

**REPORT OF THE**

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# **Virginia Freedom of Information Advisory Council**

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



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RICHMOND  
2014**





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

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

COMMONWEALTH OF VIRGINIA  
DECEMBER 2014

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OF THE  
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Senator Richard H. Stuart, Chair  
Delegate James M. LeMunyon, Vice Chair  
Christopher Ashby  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Forrest M. "Frosty" Landon  
Timothy Oksman  
John G. Selph  
Robert L. Tavenner  
Sandra G. Treadway  
George T. Whitehurst

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*Division of Legislative Services*

Maria J.K. Everett, *Executive Director and Senior Attorney*  
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# REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**To: The Honorable Terence R. McAuliffe, Governor of Virginia  
and The General Assembly of Virginia**

**Richmond, Virginia  
December 2014**

## INTRODUCTION

"Nothing could be more axiomatic for a democracy than the principle of exposing the process of government to relentless public criticism and scrutiny."

Rourke, Francis E. 1960. Administrative Secrecy: A Congressional Dilemma.  
*The American Political Science Review* 54 (3):684-694

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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 Virginia 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

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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*.

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 as well as 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 an ombudsman role, the Council is a resource for the public, representatives of state and local government, and members of the media.

## EXECUTIVE SUMMARY

In its fourteenth year, the Council continued to fulfill its role as a clearinghouse for public access issues for the Virginia General Assembly. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to the Virginia Freedom of Information Act (FOIA) and access generally. In its 14-year history, the Council has provided more than 20,000 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 770 FOIA training programs. The Council is recognized as the forum for evaluating proposed FOIA and related public access legislation and routinely conducts comprehensive studies of FOIA and other Virginia laws to ensure Virginia's commitment to open government while balancing the need to protect the public's negotiating and litigation positions, privacy, and safety.

During this reporting period—December 1, 2013, through November 30, 2014—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. The three bills referred to the Council by the General Assembly are:<sup>3</sup>

- **HB 339 (Anderson) / SB 387 (Reeves)** - FOIA; certain proprietary records of the Department of Rail and Public Transportation.
- **HB 788 (LeMunyon)** - FOIA; out-of-state requests for records.
- **HB 839 (Brink)** - FOIA; applicability to the Office of the Attorney General.

Additionally, House Joint Resolution No. 96 (HJR 96, LeMunyon) was enacted, which directs the FOIA Council to study all exemptions contained in FOIA and determine the

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<sup>3</sup> Summaries of each of the bills referenced appear as Appendix A to this report.

continued applicability or appropriateness of such exemptions. HJR 96 directs the Council to determine whether FOIA should be amended to eliminate any exemption from FOIA that the FOIA Council determines is no longer applicable or appropriate. HJR 96 also requires the FOIA Council to examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The FOIA Council is required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open-government organizations; and other interested parties. All agencies of the Commonwealth are required to provide assistance to the FOIA Council for this study, upon request. The resolution requires the FOIA Council to report its findings and recommendations by December 1, 2016. To begin the three-year study, the Council developed a study plan and organizational timetable and addressed issues such as the use of subcommittees and work groups to carry out the study as directed by HJR 96.

The Council appointed two subcommittees to begin work on the HJR 96 FOIA study: the Records Subcommittee and the Meetings Subcommittee. HB 339 and SB 387, referred to the Council for study by the General Assembly, were added to the work of the Records Subcommittee. HB 788 and HB 839 were considered by the full Council, which took no action on either bill. The Records Subcommittee consisted of Council members Robert Tavenner (chair), Christopher Ashby, Stephanie Hamlett, and G. Timothy Oksman. The Meetings Subcommittee consisted of Council members George Whitehurst (chair), Kathleen Dooley, John Selph, Forrest “Frosty” Landon, and G. Timothy Oksman. Three recommendations for amending or eliminating exemptions were made by the respective subcommittees and adopted by the Council. However, the Council decided to defer introduction of this legislation until the three-year study of FOIA is completed. All recommendations of the Council concerning HJR 96 will be presented in one omnibus bill in the 2017 Session. Summaries of the Records Subcommittee’s and Meetings Subcommittee’s work, including agendas, recommendations, and exemption worksheets, are available on the Council’s website.

The Council continued to monitor Virginia court decisions relating to FOIA. In the spring of 2014 the Supreme Court of Virginia issued an opinion in *American Tradition Institute v. Rector and Visitors of the University of Virginia*. This case concerned a request for a former professor’s electronic mail concerning climate science research. The decision addressed an exemption for certain higher education records and the use of the term “proprietary” in that exemption, as well as charges allowed under FOIA. In summary, the Court upheld the decisions of the trial court in favor of the University of Virginia, holding that the term “proprietary” should be given its ordinary usage, reflecting rights of ownership and control; that the University had established all of the elements for the exemption to apply; and that public bodies may charge under FOIA for reviewing records “to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law.”

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes every opportunity to provide FOIA training programs. During 2014, Council staff conducted 53 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. Also, all Council-sponsored training programs, whether the statewide workshops or specialized programs, are preapproved by the Virginia State Bar for continuing legal education credit for licensed attorneys. The training programs are also preapproved by the Department of Criminal Justice Services for law-enforcement in-service credit, the Virginia Municipal Clerks Association, and the Virginia School Board Association for academy points. The Council also held its annual FOIA Workshops in Manassas, Richmond, and Norfolk.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,494 inquiries. Of these inquiries, six resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: one by a government official, three by media representatives, and two by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 873 were made by government officials, 148 by media, and 467 by citizens. Since 2006, the Council has seen an increase in the number of informal opinion requests compared with requests for formal written opinions. This continuing trend appears to stem from the Council's reputation for fairness and reliability in its informal opinions and as a creditable source for FOIA guidance before disputes arise.

FOIA was again the subject of significant legislative activity in the 2014 Session. The General Assembly passed a total of 10 bills amending FOIA during the 2014 Session. One bill passed the General Assembly that was recommended by the FOIA Council: HB 219, which extends an existing record exemption for educational institutions for confidential letters and statements of recommendation to include records respecting an application for promotion. This bill was the only legislation recommended by the FOIA Council.

One bill creates a new section (§ 2.2-3703.1) in FOIA as follows:

- Provides that nothing in FOIA shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena, nor shall any discretionary exemption from mandatory disclosure be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law. (HB 380 adding new § 2.2-3703.1.)

One bill adds a new records exemption as follows:

- Creates an exemption for certain records of the judicial performance evaluation program. (HB 272 amending § 2.2-3705.7.)

