publication of such personal information as contained in court documents and real estate assessment records. While the PII Subcommittee felt that the



overall issue was of some concern, FOIA, itself, does not require the posting of any information on the internet, except for state executive branch meeting notices and minutes. As a result, the PII Subcommittee recommended no action be taken on HB 2630 as online publication of this information is required pursuant to other laws and not dictated by FOIA, and therefore outside the purview of the Council's authority. SB 1332 (Cuccinelli) would have included as public bodies for the purposes of FOIA any private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions. No action was recommended on SB 1332. Finally, SB 880 would have exempted from public disclosure personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department, provided that such individuals had requested that the Department not disclose such information. Given the enactment of the Protection of Social Security Numbers Act (§ 2.2-3815 et seq.) (c. 213 of the Acts of Assembly of 2009), SSNs are now protected and the portion of this bill dealing with SSNs has been resolved in favor of protecting the first five digits of a SSN. The PII Subcommittee did, however, recommend an exemption of general application in FOIA that protects the credit card, debit card, routing numbers, and other account information of private persons and public bodies with a financial institution. The Council voted unanimously to approve the PII Subcommittee's draft legislation and recommend it to the 2010 Session of the General Assembly.

The Public Records Subcommittee was established in 2009 to examine the issues raised by HB 2421 (May), which would have amended the definition of "public records" in FOIA. Delegate May had introduced the bill on behalf of Loudoun County after several FOIA court cases where the definition of "public records" was at issue.<sup>4</sup> In summary, a citizen sought records of all communications, including all electronic mail messages (email), between several County Supervisors and certain other individuals. The Supervisors provided some records but withheld personal emails, asserting that they were not public records because they were not in the transaction of public business. The citizen brought FOIA petitions seeking all of the Supervisors' records to and from the named individuals regardless of whether the contents were asserted to be personal in nature. At the general district court level, it was held that the Supervisors in question must turn over all of their electronic mail messages, including those that the Supervisors asserted were not in the transaction of public business. On appeal the circuit court indicated that records not in the transaction of public business were not public records subject to FOIA, but the Supervisors would have to create a log indicating what records were being withheld. The log created was to be in sufficient detail that the court could ascertain whether the withheld records were in fact matters in the transaction of public business or not. Further appeals and the FOIA requests themselves were withdrawn by agreement with the requester, without a final order being issued by the circuit court. Delegate May indicated that the intent was not to change existing law, but to clarify it. As a result of the Subcommittee's deliberations, Delegate May withdrew the bill. The Subcommittee, however, recommended that staff develop a guidance document that would clarify the definition of "public record" to eliminate any confusion regarding what records are and are not subject to disclosure under FOIA. The Council voted unanimously to approve the Subcommittee's recommendation.

Finally, the Council unanimously agreed to technical amendments to the GDCDPA, with the concurrence of the Office of the Attorney General to clarify the date when SSNs could no longer be collected/required at the state level.

The Council continued to monitor Virginia court decisions relating to FOIA. In the spring of 2009, the United States District Court for the Eastern District of Virginia heard the case of *McBurney v. McDonnell* (Case No. 3:2009cv44). In this consolidated case, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.<sup>5</sup> The *McBurney* case followed a 2006 decision of the Third Circuit Court of Appeals<sup>6</sup> that upheld a decision of the federal District Court for the District of Delaware,<sup>7</sup> holding that the limitation of rights under Delaware's FOIA law to Delaware citizens violates the Privileges and Immunities Clause of the Constitution of the United States. The District Court found that the law violated two rights of the requester under the Privileges and Immunities Clause: (1) his right to pursue a "common calling" as a journalist, and (2) his right to participate in the political process. The Circuit Court did not consider the "common calling" ground. Instead, in a three-step analysis the Circuit Court (i) found that participation in the national political process was a fundamental right protected by the Privileges and Immunities Clause, (ii) found that Delaware's stated interest in defining its political community and strengthening the bond between its citizens and government was a substantial interest, and (iii) found that Delaware's stated interest was not furthered by limiting access to public records to Delaware citizens. Finding that the citizenship limitation did not further a substantial interest and did impair a fundamental right, the Circuit Court in the *Lee v. Minner* case held that limitation to be unconstitutional.

The Council continued its commitment to providing FOIA training. The Council views its training mission as its most important duty and welcomes every opportunity to provide FOIA training programs. During 2009, Council staff conducted 54 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and citizens. Training programs are tailored to meet the needs of the requesting organization and are provided free of charge. All Council-sponsored training programs, whether the statewide workshops or specialized programs, are approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. In 2009, the Council conducted its statewide FOIA workshops in five locations--Richmond, Staunton, Abingdon, Suffolk, and Manassas. Due to the demand for FOIA training in the seat of government, the Council held two workshops in Richmond. Concerned about the appropriateness of conducting these workshops given the current budget constraints faced by state and local officials, the Council reduced the registration fee from \$50.00 to \$35.00. In addition to Virginia State Bar continuing legal education credit, these workshops are also pre-approved by the Department of Criminal Justice Services for law-enforcement in-service credit and the Virginia School Board Association for academy points. Approximately 600 persons, including government officials, media representatives and citizens, attended the 2009 statewide FOIA workshops.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,691 inquiries. Of these inquiries, 13 resulted in formal, written opinions. The breakdown of

requesters of written opinions is as follows: three by government officials, none by media representatives, and ten by citizens. The remaining requests were for informal opinions, received via telephone and e-mail. Of these requests, 910 were made by government officials, 618 by citizens, and 150 by media. Over the past several years, the Council has seen an increase in the number of informal opinion requests as compared to requests for formal written opinions. This continuing trend appears to stem from the Council's reputation as a creditable source for FOIA guidance before disputes arise and the reliability of its informal opinions.

FOIA was again the subject of significant legislative activity in the 2009 Session. The General Assembly passed a total of 19 bills amending FOIA. Two bills amending FOIA were passed as recommendations of the Council: SB 1316 (Houck), which strikes the requirement that state agencies publish annually an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records, and SB 1319 (Houck), which clarifies the existing requirement that meeting minutes be in writing. Additionally, SB 1317 (Houck), concerning certain electronic meetings held by the Air Pollution Control Board and the State Water Control Board, also passed as a recommendation of the Council. The General Assembly also passed SB 1318 (Houck) and HB 2426 (May), extending the implementation date for the prohibition against collecting an individual's SSN under the Government Data Collection and Dissemination Practices Act -- a recommendation of the Council and the Joint Commission on Technology and Science. Finally, the General Assembly also passed HB 2144 (Nutter), concerning access to concealed carry handgun permits. The language of HB 2144 was identical to SB 529 (Houck), which was introduced as a recommendation of the Council in the 2008 Regular Session. SB 529 did not pass at that time, but was referred back to the Council for further study, after which the substance of the bill was again recommended by the Council for 2009. A more detailed report of the bills discussed above and those FOIA and other public access bills passed during the 2009 Session appears on the Council's website and is attached as Appendix E to this report.

## **WORK OF THE COUNCIL**

### ***January 13, 2009***

The Council held a special meeting to vote on whether to recommend SB 529 (Houck) to the General Assembly for its 2009 Session.<sup>8</sup> The PII Subcommittee voted unanimously to re-recommend SB 529 from the 2008 Session, but consideration of the bill was inadvertently omitted from the December 1, 2008 meeting of the Council.

More specifically, SB 529 was a Council recommendation to the 2008 General Assembly concerning access to concealed handgun permit holders. The PII Subcommittee voted again to recommend SB 529 as introduced in 2008 because of its belief that it reflects the proper balance between privacy and public access. The draft legislation would require the Department of State Police (DSP) to withhold from public disclosure permittee information submitted to the DSP for purposes of entry into the Virginia Criminal Information Network, with a limited exception for access by law-enforcement agencies. Records of the names and

addresses of holders of concealed weapons permits issued by the DSP, however, to out-of-state persons would be publicly available from DSP. Permittee records will still be open to the public at each circuit court where the permits are issued.

The recommendation of the PII Subcommittee served as a motion for the Council to recommend the bill. After the motion was seconded, Chairman Griffith opened the floor to discussion by the Council and to public comment. Phillip Van Cleave, on behalf of the Virginia Citizens Defense League (VCDL), stated that VCDL opposed the bill because it leaves access to concealed carry permit information open at the circuit courts. Some permit holders may be endangered by the release of their personal information, for example, those who have been victims of crimes such as stalking or domestic violence and may continue to be threatened by the perpetrators. Mr. Van Cleave noted that the Free Lance-Star newspaper each month publishes the list of new permit holders obtained from the local circuit court, and could continue to do so if this bill becomes law. Instead of this bill, VCDL supports closing all points of access to lists of concealed carry permit holders.

Council member Craig Fifer then spoke in opposition to the bill, for the same reasons he opposed the bill last year. He stated that he believes the records should be open both at the state police level and at the courts. Additionally, he stated that it served no purpose to eliminate access to the statewide list from DSP when other organizations could and would compile an equivalent statewide list from information available at the courts and then publish it. Recognizing that some permit holders may be endangered under certain circumstances, Mr. Fifer further observed that since each permit application is already inspected individually by a judge or clerk of court, it should be possible to provide individual protection for those that need it while still allowing access to other permit holders' information. Finally, Mr. Fifer pointed out that as a matter of policy, the Council generally does not support bills that would apply wide restrictions on access to an entire category of records, nor does the Council usually recommend bills that appear in sections of the law outside FOIA itself.

Council member Miller then inquired about prior votes on the bill. Staff related that the bill had been recommended unanimously to the Council by the PII Subcommittee<sup>9</sup> on December 3, 2007. At its meeting on December 3, 2007, the Council recommended the bill to the 2008 Session of the General Assembly by vote of 10 to 1.<sup>10</sup> At its November 12, 2008 meeting, the PII Subcommittee again recommended the bill to the Council by unanimous vote.<sup>11</sup> There was no further discussion. The Council then voted 9 to 1 in favor of the motion to recommend the bill to the General Assembly for its 2009 Session.<sup>12</sup>

### **Other Business**

There was no other business brought before the Council.

### **Public Comment**

There was no additional public comment.

## ***April 27, 2009***

The Council held its first meeting, a teleconference, of the 2009 interim on April 27, 2009.<sup>13</sup> This meeting was an organizational meeting, including a legislative update, review of bills referred to the Council for study, establishment of a work plan with the appointment of necessary subcommittees, and setting future meeting dates.

### **Legislative Update**

Staff provided a recap of the bills amending FOIA and other public access legislation. The General Assembly passed a total of 19 bills amending FOIA during the 2009 Session. Two bills amending FOIA were passed as recommendations of the Council: SB 1316 (Houck), which strikes the requirement that state agencies publish annually an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records, and SB 1319 (Houck), which clarifies the existing requirement that meeting minutes be in writing. Additionally, SB 1317 (Houck), concerning certain electronic meetings held by the Air Pollution Control Board and the State Water Control Board, also passed as a recommendation of the Council. The General Assembly also passed SB 1318 (Houck) and HB 2426 (May), extending the implementation date for the prohibition against collecting an individual's SSN under the Government Data Collection and Dissemination Practices Act -- a recommendation of the Council and the Joint Commission on Technology and Science. Finally, the General Assembly also passed HB 2144 (Nutter), concerning access to concealed carry handgun permits. The language of HB 2144 is identical to SB 529 (Houck), which was introduced as a recommendation of the Council in the 2008 Regular Session. SB 529 did not pass at that time, but was referred back to the Council for further study, after which the substance of the bill was again recommended by the Council for 2009. The 2009 Legislative Update is available on the Council's website and appears as Appendix E to this report.

### **Bill Referred for Study**

The Council next reviewed the five bills referred to it by the General Assembly for additional study.<sup>14</sup> Essentially, the five bills could be categorized as follows:

- **Protection of Personal Identifying Information:**
  1. SB 880 (Stuart)
  2. HB 2471 (Hugo)
  3. HB 2630 (Crockett-Stark)
- **Other bills:**
  4. SB 1332 (Cuccinelli)
  5. HB 2421 (May)

Delegate Crockett-Stark was present at the Council meeting to discuss HB 2630. She

indicated that there is a similar law in place in Ohio that was enacted because a family member of a law enforcement officer was murdered after personal information about the officer was made available. She stated that her sheriff had requested a similar law in Virginia. Staff noted that in Virginia personal information about public employees is exempt from FOIA; however, real property assessment records and court records are open to the public as a matter of law. The Council noted that there are two competing policies at work in this instance-- privacy versus a community's awareness of the identity of its officers. The Council asked Delegate Crockett-Stark to have her contact call Delegate Griffith to identify the specific issue of concern so that the scope of the bill could be narrowed to address the issue.

Concerning HB 2421, Delegate Griffith appointed Council members Fifer (chair), Selph, and Malveaux to a subcommittee to study the issue and to make a recommendation to the full Council.

Concerning SB 1332, members of the Council agreed that the issue behind this bill was unclear. Delegate Griffith directed staff to re-invite Senator Cuccinelli to address the Council at its next meeting.

The remainder of the bills, HB 2471 and SB 880, along with HB 2630, were referred to the PII Subcommittee for further review and recommendation. Membership of the PII Subcommittee remained the same as in 2008.<sup>15</sup>

### **Social Security Numbers**

In 2008, the Council indicated it would continue the work of PII subcommittee in studying SSNs and other personal identifying information in conjunction with the Joint Commission on Technology and Science (JCOTS).

- Collection of SSNs: The Council had already indicated its intent to continue studying this area, which will coincide with the analysis of the results of last year's survey regarding collection and use of SSNs (see "Other Business," below). This aspect of the study will focus on identifying and eliminating the unnecessary collection of SSNs by government. It is hoped that by limiting collection in the first instance, the need for additional protections to be added later will be reduced or eliminated.
- Disclosure of SSNs: HB 2427 (May) establishes the Protection of Social Security Numbers Act (the Act). In brief, the Act exempts from FOIA the first five digits of SSNs except under certain limited circumstances, and provides penalties for improper disclosure. The final four digits of SSNs found in public records will remain open to public disclosure under FOIA. In past meetings the Council had debated the merits of this and other protective schemes that would limit the disclosure of SSNs. The Act's passage this year raises the question of whether any further action regarding disclosure is necessary at this time, and if so, what form should that action take.

### **Other Business**

SB 1318 (Houck)/HB 2426 (May).<sup>16</sup> Last year the General Assembly passed SB 132(Houck)/HB 634 (May). These bills passed with provisions requiring that certain state agencies, cities, counties, and towns with a population in excess of 15,000 shall provide information regarding their collection and use of SSNs. The survey was conducted successfully with an unexpectedly large volume of responses that necessitate additional time for analysis. SB 1318/HB 2426 were passed this year as recommendations of the Council to extend the implementation date of the provisions of SB 132/HB 634 that would prohibit the collection of an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. Note that in light of HB 2427 (May), establishing the Protection of Social Security Numbers Act, as discussed above, the Council will have to decide what further action, if any, should be taken.

### **Of Note**

Staff advised that for the period December 1, 2008 through March 31, 2009, it had rendered 567 opinions on FOIA on behalf of the Council. Four of these opinions were formal, written opinions. Of the 563 informal opinions, 311 were requested by government officials, 206 by citizens, and 46 by representatives of the media.

Ginger Stanley, Executive Director of the Virginia Press Association, provided a report on the activities by newspapers and radio to celebrate Sunshine Week in 2009. Ms. Stanley displayed for the Council newspaper editorials and various articles published around the state during Sunshine Week (March 15 - 21, 2009). Ms. Stanley told the Council that this was a good year for access advocates and that citizens are making a difference by insisting on access generally.

Concealed Carry Handgun Permits. In 2008, the Council recommended SB 529 (Houck) to the 2008 Session of the General Assembly. That bill was referred back to the Council for additional study, and the Council again recommended it to the General Assembly for the 2009 Session. In 2009, the General Assembly passed HB 2144 (Nutter), which uses language identical to that found in SB 529. In summary, the bill protects from public disclosure permittee names and descriptive information held by the Department of State Police for purposes of entry into the Virginia Criminal Information Network. However, the information would still be available to law-enforcement agencies, officers, and agents in the course of law-enforcement duties, and nonidentifying statistical information would be available to the general public.

*McBurney v. McDonnell* (Case No. 3:2009cv44, United States District Court for the Eastern District of Virginia). In this consolidated case, three out-of-state plaintiffs challenge on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. The Court heard oral arguments on April 14, 2009, on the plaintiffs' motions for preliminary injunction. Staff will keep the Council apprised as the case develops.

### ***July 13, 2009***

The Council held its second meeting of the 2009 interim on July 13, 2009.<sup>17</sup> The purposes of this meeting were to hear about issues regarding the holding of a closed meeting by the Information Technology Investment Board (ITIB) and to receive subcommittee reports.

### **Information Technology Investment Board Meeting<sup>18</sup>**

James F. McGuirk, II, Chair of the ITIB, spoke to the Council regarding a closed meeting held by the ITIB on April 16, 2009. The events of that ITIB meeting have been the subject of inquiry by the House Committee on Technology and Science, which met on June 29, 2009, and the Senate Finance Subcommittee on General Government/Technology, which met on July 13, 2009. Statements made at these meetings gave rise to concerns that the topics discussed by the ITIB may have strayed from those set forth in the motion to convene the closed meeting. That motion cited subdivisions A 6 and A 7 of § 2.2-3711, concerning the investment of public funds and consultation with legal counsel, respectively.<sup>19</sup>

Delegate Griffith opened the discussion by noting that Secretary Pomata had indicated at the House Committee on Technology and Science meeting that the ITIB had met in closed session but was not talking about renegotiating the Commonwealth's contract with Northrop Grumman during that meeting. Delegate Griffith asked Chairman McGuirk for an explanation of the purpose of the closed meeting and asked whether there was any misunderstanding involved. Chairman McGuirk indicated that the ITIB generally prefers to meet in public rather than in closed meeting, and always consults its representative from the Office of the Attorney General (OAG) before holding any closed meeting. Regarding the meeting held April 16, 2009, Chairman McGuirk indicated that the discussion concerned the contract with Northrop Grumman, including financial details and items in the contract for which changes might be sought in the future. The closed meeting was convened due to concerns over revealing details that would adversely affect the ITIB's negotiating strategy. Chairman McGuirk further indicated that there was a power point presentation given by the Secretary during the closed session in order to keep the members of the ITIB apprised of the contractual items at issue for possible future renegotiation. The presentation at issue apparently was prepared by Northrop Grumman and was shared with the ITIB with Northrop Grumman's permission.