Eight of the 10 bills amend existing provisions of FOIA as follows:

- Amends the current provision allowing individual members of public bodies to participate in public meetings by electronic means when a personal matter or emergency prevents their physical attendance. (HB 193 and SB 161 amending § 2.2-3708.1.);

- Amends an existing record exemption for educational institutions for confidential letters and statements of recommendation placed in the records of educational agencies or institutions to include records respecting an application for promotion. (HB 219 amending § 2.2-3705.4.);
- Amends an existing exemption for records of administrative investigations to include certain records of investigations conducted by a public institution of higher education relating to individual employment discrimination complaints or audits/investigations of any officer, department, or program at such institutions. (HB 703 and SB 78 amending § 2.2-3705.3.);
- Amends the existing requirement for state agencies in the executive branch to post a statement of FOIA rights and responsibilities on their website to add a statement regarding allowable charges. (HB 837 amending § 2.2-3704.1.);
- Adds internal auditors appointed by the head of a state agency or the board of visitors of a public institution of higher education to the list of those who may use a current exemption for audit investigation records. (HB 1053 amending § 2.2-3705.3.);
- Changes the name of the State Lottery Department to the Virginia Lottery, the State Lottery Board to the Virginia Lottery Board, and the State Lottery Fund to the Virginia Lottery Fund. The bill contains numerous technical amendments to accomplish these name changes. (HB 1079 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.)

A more detailed report of the bills discussed above and other public access bills passed during the 2014 Session appears on the Council's website and is attached as Appendix D to the 2014 Annual Report of the FOIA Council.

Also of significance was the 2013 Council-recommended HB 1263 (Stuart),<sup>4</sup> which relaxed the quorum requirements for the conduct of electronic communication meetings (subsection H of § 2.2-3708) as a one-year pilot program. As enacted, this provision allowed certain state-level advisory bodies to conduct meetings using audio-visual technology without assembling a quorum in a single physical location. However, no state-level advisory bodies

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<sup>4</sup> **Virginia Freedom of Information Act; meeting by electronic communication means by certain committees, subcommittees, etc., of state public bodies; personal matters.** Authorizes an advisory public body, defined as any state public body classified as advisory pursuant to § 2.2-2100, or any committee, subcommittee, or other entity, however designated, of a state public body created to advise the state public body, to meet by electronic communication means without a quorum of the advisory public body being physically assembled at one location, provided, among other requirements, the meeting is conducted utilizing a combined audio and visual communication method. The bill requires any advisory public body holding this kind of electronic-communication meeting to make an audiovisual recording of the meeting, which recording shall be preserved by the advisory public body for a period of three years from the date of the meeting. The bill also enhances the annual reporting requirements for any public body authorized to conduct electronic communication meetings and requires the FOIA Council to develop a form that an authorized public body must make available to the public at any such meeting for public comment. The above-described provisions of the bill by its terms will expire on July 1, 2014. Finally, the bill allows a member of any public body to participate in a meeting by electronic communication means due to personal matters under certain circumstances. Currently, such remote participation is allowed only for emergency, medical condition, or distance from the meeting location of more than 60 miles. The bill is a recommendation of the Virginia Freedom of Information Advisory Council.

took advantage of this pilot program, and the General Assembly did not act to extend the sunset provision. As a result, Subsection H of § 2.2-3708 expired on July 1, 2014.

In response to confusion concerning the production of records from geographic information systems (GIS), Council staff worked with staff of the Virginia Information Technologies Agency (VITA) to produce a guidance document on how to handle GIS records under FOIA. The Council learned that the current language in FOIA only addresses charges for topographic maps and is outdated. While data collection remains much the same as it was in the past, the technology used is more accurate, of higher quality, and easier to access. For example, Google mapping technology allows for viewing by address or tax parcel and provides aerial views and views of structural footprints. Additional options are available from other competitive software providers and through “cloud” technologies. Many states and localities now provide free online access to mapping technology. Given this technological progress, GIS data need not be treated differently from other records subject to FOIA. As a further example, the Virginia Base Mapping Program has a FOIA exemption and latitude to set charges, but now operates at a much lower cost than it did in 2002. There should not be any privacy issues from using “cloud” technologies, and maps can be produced at any desired size.

The Council grappled with an unexpected electronic-communication meeting issue raised at its annual legislative preview. The issue concerned an instance when one Board member’s request to participate by electronic means due to a personal matter was denied, whereas previously another member’s request had been approved. The resulting perception was that the denial in the second instance was based on how the majority felt the member who requested remote participation would vote on a controversial issue. Such a result was not what was intended by the law allowing such remote participation for personal matters, in that the law was not meant to be used to “pick and choose” participants based on their positions on issues. The Council reviewed legislation that would require a one-time determination by each public body regarding its policy on approving such participation. The policy would then be applied uniformly to all members. Initially, the Council questioned whether this might be a case of a bad situation making for bad law, and members were hesitant to amend the law due to a single instance. Testimony on this issue indicated that the situation would likely reoccur. Concern was also raised that the proposal would allow each local public body to set policy, rather than having a uniform access policy set by the General Assembly. While the Council took no action on this issue, Council staff participated with other interested parties to craft a legislative solution.

Council staff also participated, along with the Office of the Attorney General, in the production of a FOIA Open Meetings video as part of a 2014 legislative directive to the State Council of Higher Education for Virginia (SCHEV). Though the video was produced for Virginia’s boards of visitors of public institutions of higher education, it applies to any deliberative body subject to FOIA’s open meetings requirements. Its message is that prior experience on private corporate boards does not translate to service on public boards and commissions. The Council commends this video as applicable and instructive to any member of a public board or commission. The FOIA video is available on the SCHEV website.

In 2014, the Council welcomed Tim Oksman as the designee of the Attorney General to the Council.

## **WORK OF THE COUNCIL**

### **April 22, 2014**

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of 2014.<sup>5</sup> This meeting was held to hear bills referred by the 2014 Session of the General Assembly, to establish a study plan pursuant to House Joint Resolution 96, to establish Subcommittees, and to present other issues of interest to the Council.

#### **Other Business**

After calling the meeting to order, Delegate LeMunyon took up a later agenda item first because Delegate Bulova was present with his constituent, Mr. Donald Garrett. After Delegate Bulova introduced him, Mr. Garrett spoke to the Council about his concerns that there are currently no provisions addressing retaliation in the Virginia Freedom of Information Act (FOIA). He related that as a student at a public institution of higher education, he had been labeled as a "student of concern" after making records requests under FOIA and attending public meetings. He said that his motives for requesting records and attending meetings had been questioned by administrators. Mr. Garrett submitted an issue paper for the Council's consideration, herein incorporated by reference. Delegate LeMunyon asked whether the school had provided the records Mr. Garrett had requested; Mr. Garrett said that while the response to his FOIA request followed the law, he was concerned over what happened afterward. Delegate LeMunyon asked whether Mr. Garrett was labeled a "student of concern" before or after he made his FOIA requests. Mr. Garrett replied that he was not entirely sure, but he became aware of it after making his FOIA requests. In response to further inquiry, Mr. Garrett said that once he was labeled a "student of concern," he was monitored and questioned by the administration several times, but it had been about half a year since the last such meeting. The Council had no further questions and took no action on this item at this time.

#### **Recap of FOIA and Related Access Bills from 2014 Session of General Assembly**

Staff presented a preview of the 2014 Legislative Update, herein incorporated by reference, noting that it is currently in draft form, as the Governor has submitted recommendations to amend several bills and the Reconvened Session is to be held April 23, 2014. The General

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<sup>5</sup> FOIA Council members Delegate LeMunyon, Ashby, Dooley, Hamlett, Landon, Payne (sitting as the Attorney General's designee), Selph, Tavenner, and Whitehurst were present; members Senator Stuart, Jones, and Treadway were absent.

Assembly passed a total of ten bills amending the Virginia Freedom of Information Act (FOIA) during the 2014 Session. One bill passed the General Assembly that was recommended by the FOIA Council: House Bill 219 (Albo), which amends an existing record exemption for confidential letters and statements of recommendation placed in the records of educational agencies or institutions to include records respecting an application for promotion. One bill, House Bill 380 (Surovell), creates a new section in FOIA that provides that nothing in FOIA shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena, nor shall any discretionary exemption from mandatory disclosure be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law. One bill, House Bill 272 (Loupassi), adds a new records exemption to FOIA for certain records of the judicial performance evaluation program. The remaining bills all amend existing provisions of FOIA. Two of the bills amending FOIA, and several other access-related bills, were awaiting action on the Governor's recommendations. Please see the full Draft 2014 Legislative Update for further details.

### **Bills referred to Council for study by 2014 Session of General Assembly**

Staff related the General Assembly had referred four bills to the Council for study this year. House Bill 339 (Anderson) and SB 387 (Reeves)<sup>6</sup> are identical bills addressing certain proprietary records of the Department of Rail and Public Transportation. No one appeared to speak to these bills. House Bill 788 (LeMunyon)<sup>7</sup> addressed out-of-state requests for records. Currently FOIA grants rights to citizens of the Commonwealth and certain media representatives, and the United States Supreme Court upheld this limitation last year.<sup>8</sup> Delegate LeMunyon noted that currently out-of-state requesters get around the limitation by having someone in Virginia make the same request on their behalf, but that there was also a concern that public bodies could be inundated with a large volume of requests from out-of-state if there were no limitations. House Bill 839 (Brink)<sup>9</sup> addressed the applicability of FOIA to the Office of the Attorney General (OAG). Delegate Brink stated that he brought the bill because the former Attorney General had included with some FOIA responses a footnote indicating that the OAG may not be subject to FOIA, following the reasoning of

the Supreme Court of Virginia holding that FOIA does not apply to the State Corporation Commission.<sup>10</sup> While the former Attorney General had told his staff to stop including that note, Delegate Brink indicated he felt it would be best if FOIA explicitly stated that it does apply to the OAG so there would be no confusion or doubt in the future.

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<sup>6</sup> **HB 339 (Anderson)/SB 387 (Reeves) - FOIA; certain proprietary records of the Department of Rail and Public Transportation.** Provides an exemption for confidential proprietary information and trade secrets, including commercial or financial information, balance sheets, revenue and cost projections, and detailed freight origin and destination information provided by a private transportation business to the Virginia Department of Transportation and or the Department of Rail and Public Transportation for any purpose authorized or regulated by state law, including obtaining and administering grants or other financial assistance for transportation projects, provided such information is exempt from disclosure under federal laws governing transportation or the federal Freedom of Information Act.

<sup>7</sup> **HB 788 (LeMunyon) - FOIA; out-of-state requests for records.** Sets out the process for public bodies to respond to record requests made by out-of-state requesters.

<sup>8</sup> *McBurney v. Young*, 133 S.Ct. 1709 (2014).

<sup>9</sup> **HB 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Clarifies that for the purposes of FOIA applicable to access to public records, the Office of the Attorney General shall be considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill contains technical amendments.

<sup>10</sup> *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (2011).



## **FOIA Refresher**

Staff presented a brief overview of FOIA addressing the statutory structure of FOIA, the policy of FOIA favoring openness as the default rule, the procedure for making and responding to records requests, open and closed meetings requirements, and the remedies provisions of FOIA. Regarding statutory structure, staff observed that FOIA begins with the policy statement and several miscellaneous provisions, such as setting forth entities which are not subject to FOIA, requiring that elected and appointed officials familiarize themselves with FOIA, and the requirement for state agencies to post a statement of FOIA rights and responsibilities on their websites. The next sections of FOIA address the procedure for making and responding to FOIA requests, and set forth over 100 records exemptions. The following sections detail the procedures for holding open and closed meetings, and set forth approximately 45 closed meeting exemptions. FOIA concludes with remedies provisions to address violations. The policy of FOIA states that all public records and meetings are presumed to be open unless a specific exemption is invoked, and that all exemptions must be construed narrowly. Staff briefly addressed the requirements for making and responding to a records request under FOIA, noting that a requester cannot violate FOIA and that FOIA requests are not meant to be adversarial. Regarding meetings, staff noted the main requirements are that meetings be noticed, open to the public, and that minutes be taken. Closed meetings require that an open meeting be convened, then there must be a motion and vote to close the meeting. The motion must identify the subject and purpose of the closed meeting, and cite the appropriate statutory exemption. Paraphrasing or quoting the statutory language of the exemption is sufficient to identify the purpose of the closed meeting. However, the identification of the subject must be something more than a reference to the exemption, but need not be so specific as to defeat the reason for having the closed meeting. After a closed meeting the public body must reconvene in an open meeting and certify that the body only discussed matters identified in the motion that are allowed to be discussed in closed meeting. Regarding remedies, staff noted that the statutory remedy is a petition for mandamus or injunction, meaning that a court would order the public body to do something (mandamus) or not to do something (injunction), and that each court could craft orders to fit the particular violation(s). Additionally, FOIA provides that a petitioner shall be entitled to recover reasonable costs, including court costs, attorney fees, and expert witness fees, if the petitioner substantially prevails on the merits, unless the court finds special circumstances that would make the award unjust. Staff noted that such fees can be substantial, and related examples of awards in the tens of thousands of dollars. Additionally, FOIA contains provisions where an individual who is found to have knowingly and willfully violated FOIA can be made to pay a civil penalty to the State Literary Fund.