In response to further questions from the Council, Chairman McGuirk stated that the OAG had been consulted prior to the meeting, had approved the motion made to close the meeting, and was in attendance during the closed meeting. Chairman McGuirk could not recall with certainty, but thought the OAG representative may have commented once about the discussion straying from the subjects described in the motion. Additionally, he indicated that the closed session was initiated after discussions with the Secretary, and agreed in hindsight that it would have been preferable for the Secretary to have made his own presentation rather than use that provided by Northrop Grumman. Apparently there were concerns over the confidentiality of the presentation itself, and in reply to additional inquiries, Chairman McGuirk indicated that Northrop Grumman had marked the



presentation as propriety. In response to later inquiries, he further stated that he believed a copy had been requested by and provided to the House Committee on Technology and Science.

The Council also discussed its role in this inquiry as one for informational purposes and to help clear up any misunderstandings in regard to FOIA. The Council then asked staff to provide an analysis of the motion used by the ITIB to convene the closed meeting at issue.<sup>20</sup> Staff first discussed the requirement that a motion to convene a closed meeting must contain three elements: (1) the subject of the closed meeting, (2) the purpose of the closed meeting, and (3) a citation to an appropriate exemption which allows the meeting to be closed.<sup>21</sup> In examining the motion in question, the subject for the closed meeting was vague. Additionally, because the contract has been awarded already, it is not certain that the exemption regarding the investment of public funds would apply to this discussion (i.e., the agreement to invest the funds has already been made). It was also unclear whether the citation to subdivision A 7 of § 2.2-3711 was in reference to litigation or to consultation with legal counsel regarding specific legal matters, two different aspects of the same exemption.<sup>22</sup> Overall, giving consideration to Chairman McGuirk's description as well as the motion itself, it appears that at least some of what the ITIB discussed would properly be the subject of a closed meeting, but the subjects discussed were not necessarily covered within the purview of the exemptions cited in the motion made. In response to further questions from the Council, staff indicated that at least part of the discussion appeared to concern consultation with legal counsel regarding specific legal matters, which matters could be discussed in closed meeting.

The Council also noted concerns regarding the interpretation of the exemption for the investment of public funds (subdivision A 6 of § 2.2-3711) and the exemption for contract negotiations (subdivision A 29 of § 2.2-3711). Mr. Wiley noted that in light of the description of the ITIB's discussion, he had expected to see a citation to the contract negotiation exemption, rather than one citing the exemption for the investment of public funds. Mr. Fifer also indicated concern whether "investment of public funds" was being interpreted to mean making continuing payments under an existing contract, and suggested the Council examine the policy and intent of the exemption. Later in the meeting the Council appointed a subcommittee for this purpose (see Other Business, *infra*).

## **Subcommittee Reports**

### PII Subcommittee

Staff reported that the PII Subcommittee met on June 8, 2009 to (i) consider four bills referred to it for further study, (ii) continue the study of the Government Date Collection and Dissemination Practices Act (GDCDPA), and (iii) set a study plan for its work.<sup>23</sup>

Staff advised that the PII Subcommittee reviewed the four bills referred for study that fell within the purview of the PII Subcommittee<sup>24</sup>. No patrons, however, were able to attend the meeting to discuss their bills. Below is a summary of the Subcommittee's discussion and action with regard to each of the four bills.

**SB 880--Summary:** Records of the Department of Game and Inland Fisheries (the Department) containing personal information (as defined in § 2.2-3801) of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, *provided* that such individuals have requested that the Department not disclose such information:

- Similar bills were introduced during the 2007 and 2008 Session of the General Assembly and were also referred to the Council for further study.
- The Subcommittee discussed the impact of the passage of HB 2427 (May), which created the Protection of Social Security Numbers Act. Staff advised that while SB 880 is broader, it could be read together with HB 2427 to give both bills effect. The result being that the first five digits of a SSN would be deemed confidential and not releasable; however, the last four digits could be withheld only if the individual applicants or license holders have requested that the Department not disclose such information.
- **Subcommittee Action:** Request staff to work on a redraft of SB 880 given the passage of HB 2427.

**HB 2471 (Hugo)--Summary:** Disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board:

- Delegate Griffith noted that in the Roanoke valley, 10 employees received raises, but no others. He suggested that without the names of the employees being disclosed, it is impossible to assess who did and did not receive the raise.
- Council member Spencer questioned the wisdom of excluding the names of one type of public sector employee but no others.
- Phyllis Errico, representing the Virginia Association of Counties concurred.
- **Subcommittee Action:** The Subcommittee agreed to give Delegate Hugo another opportunity to present his bill at the next Subcommittee meeting and deferred consideration until that time.

**HB 2630 (Crockett-Stark)--Summary:** Allows a law-enforcement officer to request that personal information about him/her be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

- Delegate Crockett-Stark had discussed her bill with the Council at its April meeting where she indicated that there is a similar law in place in Ohio. The Ohio law was enacted because a family member of a law enforcement officer was murdered after personal information about the officer was made available. She stated that her police chief had requested a similar law in Virginia.
- Staff advised the Subcommittee that it had discussed this issue with the police chief who requested the bill. The Chief advised that gang members are using to internet to locate law-enforcement officers and their families. The Chief had advised that it was the online disclosure of home address information that was the source of his concern.

- The bill, however, limits protection to state and local law-enforcement officials. The Subcommittee noted that Attorneys for the Commonwealth as well as federal law-enforcement officials are also part of the law-enforcement community, but were not included in the bill.
- **Subcommittee Action:** Agreed that overall issue was of some concern and requested staff to identify the laws that require online disclosure of home address information to focus the Subcommittee's future deliberations on this bill.

**SB 1332 (Cuccinelli)--Summary:** Provides that private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes FOIA as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

- Issue behind this bill was unclear.
- Delegate Griffith had directed staff to re-invite Senator Cuccinelli to address the Council at its next meeting.
- **Subcommittee Action:** No action was taken by the Subcommittee at this time.

The Subcommittee also discussed the GDCDPA as it relates to the disclosure and collection of SSNs as follows:

1. Disclosure of SSNs and HB 2427 (May).<sup>25</sup> The issue has been considered for last two years by the PII Subcommittee and the Council as well as other protective schemes limiting the disclosure of SSNs. The bill's passage in 2009 raises the question of whether any further action regarding disclosure of SSNs is necessary at this time, and if so, what form should that action take.
  - **Subcommittee Action:** The Subcommittee by consensus decided to adopt a wait and see approach to this new law, adding that if there are problems, the Subcommittee would revisit the issue.
2. Collection of SSNs: Study of this issue will continue by PII Subcommittee and JCOTS Subcommittee.
  - Awaiting the results of staff analysis of last year's SSN survey.
  - Study in 2009 will focus on identifying and eliminating the unnecessary collection of SSNs by government.
  - Federal law<sup>26</sup> prohibits the denial of any service, right or privilege if an individual refused to provide a SSN. However, an agency may ask for an SSN, but could not require it or deny a right or privilege as noted above.
  - Remaining issues before the Subcommittee: (i) how to address current collection of SSN practices where there is no authorization and (ii) the voluntary disclosure of SSNs as well as the transfer of records already containing SSNs between government entities.

- Amendment to SB 1318/HB 2426 (recommended to the Governor by the Office of the Attorney General (OAG)). Staff met with several attorneys from the OAG to further clarify the language of the amendment at the direction of the Council.
- **Subcommittee Action:** The Subcommittee voted unanimously to recommend the language suggested by staff<sup>27</sup>.

#### Public Records Subcommittee

Mr. Fifer, Chair of the Public Records Subcommittee, reported that the subcommittee had met this morning for the first time. The Subcommittee heard from Delegate May, the patron of HB 2421, which would have amended the definition of "public records" in § 2.2-3701. Delegate May had introduced the bill at the request of Loudoun County; Jack Roberts, the County Attorney, appeared to provide background information and represent the County.<sup>28</sup> After discussion with the subcommittee and interested parties, Delegate May withdrew the bill and the subcommittee directed staff to look at alternative ways to clarify the definition of "public record" to eliminate any confusion regarding what records are and are not subject to disclosure under FOIA.

#### **Public Comment**

Delegate Griffith asked if any members of the public wished to comment to the Council; no comments were forthcoming.

#### **Other Business**

In light of the ITIB meeting previously addressed, Council member Wiley suggested it may be helpful for the Council to further examine the closed meeting exemptions at subdivisions A 6 and A 29 of § 2.2-3711, concerning the investment of public funds and contract negotiations, respectively. To that end the Council appointed a subcommittee consisting of members Wiley (Chair), Spencer, Malveaux, Whitehurst, and Delegate Griffith.

The Council also inquired of staff regarding any FOIA training provided to the Office of the Attorney General (OAG). Staff indicated that training is provided upon request, and that there is frequent contact between Council staff and OAG attorneys regarding FOIA matters. Staff noted that the two offices enjoy an excellent relationship.

#### ***September 21, 2009***

The Council held its third meeting of the 2009 interim on July 13, 2009.<sup>29</sup> The purpose of this meeting was to receive subcommittee reports and hear about possible FOIA legislation.

#### **Subcommittee Reports**

##### PII Subcommittee

Senator Houck advised the Council that PII Subcommittee had met briefly at 9:30 a.m. before the Council meeting. Unfortunately, the PII Subcommittee lacked a quorum for this meeting and by consensus of those members in attendance decided to hold another subcommittee meeting if needed or specifically requested by patrons of bills being studied by the subcommittee on November 9, 2009. Delegate Griffith announced, however, that the redraft of SB 880 prepared by staff should be reviewed by the Council at today's meeting.

Staff presented the redraft it had prepared for SB 880 (Senator Stuart), which provides that the name, address, telephone number, email address, and credit card or bank account data; of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be exempt from disclosure FOIA, provided that such individuals have requested that the Department not disclose such information. Council member Fifer inquired whether there was any general law the protected credit card or other bank card information. Staff responded in the negative. Mr. Fifer asked whether licensee information should be open, save the bank card information, and further inquired whether the Council was now predisposed to keep licensee information away from the public. The consensus of the Council was that it was not predisposed to protect certain licensee information. Delegate Griffith stated that credit card and bank card information, and perhaps a licensee's email address should be protected. The Council by consensus agree that there should be a general exemption to protect credit card and bank card information; but noted, however, that it is important for the public to know who the licensed people are. The Council asked for public comment on this issue.

Craig Merritt, representing the Virginia Press Association (VPA) expressed that there is a legitimate need to protect people from identity theft and agrees that credit card and bank card information should be protected. However, he noted that the remainder of the information is already in the public domain via the telephone book, internet search engines and the like.

Chris White, representing Reed Elsevier (parent company of Lexis-Nexis), advised the Council that there were legitimate uses for licensee information. For example, in the context of child support enforcement, licensee information (i.e. who has a registered boat) is helpful to track "deadbeat dads" who may be hiding assets.

Other members of the Council felt that while name and address information should be public, telephone numbers and email addresses should be protected. As a result of the discussion, Delegate Griffith directed staff to again redraft the bill in two ways--first to protect credit card and bank card information and the second version also to include protection for telephone numbers and email addresses. He indicated that the PII Subcommittee would meet again on Friday, November 6, 2009 at 10 a.m. to review these drafts. He asked staff to post the drafts by November 2, 2009.

#### Public Records Subcommittee

Staff reported that it was working on publication of a guidance document that would clarify what is covered under the definition of "public records" found in FOIA and give specific examples of those records.

#### **Public Comment**

Rob Lockridge for the University of Virginia (UVA) reported to the Council that it would be seeking an exemption in FOIA for the findings of threat assessment teams created under chapter 450 of the 2008 Acts of Assembly. Chapter 450 requires public institutions of higher

education to implement a crisis and emergency management plan to prevent violence on campus, including assessment and intervention with individuals whose behavior poses a threat to the safety of the campus community. Delegate Griffith inquired whether as a parent he should know about the assessments. He questioned whether there was a difference between an individual who may be behaving badly as a result of alcohol and someone who is truly a threat.

Jim Council for the Prince William County Public Schools and Mary McGowan, Counsel to Prince William County Public Schools told the Council that they had two legislative initiatives. First, to address the serious unintended consequences from SB 1505 (2009) that attempted to clarify that enforcement actions under FOIA take precedence over other general provisions of law relating to writs of mandamus or injunction. Mr. Council and Ms. McGowan indicated that the changed language could be abused by a plaintiff who would only notice a public body of a petition on the day the petition was to be heard by the court, depriving the public body of any opportunity to prepare. By consensus, the Council agreed that this matter should be an agenda item for its meeting on November 9, 2009.

The second issue presented by Mr. Council and Ms. McGowan involved an exemption for the visitor surveillance system recently implemented in the Prince William County Public Schools, which was the subject of a Council opinion in 2008 (AO-03-08). That opinion held that to withhold any of the requested records relating to the visitor surveillance system from disclosure, whether the records are exempt portions of a school safety audits or may be withheld under other FOIA exemptions, the School must respond in writing, identify with reasonable particularity the volume and subject matter of the withheld records, and cite the specific statutory exemption or exemptions that allow the records to be withheld. Ms. McGowan indicated that this was a case where technology was ahead of the law. In brief, visitors are required to present government-issued identification, then the system scans the identification and performs a multi-state background check against various databases. Information retained in the systems is routinely shared with local law-enforcement. Mr. Council indicated that essentially the system was a background check for sex offenders and other individuals who may pose a threat to children, and is also useful for locating visitors in the case of any emergency.

Council member Axelle inquired whether persons attending a school play were subject to the visitor surveillance system, to which Ms. McGowan replied in the affirmative. In response to another question from Mr. Axelle concerning visiting teams and the visitor surveillance system, Ms. McGowan advised that she was not sure whether the system was in use for evening events. Mr. Fifer stated that with the suggested amendment, that FERPA was being trumped by FOIA. Ms. McGowan answered that this is the intent. She indicated that to print out the records and redact as allowed by law was a huge and time consuming undertaking. Mr. Fifer asked whether there is any legal requirement for the retention of background checks. Ms. McGowan responded that retention is a practice of the school system and it has been useful in litigation with parents. She indicated that notice of the retention of these records is posted on the wall in the schools near the scanning equipment. Mr. Fifer continued that he agrees with them as it relates to school safety, but stated that there may be legitimate reasons for the public to get some of this information, such as

parents finding out about who has access to their children during school. Mr. Whitehurst stated that he felt the system was over kill in the name of school safety. He did not savor the idea of having his driver's licensed scanned every time he picks up his kids at school. He noted that in Spotsylvania County, he is given a pass after he shows his identification. He opined that the Prince William School System put the cart before the horse in that it purchased the system first and thought about FOIA and the school system's obligation for openness later. He noted that the system is required by § 2.2-1111 of the Code of Virginia to work in a way that comports with FOIA. Delegate Griffith inquired whether teachers and staff are in the system. Ms. McGowan replied that they are not; however the principals have a schedule of school personnel. She stated that the system allows visitors to the schools to be known to law-enforcement just in case. Senator Houck requested more information about the criteria to segregate visitors or to deny entry into the schools. Senator Houck questioned what happens when a student is born to undocumented parents. Ms. McGowan responded that if parent cannot produce documentation, they are not denied entry, but escorted while they are there. Mr. Landon urged Prince William County Schools to explore with private vendors ways to redact sensitive information related to school safety. Mr. Landon asked if the school system was collecting more information than before. Ms. McGowan answered in the affirmative and indicated that they system records date of birth, photograph, and status as a criminal to name a few. Mr. Council indicated that it is feasible to separate information in the system to distinguish between open public records and other sensitive information. Mr. Fifer agreed with Mr. Whitehurst that the problem was not in the law, but in Prince William County Schools using technology first before acknowledging their FOIA responsibilities. He suggested that a workgroup to examine this issue may be helpful. Mr. Whitehurst stated that too much information is being collected which should not have been collected in the first place. He averred that Prince William County Schools did not think first and now the Council has to address the issue after the "milk is spilled" to fix their problem.

As a result of the lengthy discussion and concerns, Delegate Griffith requested that the Public Records Subcommittee chaired by Mr. Fifer study this issue.<sup>30</sup> Mr. Axselle requested that the subcommittee identify what information is collected and then address what should be available and what should not. Delegate Griffith expressed his concern about the speed with which the system runs its checks and the resulting misidentification that can take place. He stated that it is generally held that the faster the processing of information the greater the likelihood of misidentification. He noted that implementation of this system certainly would have a chilling effect on people participating with the school system, especially someone with an old criminal conviction of which he has not told people (perhaps not even to a spouse). With this system, this would be known. The subcommittee was directed to study these issues and report back to the Council with a recommendation.

**Of Note:**

Staff reported that the 2009 statewide FOIA Workshops had been scheduled as follows:

- Monday, September 14, 2009 - Richmond, VA
- Monday, September 28, 2009 - Staunton, VA
- Tuesday, September 29, 2009 - Abingdon, VA

- Tuesday, October 6, 2009 - Suffolk, VA
- Tuesday, October 27, 2009 - Manassas, VA
- Monday, November 2, 2009 - Richmond, VA

Megan Rhyne for the Virginia Coalition for Open Government advised the Council of the upcoming VCOG conference in Staunton on October 15 and 16, 2009.

### ***November 9, 2009***

The Council held its final meeting of the 2009 interim on November 9, 2009.<sup>31</sup> The purpose of this meeting was to hold the annual legislative preview to hear about potential FOIA legislation for the upcoming 2010 Session of the General Assembly and to receive subcommittee reports.