## **Public Comment**

Ginger Stanley of the Virginia Press Association commended the passage of House Joint Resolution No. 96 directing the Council to conduct a three-year study of FOIA. She stated that she had been involved with two prior legislative studies of FOIA and believed this one

would be the most thorough. She informed the Council that she had already received dozens of comments from reporters and correspondents with concrete examples of what does and does not work in FOIA currently.

Mary Davye Devoy, a citizen concerned with issues involving the Virginia Sex Offender Registry, indicated that she felt the discretion to disclose otherwise exempt records had been used improperly. Specifically, she related that she had been denied certain records she requested from the State Police, but a very similar request from researchers at Longwood University had been filled. She submitted written remarks on this issue, herein incorporated by reference.

Megan Rhyne of the Virginia Coalition for Open Government (VCOG) announced that VCOG will hold a workshop on June 4, 2014 in Fredericksburg. She stated that Maria Everett would speak on FOIA, someone from the Library of Virginia would speak on the Virginia Public Records Act, and that the Acting Public Information Director for the City of Alexandria would discuss the interaction between both Acts. More information is available on VCOG's website ([www.opengovva.org](http://www.opengovva.org)).

### **Study of the Virginia Freedom of Information Act - HJR No. 96 (LeMunyon)**

House Joint Resolution No. 96 (2014) directs the FOIA Council to study all exemptions contained in FOIA to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption from FOIA that the FOIA Council determines is no longer applicable or appropriate. HJR No. 96 also requires the FOIA Council to examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The FOIA Council is required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties. All agencies of the Commonwealth are required to provide assistance to the FOIA Council for this study, upon request. The bill requires the FOIA Council to report its findings and recommendations by December 1, 2016. Staff distributed a Study Plan Discussion Draft, herein incorporated by reference, which addresses the actual implementation of HJR No. 96. Staff observed that it was originally anticipated as a two-year study, but HJR No. 96 was actually passed as a three-year study. The goal is to look at all of the FOIA exemptions, asking whether they are needed, to look at the structure of FOIA, and to consider comments from others. After reviewing the Study Plan Discussion Draft, staff discussed the use of the word "proprietary" as a specific example, noting a recent decision of the Supreme Court of Virginia addressing the issue (case brief, *infra*), that the term "trade secrets" is defined in another statute, and that FOIA generally uses an "earmarking" process that allows vendors to designate categories of records to be protected, and gives government the ability to agree or disagree in advance. Staff suggested that some of the bills referred by the General Assembly could be taken up within the context of the HJR No. 96 study. It was agreed to begin the study as suggested in the Study Plan Discussion Draft by forming two subcommittees, one to start studying records exemptions, and the other to address meetings.

Delegate LeMunyon opened the floor to questions about the study. Mr. Landon asked how the Council might look at the experience of the office, noting that there was no FOIA Council for previous legislative studies to consider, and that FOIA does not have a provision concerning the Council's role as an informal mediator for FOIA disputes. Staff noted the Council can examine any issue it chooses regarding access and open government. Mr. Landon further noted that many years ago the Office of the Attorney General (OAG) indicated it would generally agree with FOIA Council opinions unless there was severe disagreement, but that policy was not written anywhere. Staff related that the Council has always maintained a very good relationship with the OAG, and is consulted on FOIA matters. Staff also noted that the specific language of HJR No. 96 does not address the role of the FOIA Council.

Ms. Dooley asked whether the Meetings Subcommittee suggested in the Study Plan Discussion Draft to be established in 2014 would continue its work in 2015, noting that with 45 exemptions to consider as well as procedural issues, it might not complete its work in 2014. Staff agreed that the Subcommittee would continue its work in 2015 if needed, or as the Council decides.

Delegate LeMunyon noted that if the next Council meeting is in July, the subcommittees would be able to meet once or twice before then. Staff noted that it would be more convenient to schedule subcommittee meetings on the same day. Delegate LeMunyon stated that the study would take a "zero based FOIA" approach by assuming everything was open to the public and requiring justification for any exemptions. He further noted that there is no requirement to hold meetings in Richmond, and suggested it might be useful to hold regional meetings to hear from local governments. Taking up the bills referred to the Council by the 2014 Session of the General Assembly, the Council agreed without objection to refer HB 339 and SB 387 to the Records Subcommittee, and that HB 788 and HB 839 would stay in the full Council for consideration.

### **Appointment of Subcommittees related to bills referred and study of FOIA**

Delegated LeMunyon then asked for volunteers to comprise the subcommittees, beginning with the Records Subcommittee. Members Ashby, Hamlett, and Tavenner volunteered, and Mr. Payne volunteered the designee of the Attorney General. Members Dooley, Landon, Selph, and Whitehurst comprise the Meetings Subcommittee. Staff was directed to contact those Council members who could not be present today so that they might choose to participate in a Subcommittee as well.<sup>11</sup>

### **Of Note**

*American Tradition Institute v. Rector and Bd. of Visitors of the University of Virginia*

The decision of the Supreme Court of Virginia in *American Tradition Institute v. Rector and Visitors of the University of Virginia* was issued Thursday, April 17, 2014. This case concerned

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<sup>11</sup> After being contacted by staff, Mr. Oksman, the designee of the Attorney General, subsequently indicated he would be willing to participate as a member of both subcommittees.

a request for a former professor's electronic mail concerning climate science research. The decision addressed an exemption for certain higher education records and the use of the term "proprietary" in that exemption, as well as charges allowed under FOIA. Staff prepared a case brief, herein incorporated by reference. In summary, the Court upheld the decisions of the trial court in favor of the University, holding that the term "proprietary" should be given its ordinary usage, and reflects rights of ownership and control; that the University had established all of the elements for the exemption to apply; and that public bodies may charge under FOIA for reviewing records "to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law."

*Electronic meetings; July 1, 2014 sunset provision on subsection H of § 2.2-3708*

Subsection H of § 2.2-3708 was passed last year to allow certain state-level advisory bodies to conduct meetings using audio-visual technology without assembling a quorum in a single physical location. The General Assembly did not act to extend the sunset provision; this subsection will expire on July 1, 2014. Staff observed that none of the annual electronic meeting reports received by the Council this year mentioned any use of this provision.

*State Council on Higher Education for Virginia FOIA video press release*

Staff announced that the State Council on Higher Education for Virginia (SCHEV) had issued a press release stating that its FOIA video, created in conjunction with the Office of the Attorney General and the FOIA Council, is available on SCHEV's website. Staff noted that the video was shown at the conclusion of the December 5, 2014 meeting of the FOIA Council.

## **September 16, 2014**

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of 2014.<sup>12</sup> This meeting was Part I of the Council's annual legislative preview, with Part II to be held on November 18, 2014. The Council also discussed the bills referred to it by the 2014 Session of the General Assembly and received progress reports from its two subcommittees.

### **Subcommittee Reports**

***Records Subcommittee:***

Staff presented a progress report of the work of the Records Subcommittee to date. Staff advised that the Records Subcommittee has met three times (May 14, July 8, and August 25) to study the exemptions of general application and exceptions thereto found in §§ 2.2-3705.1 and 2.2-3705.8 as per the study plan adopted by the Council. The Subcommittee has followed the exemption worksheet prepared by staff to review each exemption. Public comment was asked for and received on a per exemption basis, which comment was thoughtfully considered by the Subcommittee.

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<sup>12</sup>All FOIA Council members were present, except Messrs. Tavenner, Whitehurst, Landon, Ashby and Jones, who were absent.

The Subcommittee considered all of the 13 exemptions in found § 2.2-3705.1 and 15 of the 33 exemptions found in § 2.2-3705.7. As several of these exemptions concern specific agencies, agency representatives were invited to attend the Subcommittee meeting. For agencies that have additional exemptions in this section, the Subcommittee also considered those exemptions at the same time.

The specific exemptions that have been considered include the following:

- The personnel exemption found at subdivision 1 of § 2.2-3705.1 and the exceptions to that exemption found at subsection A of § 2.2-3705.8.
  - Staff suggested that, for clarity, it would be helpful to combine these provisions in one location, since both provisions address the treatment of personnel records. Staff also suggested adding the word "name" to the listed exceptions in clause (ii) of subsection A of § 2.2-3705.8 in order to codify explicitly prior opinions of the Attorney General and FOIA Council that employee names cannot be withheld as personnel records.<sup>13</sup> There was some discussion about the use of the phrase "shall open such records for inspection and copying" relating to whether the public body would have to make and send copies on request or merely make the records available so a requester could come to the public body's office and make his or her own copies. The Subcommittee agreed to have staff draft a new version that would incorporate both the exemption and the exceptions to it and that would include "name" in the list of exceptions. Mr. Merritt also suggested that certain records concerning higher-level administrators should be more transparent, such as records of benefits packages and the circumstances of departure when such senior employees leave. The Subcommittee agreed to have Mr. Merritt come up with an appropriate proposal for consideration.
- Written advice of legal counsel and other records protected by the attorney-client privilege under subdivision 2 of § 2.2-3705.1.
  - Peter Easter, on behalf of VAB, stated that this exemption was used too broadly in practice. Mr. Tavenner stated that the exemption itself covers more than just attorney-client privileged records. After some further discussion among the Subcommittee and Mr. Merritt, it was agreed that the attorney-client privilege part of the exemption was fine as it is, but Mr. Jones would draft a proposal to establish clearer boundaries regarding what qualifies as written advice of legal counsel.
- Work-product exemption found in subdivision 3 of § 2.2-3705.1.
- Tests or examinations, subdivision 4 of § 2.2-3705.1.

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<sup>13</sup> See 1987-1988 Op. Atty. Gen. Va. 33; 1978-1979 Op. Atty. Gen. Va. 310; Freedom of Information Advisory Opinions 01 (2009), 01 (2002), and 28 (2001).

- Records prepared exclusively for use in closed meetings under subdivision 5 of § 2.2-3705.1.
  - Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she had received many questions regarding whether this exemption would still apply if materials were distributed to members at closed meetings but were not collected from the members afterward (i.e., the members took the documents with them after the closed meeting ended). The matter was discussed among the Subcommittee members, staff, Roger Wiley (a local government attorney and former FOIA Council member), and Mr. Merritt and Ginger Stanley of the VPA. The consensus was that the key to the exemption was whether the records were still exclusively for use in a closed meeting and that once the records were used for some other purpose, the exemption would no longer apply. No change was recommended.
  
- Certain "vendor proprietary information software" under subdivision 6 of § 2.2-3705.1.
  - Mr. Oksman pointed out that the exemption begins by stating it applies to "vendor proprietary information software" but subsequently defines "vendor proprietary software" instead, and the two phrases should be amended to match. Mr. Merritt noted that the Supreme Court of Virginia had recently addressed the meaning of the term "proprietary" in the context of a different exemption,<sup>14</sup> that the Uniform Trade Secrets Act defines the term "trade secrets,"<sup>15</sup> and that it might be best to consider creating a single comprehensive exemption for all proprietary information and trade secrets. Eric Link of the Virginia Information Technologies Agency (VITA) pointed out that in addition to commercially purchased software, the exemption could also apply to open-source software, depending on the user agreement and rights. Mark Flynn of the Virginia Municipal League (VML) pointed out that the exemption refers to "processing data" and thus would not apply to operating systems or other software that was not used for data processing. Mr. Tavenner noted that the language used in the exemption is antiquated and needs to be rewritten. The Subcommittee agreed to give this exemption further consideration along with the other exemptions for proprietary records and trade secrets when it considers § 2.2-3705.6 at a later meeting.
  
- "Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth" under subdivision 7 of § 2.2-3705.1.
  
- Certain appraisals and cost estimates of real property under subdivision 8 of § 2.2-3705.1.

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<sup>14</sup> *American Tradition Institute v. Rector and Visitors of the University of Virginia*, No. 130934 (Va. April 17, 2014).

<sup>15</sup> § 59.1-336.