### **Annual Legislative Preview**

University of Virginia - Proposed Exemption for Threat Assessment Team Records. The Council heard from Rob Lockridge on behalf of the University of Virginia (UVA). Mr. Lockridge indicated to the Council at its meeting on September 21, 2009 that UVA seeks an exemption for the findings of threat assessment teams created under chapter 450 of the 2008 Acts of Assembly. Chapter 450 requires public institutions of higher education to implement a crisis and emergency management plan to prevent violence on campus, including assessment and intervention with individuals whose behavior poses a threat to the safety of the campus community. Mr. Lockridge brought a proposed draft exemption that would allow the following records to be withheld in the discretion of the custodian: *All records and electronic communications of a threat assessment team established by a public institution of higher education pursuant to § 23-9.2:10 relating to the assessment or intervention of specific individuals.* In discussing the proposed exemption, the Council first clarified that it would apply to records generated by the threat assessment team about specific individuals, not records about the team itself. Next, the Council agreed that referring to both *records* and *electronic communications* would be redundant, as the electronic communications at issue would already be considered public records subject to FOIA. It was also pointed out that other exemptions use the terminology *identifiable individuals*, and it was suggested that for consistency, this terminology be used rather than the reference to *specific individuals* in the draft.

The Council then requested public comment on the proposal. Craig Merritt, on behalf of the Virginia Press Association (VPA), indicated that he agreed with the technical points made and that the draft might further be improved by including a reference to Code § 23-9.2:10(C)(iii).<sup>32</sup> Mr. Merritt made two further suggestions: (i) that the exemption use language of redaction (e.g., *to the extent*) instead of the current language (*All records*) because providing part of a record while redacting other parts provides more information than does withholding records in their entirety, and (ii) that it would be in the public interest for the records to be opened to public disclosure in the event of a tragedy.

Mr. Lockridge indicated he agreed with the technical suggestions, but the idea of opening the records in the event of a tragedy was problematic. It raises the questions of what the criteria for opening the records would be, such as how severe a tragedy must occur before



the records would be opened - a multiple murder such as occurred at Virginia Tech? A fistfight between students downtown? Mr. Lockridge further expressed the concern that such a provision might have a chilling effect on the willingness of team members to be fully candid, knowing the records might be opened someday, and that it would be confusing as to how and when the provision would apply. Mark Hjelm, a citizen of Woodbridge, Virginia, noted that a conceptually similar exemption already exists for school safety audits. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), indicated support for the notion that records be released after a certain time or by a triggering incident, and pointed out that health records and scholastic records exemptions would still apply.

The Council then voted unanimously in favor of a motion to amend the proposed draft in four ways: (i) strike *and electronic communications*; (ii) add a reference to § 23-9.2:10(C)(iii) at the end of the exemption; (iii) strike the word *specific* and replace it with *identifiable*; and (4) strike the word *relating* and replace it with *to the extent they relate*. The final version of the exemption as amended would read as follows: *All records of a threat assessment team established by a public institution of higher education pursuant to § 23-9.2:10 to the extent they relate to the assessment or intervention of identifiable individuals pursuant to § 23.9.2:10(C)(iii)*. The Council next debated whether it should recommend the draft exemption as amended to the General Assembly. It was suggested that UVA and VPA might try to work out their differences regarding the proposal before the 2010 Session, but that the Council was not planning to meet again before then. The Council further discussed the possible consequences of releasing records after a time certain has elapsed. For example, what if someone was identified as a potential threat but never committed any crime, and this information was released 10 years later? The Chairman asked for any motions on this draft; hearing none, the Council moved to the next topic.

Anthony Troy, Esq. - Proposed Amendments to FOIA Remedies Provisions. The Council next heard from attorney Anthony Troy regarding two proposed amendments to § 2.2-3713 concerning remedies under FOIA: (1) to make clear that an attorney may bring a petition on behalf of a client; and (2) to allow for the recovery of expert witness fees by a successful petitioner. Mr. Troy related that in order to establish the reasonableness of attorneys' fees, expert testimony is often required. While FOIA allows for the recovery of attorneys' fees currently, it does not allow for the recovery of expert witness fees. Mr. Troy had recently had a FOIA case in which his client won, and was awarded attorneys' fees and court costs, but the judge denied the costs of hiring the expert witness who testified as to the reasonableness of the attorneys' fees. Mr. Troy also pointed out that other statutes have provisions allowing for the recovery of expert witness fees, and that the purpose is allow for reimbursement to a successful petitioner, not as a reward or for profit.

Next, Mr. Troy related how it is common for attorneys to make FOIA requests on behalf of clients, but the Office of the Attorney General (OAG) has opined that if the attorney makes the request, then the attorney must also be the one to file a petition for mandamus. In other words, the attorney must be named as the petitioner even though the client is the real party in interest. Because the attorney is named as the petitioner, he or she cannot recover attorneys' fees in such a situation. The result is that the attorney is really working

for the client and being paid by the client, but because the attorney is the named petitioner, the client cannot be reimbursed attorneys' fees. In response to questions from the Council, Mr. Troy indicated that the judge in his case had ruled that his client could recover fees for the work performed by associate attorneys, but not for work performed directly by Mr. Troy. Mr. Troy indicated that the ultimate goal of this change would be to make clear that an attorney can make a request and bring a petition on behalf of a client, and the client could still recover attorneys' fees. The Council then discussed the proposed language used in the draft.

The Council agreed with the language amending subsection A of § 2.2-3713 of the draft proposed by Mr. Troy. As to the amendments appearing in subsection D of § 2.2-3713 of Mr. Troy's proposed draft, the Council suggested that the word *reasonable* be inserted before the word *fees*, thereby making the amendment read as follows: "...the petitioner shall be entitled to recover reasonable costs, *including costs and reasonable fees for expert witnesses*, and attorneys' fees from the public body...."

The Council then moved to approve the proposal recommended by Mr. Troy, as amended. The motion carried by vote of 9-1-1 (Mr. Malveaux abstained; Delegate Griffith voted against).

Prince William County Schools - Proposed Amendment to FOIA Remedies Provision. James G. Council, appearing on behalf of Prince William County Schools (PWCS), presented two alternative drafts intended to reverse the effects of SB 1505 (Puller), enacted in 2009, which changed the notice requirements for mandamus actions.<sup>33</sup> Mr. Council noted that the changes wrought by SB 1505 effectively eliminated the requirement for reasonable notice to be given prior to filing a petition for mandamus. The result was to open the door for legal gamesmanship by petitioners who might fail to serve a respondent in a timely fashion, effectively preventing respondents from having any chance to prepare before a hearing. Mr. Council had prepared two draft versions of the exemption. The first simply eliminated the changes made by SB 1505 by striking the language that was added. The second would strike the reference to § 2.2-3713 that appears in § 8.01-644, and add language into § 2.2-3713 so that the provisions of § 8.01-644 would not apply to FOIA mandamus actions provided that the respondent was provided with notice and a copy of the petition a reasonable time before the writ is filed.

Upon a request for background information, staff related that the original bill had not been presented to the Council for consideration, but apparently came from a situation where a citizen filed a petition for mandamus against PWCS during the winter holidays (when school staff was on vacation). It is staff's understanding that because FOIA requires a hearing within seven days of filing the petition, and the timing of the filing, the hearing was scheduled for December 23. However, citing Code § 8.01-644, which required that a copy and notice of the petition be served on the respondent before application for a writ of mandamus is filed, the judge dismissed the case for failure to provide the required notice. SB 1505 changed both FOIA and § 8.01-644 to state that the notice requirements of § 8.01-644 do not apply to FOIA petitions for mandamus filed under § 2.2-3713.

As further background, Mr. Council indicated he had spoken with Senator Puller, and believed she may not have fully understood all of the ramifications of the changes made by SB 1505. Mr. Hjelm, who had brought the petition at issue against PWCS, related that he had asked Senator Puller to introduce the bill in order to help *pro se* petitioners navigate through the court system, and to clarify that the FOIA requirement to hold a hearing within seven days really meant seven days. He also indicated that PWCS was aware of his requests, having denied them repeatedly, and that he had received responses from PWCS' lawyers, not school staff. Ms. Rhyne indicated that she had spoken to Senator Puller about the bill during the 2009 Session, and that VCOG supported it because it helped to simplify the process for citizens filing *pro se*, and because the Virginia Supreme Court has indicated that FOIA mandamus actions are different from common law writs of mandamus. She also indicated that SB 1505 was not intended to eliminate notice, and that all parties are entitled to notice, but that she would object to reverting to the language used prior to SB 1505. Upon question by the Council, Ms. Rhyne agreed that the second alternative draft presented by Mr. Council appeared to satisfy her concerns.

Mr. Merritt indicated that in his experience, when filing a writ of mandamus against a public officer, it was typical to send notice of one's intent to file and a copy of a petition to the officer a couple of days before filing the petition with the court. Mr. Merritt proposed a technical change to the second draft, to which Mr. Council agreed. Mr. Hjelm suggested that it needs to be easy for an average citizen to use, otherwise it would discourage people from enforcing their FOIA rights. The Council then moved to adopt the second draft presented by Mr. Council as amended with Mr. Merritt's suggestions. Discussion ensued as to whether to include a "reasonable time" provision in the draft. After further discussion of the specific language, the Council moved to approve the proposed exemption, as amended. The motion carried by vote of 8-1.<sup>34</sup>

## **Subcommittee Reports**

### PII Subcommittee

Staff presented the report of the PII Subcommittee, which had met three times during the interim, most recently on Friday, November 6, 2009. Staff reported that the PII Subcommittee reviewed the four bills referred by the 2009 General Assembly and recommended the following action as to each four bill:

- **HB 2471 (Hugo); Freedom of Information Act; salary records of teachers.** Provides that the disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board.

Subcommittee Recommendation: No action to be taken. Rationale: Protecting only one segment of public employees not deemed advisable.

- **HB 2630 (Crockett-Stark); Law-Enforcement Officers' Privacy Protection Act.** Allows a law-enforcement officer to request that personal information about the officer be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

Subcommittee Recommendation: No action to be taken. Rationale: While the Subcommittee felt that the overall issue was of some concern, disclosure of this information is required pursuant to other laws and not dictated by FOIA. FOIA does not require the posting of any information on the internet, except for state executive branch meeting notices and minutes.

- **SB 1332 (Cuccinelli); Private entities operating, managing, or supervising any portion of the state highway system.** Provides that a private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

Subcommittee Recommendation: No action to be taken.

- **SB 880 (Stuart); Department of Game and Inland Fisheries; disclosure of official records; exceptions.** Provides that records of the Department shall be subject to the disclosure provisions of the Freedom of Information Act, except that personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, provided that such individuals have requested that the Department not disclose such information. However, statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify individual applicants or licensees shall be disclosed. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order, (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties, or (iii) to any person who is the subject of the record.

Subcommittee Recommendation: Given the enactment of the Protection of Social Security Numbers Act (§ 2.2-3815 et seq.) (c. 213 of the Acts of Assembly of 2009), SSNs are now protected and the portion of this bill dealing with SSNs has been resolved. The Subcommittee does, however, recommend an exemption of general application in FOIA that protects the credit card, debit card, other account information with a financial institution,

and routing information of private persons and public bodies. The Subcommittee recommends unanimously the attached draft legislation labeled "#1."

Staff reported that the PII Subcommittee had also discussed the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.). The Council was reminded that an amendment to the Council-recommended bill in 2009 (SB 1318/HB 2426) was recommended to the Governor by the OAG. The intent of the amendment was to clarify the date when SSNs could no longer be collected/required at the state level. Staff reported that it met with several attorneys from the OAG to further clarify the language of the amendment at the direction of the Council. Staff reported that the Subcommittee voted unanimously to recommend the draft legislation worked out by staff and the OAG. The Council, by consensus, agreed to adopt the Subcommittee's recommendations.

The Council continued discussing the language of the proposed exemption for financial information. The Council agreed by unanimous voice vote to strike the second sentence of the proposed draft concerning access by law-enforcement, by court order, and to the subject, and replace it with the following language adopted from other exemptions: *However, access shall not be denied to the person who is the subject of the record.* Also by unanimous voice vote, the Council agreed to add an emergency clause to the proposed exemption (so that it would take immediate effect after being passed by the General Assembly and signed by the Governor, rather than going into effect July 1). The Council further agreed by unanimous voice vote to defer to staff regarding the use of the term *financial institution*, and to recommend the proposed draft, as amended, to the 2010 Session of the General Assembly.

#### Public Records Subcommittee

Mr. Fifer reported that the subcommittee had met on Friday, November 6, 2009, to consider an exemption proposed by PWCS for certain records entered into PWCS' visitor identification system. After discussing the issues involved and how various current exemptions might apply to the records, the subcommittee recommended that no further action be taken at this time.

#### **Other Business**

There was no other business to discuss.

#### **Public Comment**

No further public comment was made.

### **SERVICES RENDERED BY THE COUNCIL**

As part of its statutory duties, the Council is charged with providing opinions about the application and interpretation of FOIA, conducting FOIA training seminars, and publishing educational materials. In addition, the Council maintains a website designed to provide on-line access to many of the Council's resources. The Council offers advice and guidance over the phone, via e-mail, and in formal written opinions to the public, representatives of state and local government, and members of the news media. The Council also offers training

seminars on the application of FOIA. In addition to the statewide FOIA Workshops offered in odd-numbered years, Council staff is available to conduct FOIA training throughout Virginia, upon request, for governmental entities, media groups and others interested in receiving a FOIA program that is tailored to meet the needs of the requesting organization. This service is provided free of charge. The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. During this reporting period, the Council, with its staff of two, responded to 1,691 inquiries and conducted 54 training seminars statewide. A listing of these training seminars appears as Appendix B.

### FOIA Opinions

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of government, media, or citizens. The logs help to keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency in responding to inquiries. All opinions, whether written or verbal, are based solely on the facts and information provided to the Council by the person requesting the opinion. The Council is not a trier of fact. Thus, it is specifically noted in each opinion, whether written or verbal, that Council opinions are given based on the representations of fact made by the opinion requester.

For the period of December 1, 2008 to November 30, 2009, the Council, with a staff of two attorneys, fielded 1,691 inquiries. Of these inquiries, 13 resulted in formal, written opinions. By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, written opinions are posted on the Council's website in chronological order and in a searchable database. The Council issues written opinions upon request, and requires that all facts and questions be put in writing by the requester. Requests for written opinions are handled on a "first come, first served" basis. Response for a written opinion is generally about four weeks, depending on the number of pending requests for written opinions, the complexity of the issues, and the other workload of the staff. An index of formal opinions issued during the past year appears as Appendix C.

The table below profiles who requested written advisory opinions for the period December 1, 2008 through November 30, 2009:

Written Advisory Opinions: 13

State and Local Government	3
Citizens of the Commonwealth	10
Members of the News Media	0

Typically, the Council provides advice over the phone and via e-mail. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses are recorded in a database for the Council's own use, but are not published on the website as are written advisory opinions. Questions are often answered on the day of receipt, although response time may be longer depending on the complexity of the question and the research required. The table below profiles who requested informal opinions between December 1, 2008 and November 30, 2009:

Telephone and E-mail Responses: 1,678

Government	910
Citizens	618
News Media	150

Appendix F to this report sets out how many inquiries were received by the Council each month from December, 2008 through November, 2009, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other). Appendix G to this report provides an overview of the total number of inquiries received by the Council each year from 2000 through 2009.

### The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. During the past year, the website was visited approximately 3,178,132 times. About 72,285 visitors viewed the written advisory opinions and reference materials of the Council. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms and letters, (iv) the Council's annual reports, (v) information about Council subcommittees and legislative proposals, and (vi) links to other Virginia resources, including the Virginia Public Records Act. To facilitate compliance with FOIA, sample response letters for each of the five mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

### FOIA Training

After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, 2006 was the first year where statewide FOIA training workshops were not offered. The Council viewed declining attendance over the previous two years as a sign that its basic training mission had been successfully accomplished. Statewide workshops are now offered in odd-numbered years to provide FOIA training to recently-appointed public officials and employees. As is customary, the workshops are

approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys. They are also approved for in-service credit for law-enforcement personnel by the Department of Criminal Justice Services and for three academy points for school board officials by the Virginia School Board Association.

The Council also provides training, upon request, to interested groups. These groups include the staff of state agencies, members of local governing bodies, media organizations, and any other group that wishes to learn more about FOIA. Council staff travels extensively throughout the Commonwealth to provide this training. The training is individualized to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group. These specialized programs are provided free of charge. All of the Council's training programs have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. From December 1, 2008 to November 30, 2009, the Council conducted 54 such training programs. A listing of these trainings appears as Appendix B to this report.

### Educational Materials

The Council continuously creates and updates educational materials that are relevant to requesters and helpful to government officials and employees in responding to requests and conducting public meetings. Publications range from documents explaining the basic procedural requirements of FOIA to documents exploring less-settled areas of the law. These materials are available on the website and are frequently distributed at the training seminars described above. Specifically, the Council offers the following educational materials:

- Access to Public Records
- Access to Public Meetings
- Guides to Electronic Meetings
  - Local and Regional Public Bodies
  - State Public Bodies
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- 2009 FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>35</sup>
- Legislators Guide to FOIA

In addition to these educational materials, the Council has also developed a series of sample letters to provide examples of how to make and respond to FOIA requests. Response letters were developed by the Council to facilitate compliance with the procedural requirements of FOIA by public bodies. The Council website also includes a FOIA petition should enforcement of the rights granted under FOIA be necessary.



## CONCLUSION

In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. The Council has gained recognition as a forum for the discussion, study, and resolution of FOIA and related public access issues based on sound public policy considerations. For the ninth 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, responding to approximately 1,700 inquiries. It formed two subcommittees to examine FOIA 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 54 specialized training sessions throughout the Commonwealth. 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,

Delegate H. Morgan Griffith, Chair  
Senator R. Edward Houck  
Ralph L. "Bill" Axselle  
Craig T. Fifer  
Forrest M. "Frosty" Landon  
Courtney M. Malveaux  
E. M. Miller, Jr.  
John G. Selph  
Mary Yancey Spencer  
Sandra G. Treadway  
Roger C. Wiley  
George T. Whitehurst

**2010 LEGISLATIVE RECOMMENDATIONS**

**BILL SUMMARY: Freedom of Information Act; exemption for credit card and bank account data.** Exempts from the mandatory disclosure provisions of the Freedom of Information Act, those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. The bill provides, however, that access shall not be denied to the person who is the subject of the record. The bill defines "financial institution" and contains an emergency clause.