- Mr. Jones asked what was meant by the word "proposed" in the phrase "subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease." Mr. Wiley observed that generally, government would not do an appraisal if it was not considering buying or selling the property, and that eminent domain requires appraisals to be given. Joanne Sherman of the Virginia College Savings Plan noted there are instances where a building is an investment and is appraised, but not for sale. Mr. Easter noted that there can be situations such as a relative of a local board member buying a property where there is no way for the public to know in time to stop the deal. Others pointed out that such a situation is really a conflict of interests law problem rather than a FOIA issue. Mr. Tavenner questioned the need for the exemption; others responded it was to protect the public purse. The Subcommittee also discussed the difficulties involved in large projects where multiple owners may be involved and noted that a corresponding meetings exemption exists. There were no further comments or proposals for changing the existing exemption.
- Records concerning reserves established in specific claims administered by the Division of Risk Management or a locality, and investigative records of claims or potential claims against a public body's insurance under subdivision 9 of § 2.2-3705.1.
- Personal information provided 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 (i.e., "opts out") under subdivision 10 of § 2.2-3705.1.
  - Staff related that this exemption had been the subject of two prior advisory opinions<sup>16</sup> because it had mistakenly been interpreted as an exemption for all "personal information," as it refers to the definition of "personal information" in § 2.2-3801 of the Government Data Collection and Dissemination Practices Act, while the original intent was to protect citizens from unwanted electronic mail ("email spam"). The Subcommittee members and interested parties debated the reasoning behind the exemption. Ms. Rhyne observed that most exemptions to protect the public are for safety reasons, but this exemption was to protect the public from commerce. Phyllis Errico of the Virginia Association of Counties (VACo) observed there could be a chilling effect on communications with government if citizens knew their email addresses would be released. Ms. Hamlett noted that in addition to commercial interests, there could be concerns regarding cyber-bullying or stalkers as well. Mr. Tavenner observed there are competing policies at issue. Mr. Link stated that there was potential for misuse, as well as an

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<sup>16</sup> Freedom of Information Advisory Opinions 11 (2007) and 07 (2004).

administrative burden in keeping a list of who had "opted-out." After hearing suggestions from Mr. Merritt, Mr. Wiley, and Mr. Flynn, the Subcommittee agreed to have staff draft an amendment to remove from the exemption the reference to the definition of "personal information" in § 2.2-3801.

- Subdivision 11 of § 2.2-3705.1 is merely a cross-reference to an exemption outside of FOIA in § 2.2-4119 of the Virginia Administrative Dispute Resolution Act.
- Subdivisions 12 and 13 of § 2.2-3705.1, which provide exemptions for certain records regarding contract negotiations and financial account numbers, respectively, both of which were FOIA Council recommendations.
  - Tax records exemption referencing § 58.1-3 tax records prohibition (§ 2.2-3705.7(1));
  - Working papers and correspondence of certain officials (§ 2.2-3705.7(2))
  - Library records (§ 2.2-3705.7(3));
  - Certain contract cost estimates and other records of the Department of Transportation (§ 2.2-3705.7(4));
  - Lists of owners of bonds issued by a political subdivision (§ 2.2-3705.7(5));
  - Records relating to financial disclosures by members of the General Assembly (§ 2.2-3705.7(6));
  - Public utility customer account information (§ 2.2-3705.7(7));
  - Personal information filed with the Virginia Housing Development Authority or a local housing and redevelopment authority (§ 2.2-3705.7(8));
  - Hazardous waste facility siting records (§ 2.2-3705.7(9));
  - Records regarding certain plant and animal species, natural communities, caves, and significant historic and archaeological sites (§ 2.2-3705.7(10));
  - Certain game-related records of the Virginia Lottery (§ 2.2-3705.7(11));
  - Certain investment-related records of the Virginia Retirement System, University of Virginia, and Virginia College Savings Plan (§ 2.2-3705.7(12));
  - Certain records of the Department of Environmental Quality, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to enforcement actions (§ 2.2-3705.7(16));
  - Certain records of the Virginia Lottery concerning retailers and individual game winners (§ 2.2-3705.7(18));
  - Certain records of the Virginia Retirement System, a local retirement system, or the Virginia College Savings Plan relating to certain investment strategies, investment managers, or trade secrets (§ 2.2-3705.7(25)).

To date, the Subcommittee has requested that new drafts be prepared for the exemptions applicable to the following types of records:

- Personnel exemption (§ 2.2-3705.1(1));
- Written advice of legal counsel (§ 2.2-3705.1(1));
- Personal identifiers used to receive email (§ 2.2-3705.1(10)).



Additionally, the Subcommittee is looking at other states' laws concerning the working papers and correspondence exemption for certain public officials.

### *Meetings Subcommittee*

Staff presented a progress report of the work of the Meetings Subcommittee. Staff advised that the Meetings Subcommittee has met three times (May 14, July 8, and August 25) to study the exemptions found in §§ 2.2-3711 as per the study plan adopted by the Council. The Subcommittee has followed the exemption worksheet prepared by staff to review each exemption. Public comment has been asked for and received on a per exemption basis, which comment has been thoughtfully considered by the Subcommittee.

The following 19 exemptions found in subsection A of § 2.2-3711 have been reviewed by the Subcommittee, which closed meeting exemptions address the following topics:

- Personnel matters;
- Student discipline and scholastic matters;
- Real estate matters;
- Personal matters not related to public business;
- Prospective business or industry;
- Investment of public funds; and
- Legal matters; probable and actual litigation.
- Gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by boards of visitors of public institutions of higher education (§ 2.2-3711(A)(8));
- Honorary degrees or special awards (§ 2.2-3711(A)(10));
- Tests and examinations (§ 2.2-3711(A)(11));
- Hazardous waste siting agreements (§ 2.2-3711(A)(13));
- Medical and mental health records (§ 2.2-3711(A)(15));
- Discussions by local crime commissions involving the identity of anonymous informants (§ 2.2-3711(A)(17));
- Public safety and security plans (§ 2.2-3711(A)(19));
- Records of transactions conducted under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 2.2-3711(A)(28));
- Award of public contracts (§ 2.2-3711(A)(29));
- Proprietary records and trade secrets of a local governing body that provides telecommunication or cable television services (§ 2.2-3711(A)(33));
- Proprietary records and trade secrets of a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 2.2-3711(A)(34)); and
- Economic development and retention records (§ 2.2-3711(A)(40)).

Note that some of these exemptions are not in numerical order. These exemptions are grouped together here because they may be used more broadly than the remaining exemptions, which may only be used by specific, named public bodies.

The Subcommittee requested that new drafts be prepared for the exemptions that allow closed meetings for:

- Personnel matters (§ 2.2-3711(A)(1); and
- Legal matters (§ 2.2-3711(A)(7).

Finally, as an example of the Subcommittee's review, the closed meeting exemption for discussions by local crime commissions involving the identity of anonymous informants (§ 2.2-3711(A)(17)) needs further review given that it appears there are no local crime commission. The Subcommittee will confirm whether local crime commission exist, and if not, will recommend the elimination of this exemption.

### **Bills referred to Council for study by 2014 Session of General Assembly**

House Bill 339 (Anderson) and SB 387 (Reeves)<sup>17</sup> are identical bills addressing certain proprietary records of the Department of Rail and Public Transportation. At its meeting in April, the Council referred these bills to the Records Subcommittee to be incorporated into its study of FOIA records exemptions, specifically exemptions for proprietary records found in § 2.2-3705.6.

House Bill 788 (LeMunyon)<sup>18</sup> addressed out-of-state requests for records and House Bill 839 (Brink)<sup>19</sup> addressed the applicability of FOIA to the Office of the Attorney General (OAG). The Council deferred consideration of these bills until their meeting on November 18, 2014.

### **Legislative Preview**

No proposed legislation was brought to the attention of the Council.

### **Public Comment**

The Council called for public comment. There was none.

### **Of Note**

- **2014 FOIA Workshops.** Staff advised that the workshops this year have been scheduled for the following dates and locations:  
*October 20 -- Manassas, VA*  
*October 21 -- Richmond, VA*  
*October 23 -- Norfolk, VA*

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<sup>17</sup> **HB 339 (Anderson)/SB 387 (Reeves) - FOIA; certain proprietary records of the Department of Rail and Public Transportation.** Provides an exemption for confidential proprietary information and trade secrets, including commercial or financial information, balance sheets, revenue and cost projections, and detailed freight origin and destination information provided by a private transportation business to the Virginia Department of Transportation and or the Department of Rail and Public Transportation for any purpose authorized or regulated by state law, including obtaining and administering grants or other financial assistance for transportation projects, provided such information is exempt from disclosure under federal laws governing transportation or the federal Freedom of Information Act.

<sup>18</sup> **HB 788 (LeMunyon) - FOIA; out-of-state requests for records.** Sets out the process for public bodies to respond to record requests made by out-of-state requesters.

<sup>19</sup> **HB 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Clarifies that for the purposes of FOIA applicable to access to public records, the Office of the Attorney General shall be considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill contains technical amendments.

- **GIS & FOIA Handout.** Staff advised that it worked with staff of the Virginia Information Technologies Agency (VITA) to produce a guidance document on how to handle geographic information systems (GIS) records under FOIA. The "Guide to Geographic Information Systems Records" is available on the Reference Materials page of the FOIA Council website.

## November 18, 2014

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of 2014.<sup>20</sup> The Council received progress reports and recommendations from its two subcommittees, held Part II of the Council's annual legislative preview, discussed the adoption of an electronic communications meeting policy, and also discussed the bills referred to it by the 2014 Session of the General Assembly.

### Subcommittee Reports

#### *Records Subcommittee:*

Staff reported that the Subcommittee had met four times in the 2014 Interim and considered three sections of FOIA that cover records exemptions of general application, records exemptions of specific public bodies and certain other limited exemptions, and limitations on record exclusions, respectively.<sup>21</sup> The Subcommittee recommended making six legislative changes to these sections:

- Combine subdivision 1 of § 2.2-3705.1 and subsection A of § 2.2-3705.8, because both apply to personnel records and the law would be clearer if all of the relevant provisions were in one place;
- Amend subdivision 10 of § 2.2-3705.1 to protect only "personal contact information" and to eliminate the current reference to "personal information" as defined in the Government Data Collection and Dissemination Practices Act;<sup>22</sup>
- Amend subdivision 1 of § 2.2-3705.7 to eliminate the word "scholastic," because scholastic records have a separate exemption at subdivision 1 of § 2.2-3705.4 and the rest of the items listed in this exemption are tax records;
- Amend subdivision 7 of § 2.2-3705.7, concerning access to public utility customer account information, to require the release of the amount of money charged for utility services as well as the amount of money paid;
- Eliminate subdivision 13 of § 2.2-3705.7 which currently exempts the names and addresses of subscribers to *Virginia Wildlife* magazine published by the Department of Game and Inland Fisheries;

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<sup>20</sup>FOIA Council members Senator Stuart, Dooley, Hamlett, Landon, Selph, and Treadway were present from the beginning of the meeting. Delegate LeMunyon arrived later (at approximate 2:15 PM), during the Legislative Preview. Members Ashby, Jones, Oksman, Tavenner, and Whitehurst were absent.

<sup>21</sup> Va. Code §§ 2.2-3705.1, 2.2-3705.7, and 2.2-3705.8.

<sup>22</sup> The current language refers to § 2.2-3801.

- Eliminate subdivision 30 of § 2.2-3705.7 which exempts names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of a public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. Because correspondence that is not in the transaction of public business would not be a public record, this exemption merely restates existing law. In response to an inquiry from Senator Stuart, Roger Wiley, an attorney and former FOIA Council member representing local government, stated that local government representatives agreed that this exemption was redundant and should be eliminated. Mr. Landon asked whether there were other areas besides electronic mail where citizens' contact information should be protected, such as Facebook or other social media. Staff observed that there is no general exemption for contact information. Staff also pointed out that many other forms of social media operate differently from electronic mail in that citizens choose to access public bodies' Facebook pages or Twitter feeds, and public bodies do not necessarily maintain distribution lists for those other social media as they do with electronic mail. Additionally, such social media is often commercially owned and operated and not under control of the public body.

There were no other comments about these recommendations.

### *Meetings Subcommittee*

Ms. Dooley reported that the Subcommittee had met four times during the 2014 Interim and had considered all but nine or ten of the 44 meetings exemptions in FOIA.<sup>23</sup> As some of these meetings exemptions are driven by corresponding records exemptions, the Subcommittee decided to defer consideration of them until the Records Subcommittee looked at the relevant records exemptions. Of the exemptions considered this year, the Subcommittee recommended leaving all but one as they are currently written. The Subcommittee recommended separating current subdivision A 7 of § 2.2-3711 into two subdivisions, one for the discussion of specific legal matters, and the other for the discussion of probable or actual litigation. Senator Stuart asked whether choosing between two such subdivisions might "give away the public body's hand." Ms. Dooley indicated the Subcommittee did discuss the definition of "probable litigation" in current law, but did not specifically discuss whether choosing one or the other exemption would reveal too much. Staff observed that in many situations a public body could cite both exemptions, and pointed out that FOIA already requires public bodies to identify the subject and purpose of a closed meeting, as well as citing the appropriate exemption(s).

The Council also discussed whether it would be better to introduce separate legislation for the Subcommittee recommendations or to put all of the study recommendations into one omnibus bill once the study was completed. The Council decided not to vote separately on each recommendation at this time, but to take up all of the recommendations as omnibus legislation at the end of the three-year study.

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<sup>23</sup> Subsection A of § 2.2-3711.