**BILL TEXT:**

A BILL to amend and reenact § 2.2-3705.1 of the Code of Virginia, relating to Freedom of Information Act; exemption for credit card and bank account data.

**Be it enacted by the General Assembly of Virginia:**

**1. That § 2.2-3705.1 of the Code of Virginia is amended and reenacted as follows:**

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

3. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

4. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

6. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer

programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

7. Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

9. Records concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ 2.2-1832 et seq.) of Chapter 18 of this title, or by any county, city, or town; and investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body's insurance policy or self-insurance plan. However, nothing in this subdivision shall prohibit the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit.

10. Personal information, as defined in § 2.2-3801, including electronic mail addresses, 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 public body not disclose such information. However, access shall not be denied to the person who is the subject of the record.

11. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.).

12. Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act

(§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.

13. Those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the record. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

**2. That an emergency exists and this act is in force from its passage.**

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**TRAINING/EDUCATIONAL PRESENTATIONS**

An important aspect of the Council's work involves efforts to educate citizens, government officials, and media representatives by means of seminars, workshops, and various other public presentations.

From December 1, 2008 through November 30, 2009, Council staff conducted 54 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 3, 2008	Permit Technician Course Department of Housing and Community Development Richmond, Virginia
December 8, 2008	Department of Accounts Division of State Internal Audit Richmond, Virginia
December 8, 2008	New Officers Training State Compensation Board Richmond, Virginia
December 9, 2008	Virginia Soil & Water Conservation Districts 70th Annual Meeting Roanoke, Virginia
December 11, 2008	Department of Agriculture and Consumer Services Richmond, Virginia
December 12, 2008	Department of Medical Assistance Services Richmond, Virginia
January 10, 2009	Virginia Municipal League Conference for Newly Elected Municipal Officials Richmond, Virginia
February 27, 2009	Sunshine in Government Initiative Washington, D.C.

March 5, 2009	City of Fredericksburg Fredericksburg, Virginia
April 22, 2009	Commonwealth Management Institute Richmond, Virginia
May 12, 2009	Virginia Executive Institute Alumni Association Richmond, Virginia
May 13, 2009	Stafford County Sheriff's Office Stafford, Virginia
May 14, 2009	City of Manassas Manassas, Virginia
May 21, 2009	Northern Virginia Regional Park Authority Fairfax, Virginia
May 28, 2009	Department of Environmental Quality Richmond, Virginia
May 29, 2009	College and University Auditors of Virginia Conference Charlottesville, Virginia
June 2, 2009	Department of Mental Health, Mental Retardation, and Substance Abuse Services State Board Meeting Ashland, Virginia
June 3, 2009	Commonwealth Management Institute Richmond, Virginia
June 4, 2009	Virginia Commonwealth University Communications Law Class Richmond, Virginia
June 11, 2009	Virginia Hospital & Healthcare Association Children's Health Insurance Program Advisory Committee Richmond, Virginia
June 16, 2009	Sheriff's Office Culpeper County, Virginia

June 17, 2009	Information Security Officer Advisory Group Chester, Virginia
July 1, 2009	State Board of Elections 2009 Election Uniformity Workshop Midlothian, Virginia
July 14, 2009	Department of Environmental Quality Richmond, Virginia
July 27, 2009	Virginia Office for Protection and Advocacy Richmond, Virginia
July 28, 2009	Henrico County Department of Social Services Henrico, Virginia
July 29, 2009	Virginia State Lottery Department Richmond, Virginia
August 11, 2009	Middle Plantation Club Williamsburg, Virginia
August 17, 2009	Cumberland County Cumberland, Virginia
August 19, 2009	Isle of Wight County Sheriff's Office Smithfield, Virginia
August 26, 2009	Department of Forensic Science Richmond, Virginia
September 9, 2009	Department of Behavioral Health and Developmental Services Mental Health Planning Council Richmond, Virginia
September 11, 2009	Virginia Board of Accountancy Richmond, Virginia
September 14, 2009	2009 FOIA Workshop Richmond, Virginia



September 23, 2009	Department of Motor Vehicles Richmond, Virginia
September 24, 2009	Mecklenburg County Public Schools Boydton, Virginia
September 28, 2009	2009 FOIA Workshop Staunton, Virginia
September 29, 2009	2009 FOIA Workshop Abingdon, Virginia
October 5, 2009	Municipal Clerk Institute Virginia Beach, Virginia
October 6, 2009	2009 FOIA Workshop Suffolk, Virginia
October 7, 2009	Virginia Association of Community Services Boards 2009 Public Policy Conference Charlottesville, Virginia
October 16, 2009	Virginia Coalition for Open Government 2009 Annual Conference Staunton, Virginia
October 19, 2009	Town of Amherst, Amherst County, and surrounding localities Amherst, Virginia
October 20, 2009	Virginia Municipal League 2009 Annual Conference Roanoke, Virginia
October 21, 2009	Clerk's Office Senate of Virginia Richmond, Virginia
October 27, 2009	2009 FOIA Workshop Manassas, Virginia

October 28, 2009	Permit Technician Module Prince William County Manassas, Virginia
October 29, 2009	Division of Legislative Services Richmond, Virginia
October 30, 2009	Department of Social Services Richmond, Virginia
November 2, 2009	2009 FOIA Workshop Richmond, Virginia
November 4, 2009	Clarke County Public Schools Berryville, Virginia
November 5, 2009	Manassas Park Police Department Manassas Park, Virginia
November 17, 2009	Winchester Star Winchester, Virginia
November 24, 2009	Virginia Association of Governmental Purchasing Harrisonburg, Virginia

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APPENDIX C

INDEX OF WRITTEN ADVISORY OPINIONS  
DECEMBER 1, 2008 THROUGH NOVEMBER 30, 2009

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
<b>December</b>	
<hr/>	
<b>AO-12-08</b>	As a general rule, an individual member of a board, designated as a liaison to staff, is not a public body for meetings purposes. Records prepared, owned, or possessed by that member in the transaction of public business are public records subject to FOIA.
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<b>AO-13-08</b>	A record which is not prepared by, owned by, or in the possession of a public body is not a public record subject to FOIA.
<hr/>	
<b>March</b>	
<hr/>	
<b>AO-01-09</b>	An agency that is supported wholly or principally by public funds is a public body subject to FOIA. A response to a records request that does not meet the procedural requirements of FOIA is not a proper response.
<hr/>	
<b>AO-02-09</b>	Scholastic records, by definition, are those records which contain information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution. A denial of a records request must cite the specific Code section that authorizes the withholding of the records.
<hr/>	
<b>May</b>	
<hr/>	
<b>AO-03-09</b>	A task force jointly created by multiple public bodies to advise them is itself a public body subject to FOIA. Likewise, a regional public body provided for by statute and established by the resolutions of several local public bodies is also subject to FOIA. Both must comply with the procedural rules for conducting public meetings.

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**AO-04-09** Subsection D of § 15.2-2907 provides that certain meetings that are or would be subject to review by the Commission on Local Government are not subject to FOIA.

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**AO-05-09** FOIA requires that meeting minutes be in writing and include a record of any votes taken.

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**June**

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**AO-06-09** Public bodies may make reasonable charges not to exceed the actual cost incurred in accessing, duplicating, supplying, or searching for requested records. Public bodies are not required to waive charges, but may do so in their discretion. Public bodies may not charge a requester for using certified mail without the requester's agreement.

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**AO-07-09** Generally, local public bodies may not meet or cast votes by electronic means. A telephone conversation between an administrator and a single member of a public body is not a meeting subject to FOIA.

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**August**

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**AO-08-09** Public records posted on a public body's website or otherwise put into the public domain remain subject to FOIA. It is generally expected that public bodies will not charge for sending brief electronic mail messages providing web addresses or copied excerpts of electronic records, as the actual costs incurred usually are negligible.

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**October**

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**AO-09-09** A nonprofit foundation that raises funds from private sources to pay for its own operations and to provide financial support to a government entity is not a public body subject to FOIA.

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**November**

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**AO-10-09** Subsection G of § 2.2-3706 provides exemptions for certain records held by local sheriffs and chiefs of police. As written it does not apply to records of the Department of State Police.

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**AO-  
11-09**

An advisory group created by a public body to advise the public body would itself be a public body subject to FOIA. However, such a group created by a public employee to advise the employee would not be a public body. Likewise, such an advisory group would not be a public body if it was self-appointed.

## APPENDIX D

### 2009 MEETINGS OF THE FREEDOM OF INFORMATION ADVISORY COUNCIL

**Monday, January 13, 2009**

**House Room D, General Assembly Building, Richmond**

Consideration of SB 529--access to concealed handgun permit holder information. The Council voted unanimously to re-recommend SB 529 referred to it by the 2008 Session. SB 529 was a Council recommendation to the 2008 General Assembly concerning access to concealed handgun permit holders.

**Monday, April 27, 2009**

**House Room D, General Assembly Building, Richmond**

Recap of FOIA and related access bills from 2009 Session of General Assembly. Continuation of subcommittee to study Personal Identifying Information in response to five bills referred to the Council by the General Assembly. Creation of Public Records Subcommittee to examine the issues raised by HB 2421 (May) concerning the definition of "public records" in FOIA. Update on law relating to SSNs; update on number of inquiries to Council for advisory opinions (oral and written); and briefing on *McBurney v. McDonnell*, U.S. District Court for the Eastern District of Virginia.

**Monday, July 13, 2009**

**House Room C, General Assembly Building, Richmond**

Discussion with James F. McGuirk, II, Chair, Information Technology Investment (ITIB) Board concerning its closed meetings. Progress reports from Personal Identifying Information s Subcommittee. Presentation on behalf of Senator Cuccinelli regarding SB 1332.

**Monday, September 21, 2009**

**House Room D, General Assembly Building, Richmond**

Progress reports from Personal Identifying Information and Public Records Subcommittees. 2009 FOIA Workshop scheduled statewide.

**Monday, November 9, 2009**

**House Room D, General Assembly Building, Richmond**

Annual legislative preview: University of Virginia, Rob Lockridge; exemption for the findings of threat assessment teams ;Anthony Troy, Esq., recovery of costs for FOIA actions; and James Council, Prince William County Schools, notice of petition for mandamus. Progress report from Personal Identifying Information Subcommittee with legislative recommendations.

**STATUS OF FREEDOM OF INFORMATION  
AND OTHER RELATED ACCESS BILLS  
CONSIDERED BY THE 2009 GENERAL ASSEMBLY**

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2009*

**I. Introduction**

The General Assembly passed a total of 19 bills amending FOIA during the 2009 Session. Two bills amending FOIA were passed as recommendations of the A Council: SB 1316 (Houck), which strikes the requirement that state agencies publish annually an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records, and SB 1319 (Houck), which clarifies the existing requirement that meeting minutes be in writing. Additionally, SB 1317 (Houck), concerning certain electronic meetings held by the Air Pollution Control Board and the State Water Control Board, also passed as a recommendation of the Council. The General Assembly also passed SB 1318 (Houck) and HB 2426 (May), extending the implementation date of the prohibition against collecting an individual's social security number and other changes under the Government Data Collection and Dissemination Practices Act (GDCDPA), as a recommendation of the Council and the Joint Commission on Technology and Science (JCOTS). Finally, the General Assembly also passed HB 2144 (Nutter), concerning access to concealed carry handgun permits. The language of HB 2144 is identical to SB 529 (Houck), which was introduced as a recommendation of the Council in the 2008 Regular Session. SB 529 did not pass at that time, but was referred back to the Council for further study, after which the substance of the bill was again recommended by the Council for 2009.

Of the 19 bills, two bills created three new record exemptions to FOIA as follows:

- Exempts certain records relating to internal controls of the Commonwealth's financial systems. (HB 2181 amending § 2.2-3705.2);
- Exempts from mandatory disclosure (1) personal information in certain records concerning residents or patients of the Department of Veterans Services care centers, and (2) certain records related to fundraising activities of the Veterans Services Foundation containing certain information about identifiable donors. Note that the bill creates two separate records exemptions, as well as two corresponding closed meetings exemptions. (HB 2639 amending §§ 2.2-3705.7 and 2.2-3711).

One bill adds two new closed meeting exemptions to § 2.2-3711:

- Allows (1) the advisory committee for veterans care centers established by the Commissioner of the Virginia Department of Veterans Services to discuss in closed meetings personal information in certain records concerning residents or patients of

- the Department of Veterans Services care centers, and (2) the Board of Trustees of the Veterans Services Foundation to discuss in closed meeting certain records related to fundraising activities of the Veterans Services Foundation containing certain information about identifiable donors. (HB 2639 amending §§ 2.2-3705.7 and 2.2-3711).

Sixteen bills amend existing provisions of FOIA as follows:

- Establishes the Fraud and Abuse Whistle Blower Protection Act; amends an existing exemption for certain records of audit investigations to exempt certain records with respect to an allegation of wrongdoing or abuse under the new Act (HB 1799 amending § 2.2-3705.3);
- Merges the Innovative Technology Authority (ITA), and the Virginia Research and Technology Advisory Commission into a single entity, named the Innovation and Entrepreneurship Investment Authority (IEIA), making corresponding technical amendments to existing records and meetings exemptions to reflect the name change. (HB 2201 and SB 1456 amending §§ 2.2-3705.6 and 2.2-3711);
- Expands the current record exemption for the names, addresses, and telephone numbers of complainants relating to zoning enforcement complaints made to a local governing body to also include complaints relating to the Uniform Statewide Building Code or the Statewide Fire Prevention Code. (HB 2266 and SB 1478 amending § 2.2-3705.3);
- Changes the name of the Department, Board, Inspector General, and Commissioner of Mental Health, Mental Retardation and Substance Abuse Services to the Department, Board, Inspector General, and Commissioner of Behavioral Health and Developmental Services, making a corresponding technical amendment to an existing records exemption to reflect the name change. (HB 2300 and SB 1117 amending § 2.2-3705.5).
- Changes the name of the Health Practitioners' Intervention Program to the Health Practitioners' Monitoring Program, and makes corresponding technical amendments to existing records and meetings exemptions to reflect the name change. (HB 2407 amending §§ 2.2-3705.5 and 2.2-3711);
- Amends existing records and meetings exemptions to allow the exclusion of certain financial records of the Virginia College Savings Plan from the Freedom of Information Act and the authorization for closed meetings of the Board of the Virginia College Savings Plan in certain circumstances. (HB 2549 and SB 1251 amending §§ 2.2-3705.7 and 2.2-3711);
- Establishes the MEI Project Approval Commission and adds it to the list of entities that may use an existing exemption for certain economic development records. (HB 2550 and SB 1119 amending § 2.2-3705.6);
- Makes technical amendments to an existing records exemption used by the Department of Minority Business Enterprise. (HB 2672 amending § 2.2-3705.6);
- Strikes the requirement to publish an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records. (SB 1316 amending §§ 2.2-3704 and 2.2-3704.1);



- Clarifies that minutes of public meetings must be in writing. The bill also contains a technical amendment. (SB 1319 amending § 2.2-3707);
- Amends an existing records exemption for economic development records to include records related to the retention of existing business, and to allow the exemption to be used by all public bodies subject to FOIA. The bill makes corresponding amendments to an existing meetings exemption. (SB 1344 amending §§ 2.2-3705.6 and 2.2-3711);
- Clarifies that enforcement actions under the Freedom of Information Act take precedence over other general provisions of law relating to writs of mandamus or injunction. (SB 1505 amending §§ 2.2-3713 and 8.01-644).

Section II of this update presents a brief overview of amendments to FOIA section by section in order to provide context and organization to the numerous bills. Section III presents a brief overview of other access-related legislation passed during the 2008 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself.

## **II. Amendments to the Freedom of Information Act**

### **§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges.**

**Freedom of Information Act; requirements to publish a database index and a statement of rights and responsibilities.** Strikes the requirement to publish an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records. This bill is a recommendation of the Freedom of Information Advisory Council. SB 1316 (2009 Acts of Assembly, c. 626).

#### **§ 2.2-3704.1. Posting of notice of rights and responsibilities by state public bodies; assistance by the Freedom of Information Advisory Council.**

**Freedom of Information Act; requirements to publish a database index and a statement of rights and responsibilities.** Strikes the requirement to publish an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records. This bill is a recommendation of the Freedom of Information Advisory Council. SB 1316 (2009 Acts of Assembly, c. 626).

**§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.**

**Freedom of Information Act; protection of internal controls of the Commonwealth's financial systems.** Exempts from the mandatory disclosure requirements of FOIA documentation or other information as determined by the State Comptroller that describes the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the Comptroller, the disclosure of which would jeopardize the security of the Commonwealth's financial assets. However, summary reports relating to the soundness of any fiscal process shall be disclosed in a form that does not compromise the internal controls. The bill provides that nothing contained in its provisions shall be construed to prohibit the Auditor of Public Accounts or the Joint Legislative Audit and Review Commission from reporting internal control deficiencies discovered during the course of an audit. HB 2181 (2009 Acts of Assembly, c. 418).

**§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.**

**Fraud and Abuse Whistle Blower Protection Act.** Establishes the Fraud and Abuse Whistle Blower Protection Act to protect whistle blowers from certain adverse employment actions. Makes a corresponding amendment to an existing exemption for certain audit investigation records. HB 1799 (2009 Acts of Assembly, c. 340).

**Freedom of Information Act; building and fire code complaints.** Expands the current record exemption for the names, addresses, and telephone numbers of complainants relating to zoning enforcement complaints made to a local governing body to also include complaints relating to the Uniform Statewide Building Code or the Statewide Fire Prevention Code. HB 2266 (2009 Acts of Assembly, c. 237), SB 1478 (2009 Acts of Assembly, c. 326).

**§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.**

**Health Practitioners' Intervention Program; revisions.** Changes the name of the Health Practitioners' Intervention Program to the Health Practitioners' Monitoring Program. Among other provisions, the act makes technical changes to existing records and meetings exemptions to reflect the name change. HB 2407 (2009 Acts of Assembly, c. 472).

**Department of Mental Health, Mental Retardation and Substance Abuse Services; name change.** Changes the name of the Department, Board, Inspector General, and Commissioner of Mental Health, Mental Retardation and Substance Abuse Services to the

Department, Board, Inspector General, and Commissioner of Behavioral Health and Developmental Services. The act makes technical amendments to an existing exemption to reflect the name change. HB 2300 (2009 Acts of Assembly, c. 812), SB 1117 (2009 Acts of Assembly, c. 839).

## **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

**Economic development; incentive financing for major employment and investment projects.** Among other things, establishes the MEI Project Approval Commission to review financing for individual incentive packages for major employment and investment projects (MEI projects) to be financed by the Virginia Public Building Authority. Adds the MEI Project Approval Commission to the list of entities that may use an existing exemption for certain economic development records. HB 2550 (2009 Acts of Assembly, c. 246), SB 1119 (2009 Acts of Assembly, c. 311).

**Oversight of research and development in the Commonwealth.** Merges the Innovative Technology Authority (ITA), and the Virginia Research and Technology Advisory Commission into a single entity, named the Innovation and Entrepreneurship Investment Authority (IEIA). Makes technical amendments to existing records and meetings exemptions to reflect the name change. HB 2201 (2009 Acts of Assembly, c. 809), SB 1456 (2009 Acts of Assembly, c. 325).

**Department of Minority Business Enterprise.** Clarifies that small, women-owned, and minority-owned businesses must be comprised of individuals who are U.S. citizens or legal resident aliens, and that both the management and daily business operations are conducted by such individuals. The bill contains corresponding technical amendments to an existing records exemption. HB 2672 (2009 Acts of Assembly, c. 869).

**Freedom of Information Act; economic development records.** Amends an existing records exemption for economic development records to include records related to the retention of existing business, and to allow the exemption to be used by all public bodies subject to FOIA. The bill makes corresponding amendments to the existing meetings exemption that allows discussion of such records in closed meetings. SB 1344 (2009 Acts of Assembly, c. 765).

## **§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.**

**Virginia College Savings Plan.** Provides for: (i) the exclusion of certain financial records of the Virginia College Savings Plan from the Freedom of Information Act; (ii) the authorization for closed meetings of the Board of the Virginia College Savings Plan in certain circumstances; (iii) the expansion of the Virginia College Savings Plan Board from eight to 11 members; (iv) the creation of two advisory committees to the Board; and (v) the

authority for the Virginia College Savings Plan Board to establish scholarships or matching grant programs for qualified students. The bill also renames the individual hired by the Virginia College Savings Plan Board to direct, manage, and administer the Plan as the "chief executive officer," rather than the current designation of "executive director." HB 2549 (2009 Acts of Assembly, c. 826), SB 1251 (2009 Acts of Assembly, c. 844).

**Freedom of Information Act; certain records of the Department of Veterans Services and the Veterans Services Foundation.** Exempts from the mandatory disclosure provisions of the Freedom of Information Act (i) personal information contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services care centers and (ii) records maintained in connection with fundraising activities by the Veterans Services Foundation to the extent that such records reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the record. The bill provides, however, that it shall not be construed to authorize the withholding of records relating to the amount, date, purpose, and terms of the pledge or donation, or the identity of the donor. Nor does the exclusion provided by the bill apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts. Adds corresponding closed meetings exemptions. HB 2639 (2009 Acts of Assembly, c. 223).

### **§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.**

**Freedom of Information Act; meeting minutes.** Clarifies that minutes of public meetings must be in writing. The bill also contains a technical amendment. The terms "include" and "in writing" that appear in the bill are defined in Title 1 to mean, respectively, "include, but are not limited to," and "any representation of words, letters, symbols, numbers, or figures, whether (i) printed or inscribed on a tangible medium or (ii) stored in an electronic or other medium and retrievable in a perceivable form and whether an electronic signature authorized by Chapter 42.1 (§ 59.1-479 et seq.) of Title 59.1 is or is not affixed." This bill is a recommendation of the Freedom of Information Advisory Council. SB 1319 (2009 Acts of Assembly, c. 628).

### **§ 2.2-3711. Closed meetings authorized for certain limited purposes.**

**Oversight of research and development in the Commonwealth.** Merges the Innovative Technology Authority (ITA), and the Virginia Research and Technology Advisory Commission into a single entity, named the Innovation and Entrepreneurship Investment Authority (IEIA). Makes technical amendments to existing records and meetings exemptions to reflect the name change. HB 2201 (2009 Acts of Assembly, c. 809), SB 1456 (2009 Acts of Assembly, c. 325).

**Health Practitioners' Intervention Program; revisions.** Changes the name of the Health Practitioners' Intervention Program to the Health Practitioners' Monitoring Program. Among other provisions, the act makes technical changes to existing records and meetings exemptions to reflect the name change. HB 2407 (2009 Acts of Assembly, c. 472).

**Virginia College Savings Plan.** Provides for: (i) the exclusion of certain financial records of the Virginia College Savings Plan from the Freedom of Information Act; (ii) the authorization for closed meetings of the Board of the Virginia College Savings Plan in certain circumstances; (iii) the expansion of the Virginia College Savings Plan Board from eight to 11 members; (iv) the creation of two advisory committees to the Board; and (v) the authority for the Virginia College Savings Plan Board to establish scholarships or matching grant programs for qualified students. The bill also renames the individual hired by the Virginia College Savings Plan Board to direct, manage, and administer the Plan as the "chief executive officer," rather than the current designation of "executive director." HB 2549 (2009 Acts of Assembly, c. 826), SB 1251 (2009 Acts of Assembly, c. 844).

**Freedom of Information Act; certain records of the Department of Veterans Services and the Veterans Services Foundation.** Exempts from the mandatory disclosure provisions of the Freedom of Information Act (i) personal information contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services care centers and (ii) records maintained in connection with fundraising activities by the Veterans Services Foundation to the extent that such records reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the record. The bill provides, however, that it shall not be construed to authorize the withholding of records relating to the amount, date, purpose, and terms of the pledge or donation, or the identity of the donor. Nor does the exclusion provided by the bill apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts. Adds corresponding closed meetings exemptions. HB 2639 (2009 Acts of Assembly, c. 223).

**Freedom of Information Act; economic development records.** Amends an existing records exemption for economic development records to include records related to the retention of existing business, and to allow the exemption to be used by all public bodies subject to FOIA. The bill makes corresponding amendments to the existing meetings exemption that allows discussion of such records in closed meetings. SB 1344 (2009 Acts of Assembly, c. 765).

## **§ 2.2-3713. Proceedings for enforcement of chapter.**

**Freedom of Information Act; proceedings for enforcement.** Clarifies that enforcement actions under the Freedom of Information Act take precedence over other general

provisions of law relating to writs of mandamus or injunction. SB 1505 (2009 Acts of Assembly, c. 634).

### **III. Other Access-Related Legislation**

#### **Uncodified Acts**

**REAL ID Act; Commonwealth's participation.** Provides that, with the exception of identification cards issued to employees of the Department of State Police and certain other law enforcement officers, the Commonwealth will not comply with any provision of the federal REAL ID Act that it determines would compromise the economic privacy, biometric data, or biometric samples of any resident of the Commonwealth. HB 1587 (2009 Acts of Assembly, c. 733), SB 1431 (2009 Acts of Assembly, c. 769).

**Administrative Process Act; required review of the feasibility of electronic submission of certain information.** Requires every agency promulgating a regulation that requires the submission of documents or payments to examine the regulation to determine whether the submission of the required documents or payments may be accomplished by electronic means, and if so, consider amending the regulation to offer the alternative of electronic submission. HB 1969 (2009 Acts of Assembly, c. 85).

#### **Title 2.2 Administration of Government**

**Patent and copyright policies of the Commonwealth.** Among other things, requires the Secretary of Administration, in consultation with the Secretary of Technology, to establish policies, subject to the approval of the Governor, regarding the use of patents and copyrights owned by the Commonwealth. HB 1941 (2009 Acts of Assembly, c. 791), SB 1174 (2009 Acts of Assembly, c. 841).

**Powers of VITA.** Authorizes Virginia Information Technologies Agency (VITA), subject to approval by the Secretary of Technology and any other affected Secretariat, to delegate to an agency within the executive branch the power to provide for the centralized marketing, provision, leasing, and executing of license agreements for electronic access to public information and government services through the Internet, wireless devices, personal digital assistants, kiosks, or other such related media. The delegated agency would be authorized to fix and collect fees and charges for such services. HB 2023 (2009 Acts of Assembly, c. 87).

**Health information technology; adoption of standards.** Allows the Information Technology Investment Board to establish an advisory committee, consisting of persons with expertise in health care and information technology, to advise it on the adoption of nationally recognized health information technology technical and data standards. HB 2044 (2009 Acts of Assembly, c. 134).

**Auditor of Public Accounts; searchable database website of state budget expenditures and revenues.** Requires the Office of the Auditor of Public Accounts to include on its existing searchable database information regarding state audits or reports relating to public entities, capital outlay payments, and annual bonded indebtedness. The bill also provides for the searchable database to include the following additional elements as they become available through improved enterprise or other systems: (i) commodities, (ii) Virginia Performs data that directly relates to funding actions or expenditures, (iii) descriptive purposes for funding actions or expenditures, (iv) laws authorizing the issuance of bonds, and (v) copies of actual grants and contracts. In addition, the bill requires the Department of General Services, the Virginia Information Technologies Agency, and the State Comptroller to develop and maintain standard accounting information for use by all agencies and institutions for payments and purchases. HB 2285 (2009 Acts of Assembly, c. 812), SB 936 (2009 Acts of Assembly, c. 758).

**Government Data Collection and Dissemination Practices Act; collection of social security numbers.** Extends from July 1, 2009, to July 1, 2010, the implementation of the prohibition against collecting an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. This bill is a recommendation of the Freedom of Information Advisory Council. See the enactment clauses of the bill for the effective dates of each provision. SB 1318 (2009 Acts of Assembly, c. 849). HB 2426 (2009 Acts of Assembly, c. 867). **Note:** *SB 1318 and HB 2426 were identical as introduced, however, the Senate accepted a Governor's recommendation amending SB 1318, while the House rejected the same recommendation regarding HB 2426.*

**Protection of Social Security Numbers Act; penalties.** Provides that the first five digits of a social security number contained in a public record shall be confidential and exempt from disclosure under the Freedom of Information Act. The bill does allow release of a social security number under certain limited circumstances, including proper judicial order; to federal, state or local law-enforcement or correctional personnel; by one agency to another agency in Virginia or to an agency in another state, district, or territory of the United States; and to any data subject exercising his rights under the Government Data Collection and Dissemination Practices Act. The bill provides for penalties for violation. HB 2427 (2009 Acts of Assembly, c. 213).

**Government Data Collection and Dissemination Practices Act; Department of Social Services; exemption.** Exempts from the Government Data Collection and Dissemination Practices Act public assistance fraud investigations conducted by the Department of Social Services and local social service departments. SB 1305 (2009 Acts of Assembly, c. 573).

### **Title 3.2 Agriculture, Animal Care, and Food**

**Dangerous Dog Registry.** Authorizes the use of copies of all records, documents, and

papers associated with the Dangerous Dog Registry in Virginia courts if the documents have been certified and authenticated by the State Veterinarian or the Dangerous Dog Registry administrator as true copies of the original documents. HB 1951 (2009 Acts of Assembly, c. 354).

## **Title 8.01 Civil Remedies and Procedure**

**Copies of medical bills and charges; no cost.** Provides that a patient's account balance or itemized listing of charges maintained by a health care provider shall be supplied at no cost, upon request, up to three times every twelve months to either the patient or the patient's attorney. SB 1154 (2009 Acts of Assembly, c. 270).

## **Title 10.1 Conservation**

**Solid waste disclosure statements.** Eliminates the requirement that applicants for permits issued under the Virginia Waste Management Act provide the social security numbers of their key personnel in disclosure statements that are submitted to the Department of Environmental Quality. HB 2255 (2009 Acts of Assembly, c. 27).

**Notice of election of district directors.** Requires that notice of the date for filing nominating petitions and the date of the election for soil and water conservation district directors shall be posted in a prominent location at each district office 30 days before the filing date. Districts may use additional means to provide notice to the public of the election of district directors. Currently, such notice has to be published in a newspaper of general circulation in the district. The bill also requires the Virginia Soil and Water Conservation Board to notify each district that it's the district's responsibility to post such notice. HB 2218 (2009 Acts of Assembly, c. 370), SB 1324 (2009 Acts of Assembly, c. 629).

**Electronic meetings by the Air Pollution Control Board and the State Water Control Board.** Requires that any electronic communication meetings (teleconference) shall be held in compliance with the provisions the Freedom of Information Act, except that a quorum of the Board is not required to be physically assembled at one primary or central meeting location. The bill also requires that discussions of the Air Pollution Control Board or the State Water Control Board held via such electronic communication means shall be specifically limited to a (i) review of certain decisions of the Director, (ii) determination of the Air Pollution Control Board or the State Water Control Board whether or not to grant a public hearing or Board consideration, or (iii) delegation of the permit to the Director for his decision. No other matter of public business shall be discussed or transacted by the Air Pollution Control Board or the State Water Control Board during any such meeting held via electronic communication. The bill also clarifies when certain public hearings may be held and who may preside over the public hearings. This bill is a recommendation of the Freedom of Information Advisory Council. SB 1317 (2009 Acts of Assembly, c. 627).



## **Title 15.2 Counties, Cities, and Towns**

**Hampton Roads area refuse collection and disposal system authority.** Sets forth the requirements that shall be followed by any authority created to collect and dispose of refuse with member localities consisting of the Cities of Norfolk, Virginia Beach, Portsmouth, Chesapeake, and Franklin, and the Counties of Isle of Wight, Southampton, and Suffolk. The list of requirements sets forth rules for selecting a board of directors, maintaining a strategic plan, setting fees and operating costs, tracking costs, revenues, and capital projects, maintaining a financing plan, and voting. Explicitly requires the authority to adhere strictly to the requirements of FOIA. Note that certain provisions of this act (other than the FOIA-related provision) have delayed effective dates, and the act expires upon dissolution of the authority. HB 1872 (2009 Acts of Assembly, c. 742).

**Publication of annual school budget.** Requires local governing bodies and local school divisions to publish the estimated required local match in the publication of the annual school budget. Local governing bodies and school divisions must, by law, publish the annual school budget for public inspection and comment. SB 1285 (2009 Acts of Assembly, c. 280).

## **Title 16.1 Courts Not of Record**

**Civil commitment of sexually violent predators; penalties.** Makes a number of changes, including requiring that the court records for certain sexual misdemeanors be retained for 50 years rather than 10 years; allowing access to records of juvenile court and the Department of Juvenile Justice; addressing challenges to filing defects, including defendants under the Commitment Review Committee; allowing access to sealed records; extending from 60 to 90 days the time for a probable cause hearing and allowing the respondent to waive his right to such hearing; setting a standard for the court to find probable cause; and extending from 90 to 120 the number of days after the probable cause hearing for conduct of the trial. HB 1843 (2009 Acts of Assembly, c. 740).

**Confidentiality of court records.** Provides that any person, agency, or institution that may inspect juvenile case files shall be authorized to have copies made of such records, subject to any restrictions, conditions, or prohibitions that the court may impose. This bill is a recommendation of the Committee on District Courts. HB 2310 (2009 Acts of Assembly, c. 138), SB 928 (2009 Acts of Assembly, c. 308).

## **Title 17.1 Courts of Record**

**Occasional remote access to land records; pilot program; fee.** Allows the clerk of the Circuit Court of Prince William County to establish a pilot program under which a daily fee is assessed for occasional remote access to land records by the general public. The clerk shall also assess a separate fee per image downloaded in an amount not to exceed the usual copying fee. The clerk shall make a report on the pilot program to the House and Senate

Committees for Courts of Justice on or before September 30, 2012. The bill expires September 30, 2012. HB 1845 (2009 Acts of Assembly, c.76), SB 935 (2009 Acts of Assembly, c. 723).

**Statewide case and financial management systems; interface with circuit courts.** Gives the Executive Secretary of the Supreme Court the responsibility for the operation and maintenance of a case management system and financial management system, for related technology improvements, and requires that he permit an interface for the purpose of providing electronic information to state agencies, upon request of any circuit court that uses automation or technology improvements provided by a private vendor or the locality. The costs of designing, implementing, and maintaining any such interface shall be the responsibility of the circuit court clerk. Any expenses incurred by the office of the Executive Secretary, not to exceed \$104,280, related to this system shall be reimbursed through the Technology Trust Fund. HB 1946 (2009 Acts of Assembly, c. 793), SB 1442 (2009 Acts of Assembly, c. 857).

**Land records; social security numbers.** Requires, beginning July 1, 2012, that land records posted via secure remote access to the Internet may contain only the last four digits of the social security number of any party. SB 1277 (2009 Acts of Assembly, c. 312).

## **Title 18.2 Crimes and Offenses Generally**

**Concealed handgun permits; access to permittee information.** Protects from public disclosure permittee names and descriptive information held by the Department of State Police for purposes of entry into the Virginia Criminal Information Network. However, the information would still be available to law-enforcement agencies, officers, and agents in the course of law-enforcement duties, and nonidentifying statistical information would be available to the general public. HB 2144 (2009 Acts of Assembly, c. 235).

## **Title 19.2 Criminal Procedure**

**Search warrants executed upon electronic communication service providers or remote computing service providers.** Provides that a search warrant for records or other information pertaining to a subscriber to, or customer of, an electronic communication service or remote computing service that is transacting or has transacted any business in the Commonwealth, including the contents of electronic communications, may be served upon such a provider within or without the Commonwealth by mail, facsimile, or other electronic means. Currently, there is no provision for service of such a warrant outside the Commonwealth nor is there a specific provision allowing for mail, fax or electronic service. Additionally, under current law, electronic communications are expressly excluded from the coverage of the warrant. SB 1009 (2009 Acts of Assembly, c. 725).

## **Title 22.1 Education**

**Annual report of expenditures; local school boards.** Requires the annual report of

expenditures provided by the school board to the appropriate governing body to also be made available to the public on a template prescribed by the Board of Education. HB 2269 (2009 Acts of Assembly, c. 104).

**Publication of annual school budget.** Requires local governing bodies and local school divisions to publish the estimated required local match in the publication of the annual school budget. Local governing bodies and school divisions must, by law, publish the annual school budget for public inspection and comment. SB 1285 (2009 Acts of Assembly, c. 280).

## **Title 32.1 Health**

**Patient level data system; reporting requirement.** Adds patient street address and city or county to and removes patient relationship to insured from the list of information that must be reported by hospitals, facilities, physicians, and oral and maxillofacial surgeons. HB 2462 (2009 Acts of Assembly, c. 652).

**Notification of family member of person involved in commitment process.** Authorizes disclosure to a family member or personal representative of a person who is involved in the commitment process of information that is directly relevant to such person's involvement with the individual's health care, which may include the individual's location and general condition. SB 1077 (2009 Acts of Assembly, c. 606).

**Death certificates; disclosure to grandchildren and great-grandchildren.** Requires the State Registrar or the city or county registrar to issue a certified copy of a death certificate to the grandchild or great-grandchild of a decedent in accordance with procedures prescribed by the Board of Health in regulation. SB 927 (2009 Acts of Assembly, c. 505).

## **Title 37.2 Mental Health, Mental Retardation and Substance Abuse Services**

**Notification of family member of person involved in commitment process.** Authorizes disclosure to a family member or personal representative of a person who is involved in the commitment process of information that is directly relevant to such person's involvement with the individual's health care, which may include the individual's location and general condition. SB 1077 (2009 Acts of Assembly, c. 606).

## **Title 38.2 Insurance**

**Confidentiality of insurance information.** Provides for the confidentiality of company licensing applications and supporting documentation received by the State Corporation Commission. The requirement for confidential treatment extends to information obtained by the Commission or any other person in the course of an investigation or a review of a licensing application. HB 1935 (2009 Acts of Assembly, c. 352).

## **Title 46.2 Motor Vehicles**

**Electronic filings; Department of Motor Vehicles.** Provides that DMV may require certain filings or submissions be made electronically, including any required monthly updates from insurance companies and requests for refunds of certain fuel. HB 2233 (2009 Acts of Assembly, c. 419).

**Obtaining licenses and identification cards; federal REAL ID Act.** Amends provisions for obtaining licenses to comply with federal REAL ID Act requirements. SB 1046 (2009 Acts of Assembly, c. 872).

## **Title 54.1 Professions and Occupations**

**Prescription Monitoring Program; disclosure of information.** Removes requirement that a prescriber obtain written consent from the recipient of a prescription before requesting information on that recipient for the purpose of establishing his treatment history, and allows prescribers to delegate authority to access information in the Program to up to two licensed health care professionals. Also allows the Director of the Department of Health Professions to enter into agreements for mutual exchange of information among prescription monitoring programs in other jurisdictions. HB 2211 (2009 Acts of Assembly, c. 158), SB 1195 (2009 Acts of Assembly, c.162).

**Department of Health Professions; investigations.** Provides that, when a complaint or report has been filed about a person licensed, certified, or registered by a health regulatory board, a copy of the complaint or report shall be provided to the person who is the subject of the complaint or report prior to any interview of the person who is the subject of the complaint or report or at the time the person who is the subject of the complaint or report is notified of the complaint or report, whichever shall occur first, unless provision of the complaint or report to the person would materially obstruct a criminal or regulatory investigation. This bill clarifies that requirements related to confidentiality of information obtained during an investigation or disciplinary proceeding shall not prohibit investigative staff from interviewing fact witnesses, disclosing to fact witnesses the identity of the subject of the complaint or report, or reviewing with fact witnesses a copy of records or other supporting documentation necessary to refresh the fact witness's recollection. HB 1852 (2009 Acts of Assembly, c. 342).

**Department of Health Professions; information concerning health professionals.** Provides that the Department of Health Professions shall collect an official address of record from each health professional licensed, registered or certified by each health regulatory board within the Department, to be used by the Department and relevant health regulatory boards for agency purposes, and that such address shall remain confidential. This bill also requires that the Department provide an opportunity for health professionals to provide a second address for purposes of public dissemination, which may include a work address, post office address, or home address, and that where no alternative address is provided, the address of record shall be made public. This bill further requires the Department to develop

a procedure for health professionals to update their address information at regular intervals, and authorizes the Department to collect a fee sufficient to cover the costs of such updates. SB 1282 (2009 Acts of Assembly, c. 687).

## **Title 55 Property and Conveyances**

**Property Owners' Association Act; access to books and records.** Provides that actual salary information of the six highest paid employees of a property owners' association making over \$75,000 shall be available for examination and copying by association members. Currently, only aggregate salary information is required to be open. The bill also specifies that all books and records of the association, including individual salary information for all employees and payments to independent contractors, are available for examination by a member of the board of directors. HB 2305 (2009 Acts of Assembly, c. 665).

## **Title 56 Public Service Companies**

**Public-Private Education Facilities and Infrastructure Act of 2002; definitions; review of proposals.** Amends the definition of "qualifying project" to include any services designed to increase the productivity and efficiency of a responsible public entity. Currently such services require the direct or indirect use of technology. In addition the bill (i) requires that a public hearing be held by the responsible public entity on a proposal at least 30 days prior to entering into an interim or comprehensive agreement, and (ii) provides for the Auditor of Public Accounts to post copies of interim and comprehensive agreements that have been periodically reviewed by that office in an online database. The bill also establishes a working group convened by the Chairmen of the Senate Committee on General Laws and Technology and the House Committee on General Laws to annually review model guidelines used by responsible public entities and to consider best practices recommendations. SB 1153 (2009 Acts of Assembly, c. 762).

## **Title 62.1 Waters of the State, Ports and Harbors**

**Electronic meetings by the Air Pollution Control Board and the State Water Control Board.** Requires that any electronic communication meetings (teleconference) shall be held in compliance with the provisions the Freedom of Information Act, except that a quorum of the Board is not required to be physically assembled at one primary or central meeting location. The bill also requires that discussions of the Air Pollution Control Board or the State Water Control Board held via such electronic communication means shall be specifically limited to a (i) review of certain decisions of the Director, (ii) determination of the Air Pollution Control Board or the State Water Control Board whether or not to grant a public hearing or Board consideration, or (iii) delegation of the permit to the Director for his decision. No other matter of public business shall be discussed or transacted by the Air Pollution Control Board or the State Water Control Board during any such meeting held via

electronic communication. The bill also clarifies when certain public hearings may be held and who may preside over the public hearings. This bill is a recommendation of the Freedom of Information Advisory Council. SB 1317 (2009 Acts of Assembly, c. 627).

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**APPENDIX F**

**Breakdown of Inquiries to Council  
December 1, 2008 through November 30, 2009**

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of government, media, or citizens. The logs help to keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency in responding to inquiries. All opinions, whether written or verbal, are based on the facts and information provided to the Council by the person requesting the opinion. During this reporting period, the Council has answered a broad spectrum of questions about FOIA. This appendix provides a general breakdown of the type and number of issues raised by the inquiries received by the Council.

Time period: December 1, 2008 through November 30, 2009

Total number of inquiries: 1691

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	1	0	0	0	0	0	1	0	0	0	0	1	3
Citizens	1	0	0	2	0	3	1	0	1	0	1	1	10
News Media	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>3</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>13</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	69	79	75	88	74	67	82	82	78	75	83	58	910
Citizens	41	58	55	52	56	36	64	45	58	58	58	37	618
News Media	10	10	11	15	10	13	17	8	19	10	19	8	150
<b>TOTAL</b>	<b>120</b>	<b>147</b>	<b>141</b>	<b>155</b>	<b>140</b>	<b>116</b>	<b>163</b>	<b>135</b>	<b>155</b>	<b>143</b>	<b>160</b>	<b>103</b>	<b>1678</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	70	79	75	88	74	67	83	82	78	75	83	59	913
Citizens	42	58	55	54	56	39	65	45	59	58	59	38	628
News Media	10	10	11	15	10	13	17	8	19	10	19	8	150
<b>TOTAL</b>	<b>122</b>	<b>147</b>	<b>141</b>	<b>157</b>	<b>140</b>	<b>119</b>	<b>165</b>	<b>135</b>	<b>156</b>	<b>143</b>	<b>161</b>	<b>105</b>	<b>1691</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	2	2	1
Citizens	5	3	3
News Media	0	0	0
<b>TOTAL</b>	<b>7</b>	<b>5</b>	<b>4</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	665	180	208
Citizens	340	68	298
News Media	71	41	39
<b>TOTAL</b>	<b>1076</b>	<b>289</b>	<b>545</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	667	182	209
Citizens	345	71	301
News Media	71	41	39
<b>TOTAL</b>	<b>1083</b>	<b>294</b>	<b>549</b>



## APPENDIX G

### OPINIONS ISSUED BY THE FOIA COUNCIL JULY 2000 THROUGH NOVEMBER 2009

Written Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>Government</b>	4	20	6	8	8	4	4	2	1	3
<b>Citizens</b>	3	41	11	13	15	11	6	8	8	10
<b>News Media</b>	1	10	2	3	3	1	0	3	2	0

Informal Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>Government</b>	45	275	465	472	616	756	845	854	827	910
<b>Public</b>	43	324	360	331	429	687	664	674	641	618
<b>News Media</b>	21	169	165	198	145	209	232	167	206	150

Total Number of Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>Government</b>	49	295	471	480	624	760	849	856	828	913
<b>Public</b>	47	365	371	344	444	698	670	682	649	628
<b>News Media</b>	22	179	167	201	148	210	232	170	208	150
<b>GRAND TOTAL</b>	118	539	1009	1025	1216	1668	1751	1708	1685	1691

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## APPENDIX H

### OPINIONS ISSUED BY THE COUNCIL JULY 2000 THROUGH NOVEMBER 2009

2000

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
<b>September</b>	
<hr/>	
<a href="#"><u>AO-1-00</u></a>	Inquiries as to the status of e-mail under the Freedom of Information Act, charges for electronic records, the working papers exemption, assessment of fees for producing a requested record, the meaning of "reasonable specificity."
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<a href="#"><u>AO-2-00</u></a>	Access to property appraisal cards containing the calculations and methodology used in arriving at the individual assessed property value.
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<b>October</b>	
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<a href="#"><u>AO-3-00</u></a>	Access to a preliminary "master list" of courses offered during the next academic year at a public high school.
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<a href="#"><u>AO-4-00</u></a>	Meeting of three members of a public body to tour a permit-application site.
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<a href="#"><u>AO-5-00</u></a>	Access to records in the possession of the treasurer related to local license taxes.
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<a href="#"><u>AO-6-00</u></a>	Authority and scope of the FOI Advisory Council.
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<a href="#"><u>AO-7-00</u></a>	Presence of a lawyer during a meeting closed pursuant to subdivision A 7 §2.1-344 (consultation with legal counsel).

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**November**

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**[AO-8-00](#)**

Closed meeting to discuss publicly-held real property, and scope of discussion at closed meeting.

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**[AO-9-00](#)**

Voting requirements of FOIA; conflict between FOIA and *Robert's Rules of Order*.

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**December**

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**[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.

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**[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.

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**[AO-12-00](#)**

Vote by public body to proceed with action negates working papers exemption; application of working papers exemption; dissemination of working papers.

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**[AO-13-00](#)**

Notice requirements for special meetings.

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**[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.

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**[AO-15-00](#)**

Access to sealed divorce records.

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**[AO-16-00](#)**

Definition of a public body.

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**[AO-17-00](#)**

Access to records containing job classification information.

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**[AO-18-00](#)**

Access to death certificate.

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[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.

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[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.

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

## 2001

### Opinion No.

### Issue(s)

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#### January

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[AO-1-01](#) City's proposed e-mail network for council members constitutes an electronic meeting.

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[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.

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[AO-4-01](#) Access to identity, qualifications, and resumes of candidates for city manager position.

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[AO-5-01](#) Definition of a meeting; chance meetings.

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[AO-6-01](#) Access to noncriminal police reports; access to telephone directory of city employees.

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

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[AO-8-01](#) Application of attorney-client privilege exemption.

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**February**

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[AO-9-01](#)

Status of local Neighborhood Connections Office as a public body.

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[AO-10-01](#)

Access to audit information from the Virginia Employment Commission for unemployment compensation hearing.

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[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.

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[AO-12-01](#)

Costs for copying public records.

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[AO-13-01](#)

Access to records indicating whether an individual attended school in locality; Family Educational and Privacy Rights Act (FERPA).

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[AO-14-01](#)

Requirements of motion to enter into closed session to discuss litigation.

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[AO-15-01](#)

Access to records concerning the qualifications of a public official.

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**March**

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[AO-16-01](#)

Access to list of concealed handgun permit holders.

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[AO-17-01](#)

FOIA exemptions relating to economic development prospects; application of FOIA to the Governor's Development Opportunity Fund.

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[AO-18-01](#)

Notice requirements for a change in location of a public meeting.

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[AO-19-01](#)

Access to presentence reports.

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[AO-20-01](#)

Application of FOIA of meetings of a two-person subcommittee.

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[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.

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**April**

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[AO-22-01](#)

Freedom of Information Advisory Council lacks authority to conduct investigations; application of attorney-client privilege exemption.

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[AO-23-01](#)

Application of FOIA to student government at state college.

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**May**

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[AO-24-01](#)

Status of a citizen's advisory group as a public body.

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[AO-25-01](#)

Costs for copying public records.

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[AO-26-01](#)

Open meeting exemptions for discussion of prospective business or industry, negotiation of siting agreements.

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[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.

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[AO-28-01](#)

Exemption for personnel records; access to information concerning position and salary of public employees.

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**June**

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[AO-29-01](#)

Access by parent to child's scholastic records.

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[AO-30-01](#)

Access to records maintained in case file of the Board of Social Work by subject of the records.

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[AO-31-01](#)

No FOIA requirement that a board of supervisors conduct a public hearing before it may sell a piece of real property.

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[AO-32-01](#)

Access to budget proposals submitted by city departments to city council for preparation of city's annual budget.

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[AO-33-01](#)

Access to directory information of students; application of the Federal Educational Rights and Privacy Act.

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[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.

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**July**

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[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.

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[AO-36-01](#)

Analysis of "supported wholly or principally by public funds" language in the definition of a public body.

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**August**

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[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.

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[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.

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[AO-39-01](#)

Public body may make reasonable charges for its actual costs in responding to a FOIA request.

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[AO-40-01](#)

Discussion or transaction of public business by three or more members of a public body constitutes a meeting under FOIA.

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**September**

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**AO-41-01**

Application of FOIA to a tourism program run by a local chamber of commerce for the city council.

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**AO-42-01**

Access to list of the names of individuals who have made a FOIA request to a public body.

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**AO-43-01**

FOIA requires that notice of public meetings be posted in two physical locations.

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**AO-44-01**

Name of physician at a state correctional facility is available under FOIA.

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**October**

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**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.

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**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.

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**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 hospitals' directors by a board of supervisors does not make the hospital a public body.

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**November**

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**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.



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**December**

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**[AO-49-01](#)**

A public body may create a new record in its discretion; however, it cannot charge a requestor without prior consent. A public body may not charge a requestor for sending courtesy copies of a FOIA request to a third party as it is a general cost associated with the transacting of general business of the public body. Staff time spent responding to a FOIA request is an actual cost that may be passed on to a requestor; however, whether or not the actual cost is also reasonable is a question for the courts.

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**[AO-50-01](#)**

A county administrator, as the chief executive officer, may properly withhold correspondence between her and the board of supervisors.

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**2002****Opinion No.****Issue(s)**

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**January**

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**[AO-01-02](#)**

A public body must release the names of current public employees and salary information under FOIA. FOIA does not require, however, the release of records related to the retirement of specific public employees which may properly be withheld as personnel records.

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**March**

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**[AO-02-02](#)**

Three members of a public body may gather at a private meeting without the private meeting becoming a meeting under FOIA if the members of the public body do not "discuss" or "transact" public business.

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**[AO-03-02](#)**

Records of expenditures for Building Code Academy are not exempt from disclosure nor is the disclosure of such records otherwise prohibited by law. The format or degree of detail included in the record is within the discretion of the public body that is the custodian of the record.

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**April**

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**[AO-04-02](#)**

A public body must release records generated during contract negotiations in the absence of a statutory exemption from the mandatory disclosure requirements of FOIA for such records.

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**May**

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**[AO-05-02](#)**

The inclusion of fringe benefits as part of the charges that may be assessed is an extraneous fee to recoup the general costs of transacting the general business of the public body and therefore may not be computed in the charges allowable under FOIA for the production of requested records.

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**July**

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**[AO-06-02](#)**

Definition of a meeting; notice requirements for public meetings; waiver of notice by public officials.

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**[AO-07-02](#)**

Application of personnel records exemption to employee timesheets.

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**August**

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**[AO-08-02](#)**

Individual polling of city council members by city manager is allowable under FOIA; motion to enter into closed session must meet all three statutory requirements; discussion in closed session may not stray from exemptions cited in motion; votes must be taken in open meeting.

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**[AO-09-02](#)**

Corporation is subject to FOIA when it is wholly owned by a public body, and its records are subject to public disclosure.

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**October**

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**[AO-10-02](#)**

Delinquent tax information is public record; public body may make reasonable charges for the actual costs incurred in providing copies of records; public body has five working days to respond to a FOIA request.

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[AO-11-02](#)

Court records are subject to disclosure pursuant to FOIA; a requester has the right to request records in any medium used by a public body in the course of its regular business.

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[AO-12-02](#)

The mayor or the chief executive officer of a locality, but not both, may exercise the working papers exemption.

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[AO-13-02](#)

The procedures and practices governing the process by which those people designated by an inmate are notified in case of serious illness, injury or death are subject to disclosure under FOIA.

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**November**

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[AO-14-02](#)

Public body may make reasonable charges for its actual costs incurred in responding to request for records; question of reasonableness is for the courts.

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[AO-15-02](#)

Use of a "straw poll" in closed meeting is permitted by FOIA; however, no agreement reached in a closed meeting becomes effective until the membership of the public body votes in an open meeting.

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[AO-16-02](#)

Local public bodies may not conduct telecommunication meetings under FOIA.

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[AO-17-02](#)

The Halifax County Industrial Development Authority is a public body under FOIA and is subject to the open meeting requirements of FOIA; role of FOIA Council.

**2003**

**Opinion No.**

**Issue(s)**

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**January**

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[AO-01-03](#)

Members of a public body may reach a tentative agreement during a closed meeting, but no action will become effective until voted on in an open meeting; FOIA allows members to poll each other individually about their position on a matter of public business.

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[AO-02-03](#)

Portions of records concerning the disciplining of an identifiable employee must be released to that employee under the personnel exemption, even if those records may be withheld from public disclosure under § 2.2-3705(A)(8) as records compiled specifically for use in an active administrative investigation.

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## February

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### [AO-03-03](#)

Public bodies may adopt rules governing the placement and use of recording equipment during a meeting; however, one must examine the practical implication of the rules' application. A rule may not essentially prohibit a recording from being made.

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### [AO-04-03](#)

Comments concerning identifiable employees on a "quality of work environment" survey may be redacted and withheld as personnel records.

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### [AO-05-03](#)

When records are requested from a public body pursuant to a subpoena, the Rules of the Supreme Court of Virginia -- not FOIA -- apply.

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## March

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### [AO-06-03](#)

Deliberations of a school board to discuss whether a teacher's grievance is grievable may be kept private.

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## April

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### [AO-07-03](#)

Names of lawyers admitted to practice law in Virginia is public record and not subject to exemption.

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### [AO-08-03](#)

Public body may only make reasonable charges for its actual costs incidental to a particular request; public body may not charge a requester for the time spent compiling records prior to the request.

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### [AO-09-03](#)

The Appalachia Volunteer Fire Department appears to be a public body supported wholly or principally by public funds.

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### [AO-10-03](#)

A suicide report is a noncriminal incident report subject to disclosure under FOIA, but portions of the report of a personal, medical or financial nature may be redacted.

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### [AO-11-03](#)

A public body must disclose the salary of public employees for a particular date, upon request; dialogue between public body and requester to clarify request facilitates the production of records and is the intent of the law.

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**May**

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**AO-12-03**

Failure to respond to a FOIA request is deemed a denial of the request and is a violation of FOIA; person denied rights under FOIA may file a petition for mandamus or injunction.

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**AO-13-03**

The Virginia Baseball Stadium Authority is a public body subject to FOIA. All of its records must be available for inspection and copying and its meetings open to the public unless specifically exempted by statute.

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**June**

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**AO-14-03**

Onancock Business and Civic Association is not a public body under FOIA; it is not supported wholly or principally by public funds, nor is it acting as an agent of the town council in its participation in the Main Street Program.

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**AO-15-03**

A FOIA request from a government employee should not be treated differently than a request from a citizen or representative of the media; FOIA does not prohibit a public body from advising a third party that a particular FOIA request has been made; public body should not make promise of confidentiality about certain records when no FOIA exemption exists that would allow those records to be withheld.

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**AO-16-03**

Specific mandate in the Code of Virginia that schools provide school safety audits to Virginia Center for School Safety supercedes general FOIA exemption that allows portions of audits to be withheld; local school board retains the authority to determine which portions of the audits are subject to the exemption in response to a FOIA request.

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**July**

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**AO-17-03**

A public body may hold a closed meeting under the personnel exemption to discuss the performance and discipline of a fellow member of the public body only if the public body has the authority to censure, reprimand or otherwise discipline a member of the public body.

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**AO-18-03**

Student organizations at public institutions of higher education are public bodies if supported wholly or principally by public funds; the organization, and not the university, is the appropriate entity to ask for records of the organization.

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**AO-19-03**

Records held by a private company that has contracted to run a public university bookstore are subject to FOIA if the bookstore is acting as an agent of a public body; agency is a question of fact; the public body, acting as principal, would be the appropriate entity to request records of the agent.

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**AO-20-03**

FOIA requires that a custodian of public records take all necessary precautions to preserve and safekeep the records; FOIA does not prohibit a public officer from lending out a CD for a requester to copy public records so long as the original records are kept safe.

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**AO-21-03**

Circuit court clerk must provide digital copies of digital records upon request; electronic records must be made available at a reasonable cost, not to exceed the actual cost.

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**AO-22-03**

FOIA does not require a public comment period during public meetings, nor does it set forth procedures for receiving public comment.

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**September**

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**AO-23-03**

Notice of meetings must contain the date, time and location of the meeting. If a member of the public body is appointed by the Governor, notice must also indicate whether or not public comment will be received during the meeting and, if so, the approximate point during the meeting when public comment will be received.

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**October**

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**AO-24-03**

Protocols and procedures relating to the execution of prisoners may be withheld by the Department of Corrections under FOIA.

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**December**

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**AO-25-03**

FOIA exemption for records containing attorney-client privilege parallels Common Law attorney-client privilege; exemption does not apply to records of public relations firm hired by law firm on behalf of city if the public relations firm is not acting as an agent of the law firm for purposes of rendering legal advice. Records are not subject to attorney-client privilege merely because they are sent to an attorney.

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**AO-26-03**

Exemption at subdivision A 10 of § 2.2-3705 allows library to withhold records that identify Internet sites visited by a patron on a library computer.

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**AO-27-03**

Records of homicide investigations may be withheld pursuant to subdivision F 1 of § 2.2-3706; the provisions at subsection G of § 2.2-3706 do not conflict with subdivision F 1.

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**2004****Opinion No.****Issue(s)**

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**January**

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**AO-01-04**

Metropolitan Washington Airport Authority is subject to FOIA.

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**AO-02-04**

A public body must give notice of the time, date, and location of its meetings, even if the only item on the agenda for the meeting is a closed session; a public body may withhold records and conduct closed meetings relating to contract negotiations until a decision whether or not to enter into the contract is reached by the public body.

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**February**

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**AO-03-04**

The Peninsula SPCA is acting as the animal-control arm of local government, and its records and meetings are open under FOIA to the extent they relate to these animal control functions.

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**March**

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**AO-04-04**

FOIA requires a public body to make available salary records of public employees; however, FOIA does not require a public body to create a spreadsheet or list out of these records, and cannot charge a requester to create such spreadsheets or lists unless the public body reaches an agreement with the requester prior to the creation of the record.

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**AO-05-04**

Absent a specific court order, a public body cannot require a citizen of the Commonwealth to make a FOIA request through her attorney.

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**April**

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**AO-06-04**

Records of a committee established by a public body are public records subject to FOIA, even if the records are physically held by a private sector member of the committee at his private place of business; grant money received by a private organization from a government source is not considered "public funds" for purposes of determining whether an organization is supported wholly or principally by public funds.

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**AO-07-04**

The records exemption at subdivision A 78 of § 2.2-3705 only exempts personal information provided to a public body for purposes of receiving e-mail from a public body; it does not apply to personal information provided to an individual elected official who chooses to send out e-mails or updates to constituents.

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**May**

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**AO-08-04**

Redevelopmental plans submitted to the director of a Redevelopment and Housing Authority may not be withheld as working papers because the Authority, and not the director, is required to approve the plans.

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**AO-09-04**

The records exemption at subdivision A 85 of § 2.2-3705 for portions of school safety audits does not allow a school to withhold all records relating to a visitor monitoring procedure.



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[AO-10-04](#)

Billing statements received by a public body from a private attorney for legal services are not subject to exemption as attorney-client privilege or work product.

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**June**

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[AO-11-04](#)

Records of all investigations of the Department of Health Professions, and not just records of active investigations, are confidential, even regarding the subject of the records.

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[AO-12-04](#)

Gathering of chairmen and vice-chairmen of a board of supervisors and school board to discuss bond issues is not a meeting for purposes of FOIA when they were not appointed by their respective public bodies to advise the public bodies or perform delegated functions.

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**July**

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[AO-13-04](#)

FERPA & FOIA give access to educational records to the subject of the records, except that "sole possession records" are excluded from this requirement; when a student is enrolled in an institution of post-secondary education, the student, and not the parent, has the right of access.

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[AO-14-04](#)

The exemption in subdivision 8 of § 2.2-3705.7 that allows for personal information concerning persons participating in federally funded rent-assistance programs to be withheld does not apply to records relating to landlords who enter into contracts with local housing authorities to provide such housing.

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[AO-15-04](#)

A gathering of three members of a school board at a citizen's home is a meeting under FOIA when the purpose of the gathering is to discuss matters of public business pending before the board.

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**AO-16-04**

A public body may request a deposit before proceeding with a request if it estimates that the request will exceed \$200 and may toll its response to the entire request until the deposit is received; a requester has the right to narrow a request in an attempt to lower the costs, but the requester must clearly state that he is narrowing the request, and not simply asking that certain records be provided immediately while the remainder of the request is being processed before paying the deposit; making a FOIA request is not an adversarial process, and clear communication from both parties is often the best way to avoid disputes.

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**August**

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**AO-17-04**

The working papers exemption found in subdivision 2 of § 2.2-3705.7 was designed to provide an unfettered zone of privacy for the deliberative process. The exemption does not expire unless the working papers are disseminated or otherwise made public by the official to whom the exemption applies. Absent such a release, a record created by or for one of the named officials for his personal or deliberative use retains the characterization of a working paper.

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**AO-18-04**

A verbal request for records constitutes a FOIA request and thereby invokes the requirements of FOIA. The custodian of the records may ask that a request be put in writing, but cannot refuse to honor a request because it is a verbal request or require the request in writing. In responding to a request, a public body must provide all records that are responsive to the request. If any responsive records are withheld, an exemption must be cited in writing that allows the custodian to withhold those records.

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**AO-19-04**

Two members of a local electoral board are not violating FOIA by using e-mail to communicate with one another when the use is the equivalent of sending a letter; however, members of public bodies should be cautioned against using e-mail in a manner that appears to entail simultaneity.

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**AO-20-04**

A committee composed of two members of a seven-member board is a public body under FOIA because it was created by the board to perform delegated functions of the board and to advise the full board. Therefore, when the two members of the committee meet to discuss public business, it is a meeting under FOIA.

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## September

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### [AO-21-04](#)

Whether allowing a member of a local disability services board with a disability to participate in a meeting via telephone is required by the Americans with Disabilities Act, despite the clear prohibition found in FOIA, hinges on an interpretation of the Americans with Disabilities Act and not FOIA. The FOIA Council has the statutory authority only to interpret FOIA and therefore lacks the requisite legal authority and the expertise to opine on the requirements of the ADA.

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## October

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### [AO-22-04](#)

It is the policy of this office not to issue an opinion once litigation is commenced or a judge of competent jurisdiction has rendered an opinion on the same factual question(s) raised in a request for an advisory opinion of the Council. The court, and not the Council, is the appropriate body to decide and settle a dispute as a matter of law. An entity that was subject to FOIA by virtue of its receipt of sufficient public funds may later be excluded from the definition of a "public body" if it no longer is supported wholly or principally by public funds; it is a question of fact that must be decided on a case-by-case basis.

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## November

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### [AO-23-04](#)

Applications for appointment to fill vacancy on local governing body are exempt from disclosure as personnel records. A public body may make reasonable charges not to exceed its actual costs in responding to a FOIA request.

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## December

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### [AO-24-04](#)

A motion to convene a closed meeting must identify the subject and purpose of the meeting, and cite to a specific statutory exemption. Decisions reached in closed session do not become effective until voted upon in an open meeting.

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### [AO-25-04](#)

Open meeting minutes must be made available to any citizen of the Commonwealth upon request during the regular office hours of the custodian. Information that must be included in meeting minutes of a public body is set forth in FOIA. The intent of FOIA is best achieved by clear communication between the requester and the public body.

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[AO-26-04](#)

The Virginia Board of Bar Examiners has statutory discretion to decide whether or not to release bar examination scores, regardless of whether the scores in question are those of particular individuals or those of aggregate groups.

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[AO-27-04](#)

A task force of citizens organized by a mayor-elect is not a "public body" subject to the open records and meetings requirements of FOIA.

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[AO-28-04](#)

A private entity that exercises no governmental authority and is not wholly or principally supported by government funds is not a public body subject to FOIA's records and meeting requirements. Money received by a private entity from government sources under a procurement contract should not be used to determine whether an entity is wholly or principally supported by public funds.

**2005**

**Opinion No.**

**Issue(s)**

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**February**

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[AO-01-05](#)

No agreement reached in a closed meeting becomes effective until the public body takes an affirmative vote in an open meeting. FOIA requires the motion for that vote have its substance reasonably identified in the open meeting. For the purposes of the motion, substance is defined as a fundamental part, quality or aspect; the essential quality or import of a thing.

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**March**

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[AO-02-05](#)

**NOTICE:** This opinion has been rescinded. Please see Advisory Opinion 07 (June, 2005).

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[AO-03-05](#)

Letters of reference and recommendations are generally treated as personnel records under FOIA. Like other personnel records, they may be withheld from third parties but must be disclosed to their subject upon request. However, educational agencies and institutions may withhold these records, even from their subject, pursuant to subdivision 2 of § 2.2-3705.4.

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## April

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### [AO-04-05](#)

Records concerning what websites and keywords are blocked by a computer network firewall may be withheld from public disclosure as such records describe the design and function of a security system (pursuant to subdivision 3 of § 2.2-3705.2).

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## May

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### [AO-05-05](#)

FOIA does not require a public body to inform a requester when a requested record does not exist. However, public officials would be well advised to clearly state when requested records do not exist in order to avoid confusion and frustration on the part of the requester. FOIA does not contain any specific provisions concerning the legibility of public records. However, as a practical matter, copies of records produced in response to a request should be legible, so long as the original records are legible. Public bodies and requesters may enter mutually satisfactory agreements to resolve any problems with regard to the production of records.

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### [AO-06-05](#)

FOIA does not require a public body to create a new record to satisfy a request. If a public body elects to abstract or summarize records, it can only charge for such a newly-created record pursuant to a prior agreement with the requester. A public body must provide a requester with an estimate of all charges in advance of providing copies if the requester asks for one. The purposes of FOIA are best served by clear and open communication between requesters and public bodies.

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## June

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### [AO-07-05](#)

This opinion rescinds Advisory Opinion 02 (March, 2005). The identities of victims need not but may be released pursuant to subsection D of § 2.2-3706. The release of such information is discretionary except where disclosure is prohibited or restricted under § 19.2-11.2. Furthermore, FOIA establishes a conflict resolution rule in subsection H of § 2.2-3706, which provides that in the event of conflict between § 2.2-3706 as it relates to requests made under § 2.2-3706 and other provisions of law, § 2.2-3706 shall control.

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## July

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### [AO-08-05](#)

Under FOIA, motor vehicle accident reports concerning juveniles should be treated the same as those concerning adults, except as provided in § 2.2-3706(C).

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**AO-09-05**

Two members of a public body who also serve as members of the board of a private entity do not transform that private entity into a public body subject to FOIA. Whether an entity is a public body subject to FOIA because it is supported principally by public funds must be determined on a case-by-case basis.

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**AO-10-05**

A "special study group" composed of citizen members appointed by a county board of supervisors to make recommendations to the Board and the county's Planning Commission is a public body subject to FOIA. Public bodies may adopt rules governing the placement and use of recording equipment during a meeting. However, a public body may not prohibit a recording from being made.

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**August**

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**AO-11-05**

The definition of a public body includes committees, subcommittees and other entities of public bodies that advise or perform delegated functions of the larger public body. Meetings of such committees are subject to the open meeting requirements of FOIA. A gathering of three members of a public body, or a quorum if less than three, to discuss the public business of that body, is a meeting subject to FOIA.

**2006**

**Opinion No.    Issue(s)**

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**February**

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**AO-01-06**

FOIA requires that meeting minutes contain a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. Public bodies should always include in meeting minutes a summary of any matter that appears on the agenda for that meeting and of any matters that are the subject of a motion or vote.

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**March**

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**AO-02-06**

Whenever three or more members, or a quorum, of a public body assemble and discuss or transact public business, it is a meeting subject to FOIA. If three or more members of one public body assemble at a meeting of a second public body, and discuss or transact the public business of both public bodies, the meeting is a joint meeting of both bodies.

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**AO-03-06**

FOIA requires that meetings of a joint committee of conference of the General Assembly or a quorum of any such joint committee of conference shall be open and governed by FOIA. FOIA does not define what constitutes a quorum of a joint committee of conference.

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[AO-04-06](#)

A joint committee of conference of the General Assembly may not hold a closed meeting in order to discuss matters concerning particular budget bills, unless one of the exemptions found in § 2.2-3711 would apply to specific portions of the discussion.

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**May**

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[AO-05-06](#)

A request for statutes and regulations granting legal authority to a public body is not a request for public records as contemplated by FOIA. FOIA expressly provides the procedure to follow if a public body needs additional time to respond to a request. A response that does not meet the procedural requirements of FOIA is not a proper response.

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[AO-06-06](#)

Opining whether a FOIA provision violates substantive due process under the federal Constitution is beyond the authority of the FOIA Council.

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**July**

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[AO-07-06](#)

An independent advisory panel created by a private entity pursuant to a grant agreement with a government body is not a public body subject to FOIA.

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**August**

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[AO-08-06](#)

Animal licensing records are open to the public under FOIA and § 3.1-796.86. Public bodies should not collect from citizens information that will become part of a public record unless such collection is required or necessary to the mission of the public body.

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**October**

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[AO-09-06](#)

An entity that states that its meetings are open to the public should provide public notice of those meetings, whether or not the entity is subject to FOIA.

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[AO-10-06](#)

A nonprofit foundation created by private citizens that voluntarily works with localities for the public good, but does not receive public funding, is not a public body subject to FOIA.

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## 2007

<u>Opinion No.</u>	<u>Issue(s)</u>
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### January

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[AO-01-07](#)

The closed meeting exemption for consultation with counsel regarding specific legal matters may not be used for the purpose of discussing a general policy in the absence of any specific legal transaction or dispute.

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### March

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[AO-02-07](#)

A public body may charge for the actual cost of staff time spent redacting records in response to a request. It may not charge any additional fee for a separate legal review of the same records.

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[AO-03-07](#)

An electronic mail message header showing the time and date when the message was received by a public body may not be withheld as *documentation or other information that describes the design, function, operation or access control features of any security system* under subdivision 3 of § 2.2-3705.2.

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[AO-04-07](#)

The authority of the FOIA Council is limited by statute to providing advisory opinions and guidance regarding FOIA. An opinion advising on the interaction of boat titling and registration laws with provisions of the Government Data Collections and Dissemination Practices Act would be beyond the authority of this office.

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### May

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[AO-05-07](#)

The student government of a public institution of higher education is a public body subject to FOIA. The branches of student government are analogous to the organization of government generally (i.e., legislative, executive, and judicial).



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## June

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### [AO-06-07](#)

Meetings must be noticed for the time when they actually begin. A public body must approve by vote in an open meeting a motion to convene a closed meeting, and must certify the closed meeting after reconvening in open session. The motion and certification must be included in the meeting minutes, along with records of the votes taken to approve the motion and certification.

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## July

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### [AO-07-07](#)

A center for independent living that receives 93% of its funding from public sources is a public body subject to FOIA.

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### [AO-08-07](#)

FOIA requires public notice to be given when a public body holds a public meeting. Failure to give the required notice is a violation of FOIA.

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### [AO-09-07](#)

FOIA allows a public body to charge for existing records. FOIA does not address what a public body may charge for additional access features beyond inspection and copying of existing records.

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### [AO-10-07](#)

Determining whether an entity is a public body as a *committee, subcommittee, or other entity however designated of a public body* depends on how the entity was formed and what functions it performs.

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## October

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### [AO-11-07](#)

A citizen advisory committee created by a constitutional officer is not itself a public body subject to FOIA. Records concerning such a committee in the possession of the constitutional officer are public records subject to FOIA.

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### [AO-12-07](#)

If a public body denies a request for public records in whole or part, it must send the requester a written response citing the law that allows the records to be withheld. The release of certain Department of Social Services records pertaining to child support enforcement matters is prohibited by law under Title 63.2 of the Code of Virginia.

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[AO-13-07](#)

FOIA allows public bodies to hold closed meetings to discuss the acquisition of real property if holding the discussion *in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body*. Absent such jeopardy to the public body's bargaining position or negotiating strategy, these discussions must be open.

**2008**

**Opinion No.**      **Issue(s)**

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**February**

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[AO-01-08](#)

Records concerning a public body's employment policies are open to disclosure. If a public body is unsure of the scope of a request, it should contact the requester to clarify the matter. A failure to respond to a records request is deemed a denial of the request and a violation of FOIA.

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**March**

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[AO-02-08](#)

Weekends and legal holidays are not counted as working days when computing the five working day time limit for a response to a request for public records. A public body must inform a requester in writing when it does not have the records the requester seeks. Clear communications are essential to the operation of FOIA.

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[AO-03-08](#)

The public policy of FOIA requires that exemptions from public access to records and meetings shall be narrowly construed. If a request is unclear, then the public body should contact the requester to clarify the matter.

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**April**

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[AO-04-08](#)

A public body may convene a closed meeting to discuss the formation and award of a procurement contract.

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**May**

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[AO-05-08](#)

FOIA does not require a public body to provide records, or portions thereof, that are not responsive to a request. Implementing a universal security policy requiring all visitors to

present identification before entering a public building does not inherently exclude the public from attending public meetings which may be held therein.

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**AO-06-08**

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Records concerning general law enforcement policy matters must be disclosed, but records specifying how policy will be implemented, i.e. the methods by which officers will conduct investigations, may be withheld as records of investigative techniques or procedures.

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**June**

**AO-07-08**

Failure to respond to a request for records is deemed a denial of the request and a violation of FOIA. Clear communications are essential to FOIA transactions.

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**October**

**AO-08-08**

A citizen advisory committee that was not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding, is not a public body subject to FOIA.

**AO-09-08**

FOIA provides that public bodies bear the burden of proof to establish an exemption by a preponderance of the evidence. However, FOIA is silent regarding whether a requester may challenge as an abuse of discretion a decision not to disclose records that are excluded from mandatory disclosure pursuant to a valid exemption, once the exemption has been established.

**AO-10-08**

The records of a community center created and funded by local government, operated by a nonprofit organization acting pursuant to a contract with the local government, are public records subject to FOIA.

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**November**

**AO-11-08**

A record that is not prepared, owned, or possessed in the transaction of public business is not a public record subject to FOIA. When conducting private business, public officials and employees should avoid indicia, such as agency letterhead, that make private records appear to carry the imprimatur of a public body.

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**December**

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[AO-12-08](#)

As a general rule, an individual member of a board, designated as a liaison to staff, is not a public body for meetings purposes. Records prepared, owned, or possessed by that member in the transaction of public business are public records subject to FOIA.

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[AO-13-08](#)

A record which is not prepared by, owned by, or in the possession of a public body is not a public record subject to FOIA.

**2009**

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**Opinion No.**

**Issue(s)**

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**March**

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[AO-01-09](#)

An agency that is supported wholly or principally by public funds is a public body subject to FOIA. A response to a records request that does not meet the procedural requirements of FOIA is not a proper response.

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[AO-02-09](#)

Scholastic records, by definition, are those records which contain information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution. A denial of a records request must cite the specific Code section that authorizes the withholding of the records.

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**May**

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[AO-03-09](#)

A task force jointly created by multiple public bodies to advise them is itself a public body subject to FOIA. Likewise, a regional public body provided for by statute and established by the resolutions of several local public bodies is also subject to FOIA. Both must comply with the procedural rules for conducting public meetings.

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[AO-04-09](#)

Subsection D of § 15.2-2907 provides that certain meetings that are or would be subject to review by the Commission on Local Government are not subject to FOIA.

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[AO-05-09](#)

FOIA requires that meeting minutes be in writing and include a record of any votes taken.

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**June**

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[AO-06-09](#)

Public bodies may make reasonable charges not to exceed the actual cost incurred in accessing, duplicating, supplying, or searching for requested records. Public bodies are not required to waive charges, but may do so in their discretion. Public bodies may not charge a requester for using certified mail without the requester's agreement.

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[AO-07-09](#)

Generally, local public bodies may not meet or cast votes by electronic means. A telephone conversation between an administrator and a single member of a public body is not a meeting subject to FOIA.

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**August**

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[AO-08-09](#)

Public records posted on a public body's website or otherwise put into the public domain remain subject to FOIA. It is generally expected that public bodies will not charge for sending brief electronic mail messages providing web addresses or copied excerpts of electronic records, as the actual costs incurred usually are negligible.

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**October**

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[AO-09-09](#)

A nonprofit foundation that raises funds from private sources to pay for its own operations and to provide financial support to a government entity is not a public body subject to FOIA.

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**November**

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[AO-10-09](#)

Subsection G of § 2.2-3706 provides exemptions for certain records held by local sheriffs and chiefs of police. As written it does not apply to records of the Department of State Police.

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**AO-11-09**

An advisory group created by a public body to advise the public body would itself be a public body subject to FOIA. However, such a group created by a public employee to advise the employee would not be a public body. Likewise, such an advisory group would not be a public body if it was self-appointed.

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<sup>1</sup> Chapters 917 and 987 of the 2000 Acts of Assembly.

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

<sup>3</sup> **SB 880 (Stuart); Department of Game and Inland Fisheries; disclosure of official records; exceptions.**

Provides that records of the Department shall be subject to the disclosure provisions of the Freedom of Information Act, except that personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, provided that such individuals have requested that the Department not disclose such information. However, statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify individual applicants or licensees shall be disclosed. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order, (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties, or (iii) to any person who is the subject of the record.

**SB 1332 (Cuccinelli); Private entities operating, managing, or supervising any portion of the state highway system.** Provides that a private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

**HB 2421 (May); Freedom of Information Act; definition of public record.** Clarifies that the definition of public record does not include correspondence, messages or other records or portions thereof created or received by a public employee, appointee or officer that relate to personal matters and do not address public business; however such records may be disclosed in the discretion of the custodian.

**HB 2471 (Hugo); Freedom of Information Act; salary records of teachers.** Provides that the disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board.

**HB 2630 (Crockett-Stark); Law-Enforcement Officers' Privacy Protection Act.** Allows a law-enforcement officer to request that personal information about the officer be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

<sup>4</sup> Va. Code § 2.2-3701 defines "public records" to mean "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*." [Emphasis added.]

<sup>5</sup> The Court held that the three-out-of-state plaintiff's lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

<sup>6</sup> *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>7</sup> *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

<sup>8</sup> All Council members were present except Dr. Treadway and Mr. Landon. By designation of the Attorney General, Stephanie Hamlett attended today's meeting in place of Mr. Malveaux. Mr. Fifer participated in the meeting from Alexandria via telephone pursuant to § 2.2-3708.1, due to a temporary medical condition.

<sup>9</sup> Senator Houck, Delegate Griffith, and subcommittee members Edwards, Malveaux, Spencer and Treadway voted in favor of recommending the bill.

<sup>10</sup> Senator Houck, Delegate Griffith, and Council members Axelle, Edwards, Malveaux, Miller, Whitehurst, Wiley, Spencer, and Treadway all voted in favor of recommending the bill. Council member Fifer voted against it.

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<sup>11</sup> Senator Houck, Delegate Griffith, and subcommittee members Spencer, Treadway, Whitehurst, and Hamlett voted in favor of recommending the bill.

<sup>12</sup> Mr. Fifer voted against the recommendation; all of the other Council members present voted in favor of recommending the bill.

<sup>13</sup> Council members Delegate Griffith, Senator Houck, Wiley, Treadway, Miller, Malveaux, Fifer, Whitehurst, Landon, and Selph were present. Council members Axselle and Spencer were absent. Senator Houck participated via teleconference.

<sup>14</sup> See *supra* note 1 for a summary of each bill.

<sup>15</sup> PII Subcommittee members are Senator Houck (chair), Delegate Griffith, Courtney Malveaux, Mary Yancey Spencer, George Whitehurst, Roger Wiley, and Sandy Treadway.

<sup>16</sup> The summary of SB 1318 (enacted as Ch. 849 of the 2009 Acts of Assembly) reads as follows:

**"Government Data Collection and Dissemination Practices Act; collection of social security numbers.** Extends from July 1, 2009, to July 1, 2010, the implementation of the prohibition against collecting an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. This bill is a recommendation of the Freedom of Information Advisory Council."

The summary of HB 2426 (enacted as Ch. 867 of the 2009 Acts of Assembly) reads as follows:

**"Government Data Collection and Dissemination Practices Act; collection of social security numbers.** Extends from July 1, 2009, to July 1, 2010, the implementation of the prohibition against collecting an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. The bill contains several technical amendments, all to become effective July 1, 2010. This bill is a recommendation of the Freedom of Information Advisory Council."

The second, third, fourth and fifth enactments of Ch. 849 of the 2009 Acts of Assembly (the equivalent enactments of Ch. 867 are identical) read as follows:

"2. That the second and fourth enactments of Chapter 840 of the Acts of Assembly of 2008 are amended and reenacted as follows:

**2. That the provisions of this act shall become effective on ~~July 1, 2009~~ July 1, 2010, except that the third and fourth enactments of this act shall become effective on July 1, 2008.**

**4. That every county and city, and any town with a population in excess of 15,000 shall, no later than September 10, 2008, provide the Virginia Municipal League or the Virginia Association of Counties, as appropriate, information on a form agreed upon by the Virginia Municipal League, the Virginia Association of Counties and staff of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science identifying (i) all state or federal statutes authorizing or requiring the collection of social security numbers by such county, city or town and (ii) instances where social security numbers are voluntarily collected or (iii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each such county, city or town shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The information required by this enactment shall be submitted no later than October 1, 2008 to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission. *The chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it is deemed that the public dissemination of such lists or portions of lists would cause a potential invasion of privacy.***

3. That the second and fourth enactments of Chapter 843 of the Acts of Assembly of 2008 are amended and reenacted as follows:

**2. That the provisions of this act shall become effective on ~~July 1, 2009~~ July 1, 2010, except that the third and fourth enactments of this act shall become effective on July 1, 2008.**

**4. That every county and city, and any town with a population in excess of 15,000 shall, no later than September 10, 2008, provide the Virginia Municipal League or the Virginia Association of Counties, as appropriate, information on a form agreed upon by the Virginia Municipal League, the Virginia Association of Counties and staff of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science identifying (i) all state or federal**



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statutes authorizing or requiring the collection of social security numbers by such county, city or town and (ii) instances where social security numbers are voluntarily collected or (iii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each such county, city or town shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The information required by this enactment shall be submitted no later than October 1, 2008 to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission. *The chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it is deemed that the public dissemination of such lists or portions of lists would cause a potential invasion of privacy.*

4. That the provisions of the first enactment of this act shall become effective on July 1, 2010.

5. That an emergency exists and the second and third enactments of this act are in force from their passage."

<sup>17</sup> Delegate Griffith, Senator Houck, and Council members Axselle, Wiley, Spencer, Malveaux, Fifer, Whitehurst, and Selph were present. Council members Landon, Treadway, and Miller were absent.

<sup>18</sup> This item was originally scheduled on the agenda under "Other Business," but was moved ahead to accommodate Chairman McGuirk's schedule. Secretary Pomata, also listed on the agenda to appear with Chairman McGuirk, was unable to attend today's meeting.

<sup>19</sup> As quoted in the minutes of the April 16, 2009 meeting of the ITIB, the motion at issue reads in relevant part as follows: "I move that the Board go into closed session pursuant to § 2.2-3711(A)(6) for the purpose of discussing the potential cost efficiencies for investment of public funds in transformation through the Northrop Grumman contract in support of any agency infrastructure budget deficiencies in FY2010, as this will involve bargaining, and discussion in open session would adversely affect the financial interest of VITA and the Commonwealth; and pursuant to § 2.2-3711(A)(7) for the purpose of conferring with legal counsel regarding the contract and regarding rules for conduct of the closed meeting."

<sup>20</sup> *Id.*

<sup>21</sup> Subsection A of § 2.2-3712 states as follows: "No closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting and (iii) makes specific reference to the applicable exemption from open meeting requirements provided in § 2.2-3707 or subsection A of § 2.2-3711. The matters contained in such motion shall be set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting."

<sup>22</sup> For further discussion of this distinction, please see Freedom of Information Advisory Opinion 01 (2007).

<sup>23</sup> Subcommittee members Delegate Griffith, Mary Yancey Spencer, Courtney Malveaux, and George Whitehurst were present at the meeting. Subcommittee members Senator Houck, Roger Wiley, and Sandra Treadway were absent.

<sup>24</sup> *See supra* note 1.

<sup>25</sup> HB 2427 (May) establishes the Protection of Social Security Numbers Act (the Act), which will become effective July 1, 2009. In brief, the Act exempts from FOIA the first five digits of SSNs except under certain limited circumstances, thereby making them confidential. HB 2427 provides penalties for improper disclosure. The final four digits of SSNs found in public records will remain open to public disclosure under FOIA.

<sup>26</sup> 5 U.S.C. § 552a Note ("Section 7" refers to § 7 of Pub. L. No. 93-579, 88 Stat. 1909 (1974)).

<sup>27</sup> Pages 2 and 3 of Chapter 849 of the 2009 Acts of Assembly in § 2.2-3808 A 1 to read as follows:

1. After the words "such number is specifically required by", ~~Strike~~ "federal or;" and
2. After the words "prior to January 1, 1975" ~~Insert~~ "or federal statute."

<sup>28</sup> For additional detail, please see the meeting minutes for the subcommittee meeting, today's date.

<sup>29</sup> Delegate Griffith, Senator Houck, and Messrs. Axselle, Fifer, Landon, Malveaux, Miller, and Whitehurst were present. Council members Spencer, Treadway, Wiley, and Selph were absent.

<sup>30</sup> The Public Records Subcommittee is comprised of Messrs. Fifer, Malveaux, and Selph.

<sup>31</sup> Delegate Griffith, Senator Houck, and Messrs. Axselle, Fifer, Landon, Malveaux, Miller, Whitehurst and Wiley were present. Mr. Selph was absent.

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<sup>32</sup> In full, subsection C of § 23-9.2:10 reads as follows: *Each committee shall be charged with: (i) providing guidance to students, faculty, and staff regarding recognition of threatening or aberrant behavior that may represent a threat to the community; (ii) identification of members of the campus community to whom threatening behavior should be reported; and (iii) policies and procedures for the assessment of individuals whose behavior may present a threat, appropriate means of intervention with such individuals, and sufficient means of action, including interim suspension or medical separation to resolve potential threats.*

<sup>33</sup> SB 1505 added prefatory clauses in §§ 2.2-3713 and 8.01-644 stating that the provisions of § 8.01-644 do not apply to petitions for mandamus filed under § 2.2-3713. Specifically, as amended by SB 1505, subsection C of § 2.2-3713 reads as follows: *Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made. However, any petition made outside of the regular terms of the circuit court of a county that is included in a judicial circuit with another county or counties, the hearing on the petition shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law. As amended by SB 1505, § 8.01-644 reads as follows: Except as provided in § 2.2-3713, application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.*

<sup>34</sup> Mr. Fifer voted against the motion; Delegate Griffith and Ms. Spencer were not present at the time the vote was taken.

<sup>35</sup> Developed in cooperation with the Virginia Association of Counties and the Virginia Municipal League.