## **Legislative Preview**

**Virginia Commonwealth University (VCU)** - Karah Gunther spoke on behalf of VCU, stating that VCU sought to amend existing exemptions that apply to the VCU Health System Authority (HSA), subdivision 15 of § 2.2-3705.7 and subdivision A 23 of § 2.2-3711, so that they would also apply to VCU itself. She explained the need for this change was because of the close interaction between VCU and HSA. That interaction involves sharing records that currently would be exempt if held by HSA but not necessarily if held by VCU, discussion of such records and other HSA matters by the VCU Board of Visitors, and having persons who served on the HSA Board who are also officials at VCU. Ms. Hamlett stated that as former counsel to VCU she was aware of the close interaction between VCU and HSA, and the issues that arose because of it. She also noted that the proposed change would not affect what was exempted, only who could use the exemptions. Ms. Gunther indicated that VCU does plan to ask for the legislation to be introduced at the 2015 Session of the General Assembly. There was no public comment on this proposal. The Council voted unanimously to recommend it to the General Assembly.

**University of Virginia (UVA)** - Lynne Fleming, Esq., and Dr. Tracey Hoke spoke on behalf of UVA about UVA's proposal to add an exemption for records of certain health care committees and entities to the extent they reveal information that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17. Ms. Fleming stated that in 1976, the General Assembly had enacted statutes giving privilege to certain hospital committees, such as peer review and quality committees, so that they could speak freely to discuss and correct problems. The privilege protects such communications from discovery and use in litigation, and because private hospitals are not subject to FOIA, that was sufficient for them. However, because public hospitals are subject to FOIA, they would need the privilege to also apply in the FOIA context. Ms. Fleming stated that the proposal would benefit hospitals run by UVA, VCU, and the Department of Behavioral Health, and that the Virginia Press Association (VPA) had suggested and agreed with the proposal. Ms. Dooley questioned whether the suggested language was vague and might be made clearer, which issue was then discussed by the Council, Ms. Fleming, and Ginger Stanley, Executive Director of VPA. Senator Stuart agreed with Ms. Dooley that the language was somewhat vague and could be less verbose, but stated that he supported what UVA was trying to do. There was no public comment on this proposal. The Council voted unanimously to recommend it to the General Assembly.

## **Electronic Communications Meeting Policy**

Staff reminded the Council that at its September meeting, the Council considered adoption of an E-meetings policy as required by § 2.2-3708.1 as enacted by the 2014 Session of the General Assembly. Specifically, subsection B 1 of § 2.2-3708.1 provides that "Participation by a member of a public body as authorized under subsection A shall be only under the following conditions: ...The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an

approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting." In September, the Council considered policy options of automatic approval, approval by vote, or approval by the chair or a designee. However, given concerns raised, the Council deferred action on adoption of the policy. Staff pointed out two considerations today: (1) adoption of the policy for the Council's own use and (2) providing guidance to other public bodies.

Senator Stuart believed that approval of remote participation should be a matter of right unless it went against the terms of FOIA, and stated that if a member's participation was challenged, then the matter should be brought to a vote before the public body. He felt it would not be good to allow the chair or any other single member to decide whether to approve participation.

Mr. Wiley, speaking on behalf of Loudoun County, stated that the County Board of Supervisors had requested this legislation with the specific intent of removing discretion on the part of the public body, but there was no problem with voting to resolve a dispute regarding whether a member was eligible to participate. He stated that he advises clients to put in their by-laws that members can use remote participation to the extent the law allows, and that they must notify their clerk so that the clerk, who keeps attendance records, would know who is eligible to participate remotely.

Ms. Stanley stated for informational purposes that she knew of six public bodies who had decided not to allow such remote participation, and that citizens questioned why members would be allowed to participate remotely in the case of "personal matters."

After further discussion, the Council voted unanimously to adopt a policy of automatic approval of remote participation by electronic means so long as such participation complies with what is allowed under FOIA, and to hold a vote of the Council if there is a challenge to such participation. The Council directed staff to include the policy statement on the Council's website, and state explicitly that the policy also applied to any committees or subcommittees of the Council. That policy would also be the model for other public bodies going forward.

### **Bills referred to Council for study by 2014 Session of General Assembly**

**House Bill 788 (LeMunyon)** - FOIA; out-of-state requests for records. This bill would have granted access rights to out-of-state requesters, with certain limitations. Currently, Virginia FOIA grants access rights to Virginia citizens and certain media representatives that broadcast or have circulation in Virginia.<sup>24</sup> The Supreme Court of the United States recently upheld this provision of Virginia's FOIA.<sup>25</sup> Staff indicated that as a practical matter, public bodies are advised to respond to out-of-state requesters, but with the understanding that they

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<sup>24</sup> Subsection A of § 2.2-3704.

<sup>25</sup> *McBumey v. Young*, 133 S. Ct. 1709, 185 L. Ed.2d 758 (2013).

can get advance payment and that FOIA's response time deadlines do not strictly apply (as the typical concerns expressed are about collecting money from out-of-state and the additional workload involved). If a public body does not respond or denies an out-of-state request, the out-of-state requester can simply ask someone in Virginia to make the same request, and then all of the rules of FOIA would apply. Delegate LeMunyon noted that his bill was designed with the interests of local government in mind, to allow out-of-state requests but to give more leeway in response and allow a lower threshold for advance payment than with Virginia citizens. Senator Stuart asked about other states; staff noted that Virginia is one of only five or six states with a citizenship limitation, but that other states have much lower advance payment thresholds, often \$10 or \$20, while Virginia has a \$200 threshold.

Mr. Wiley, Phyllis Errico of the Virginia Association of Counties (VACo), and Mark Flynn of the Virginia Municipal League (VML) all expressed concerns and opposition to this bill on behalf of local governments. They indicated that local governments already do not recoup all of their costs in responding to FOIA requests, and that having to respond to out-of-state requesters would only add to those costs and to their workload. As an example, Mr. Flynn stated that for a small town with a part-time clerk, a \$100 records request could take a full day, preventing the clerk from completing any other work. There was also concern over the venue provisions of FOIA. There was no motion on the bill, but Delegate LeMunyon indicated he would be happy to continue working on it with the interested parties.

**House Bill 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Staff reminded the Council that former Delegate Brink had brought this bill after it appeared that the Office of the Attorney General (OAG) had put footnotes in FOIA responses stating that OAG might not be subject to FOIA.<sup>26</sup> However, former Attorney General Cuccinelli had directed OAG to stop including the footnote, and current Attorney General Herring has not made any assertion that the OAG is not subject to FOIA. The Council expressed concern that if it were to support legislation amending the definition of "public body" to specifically include OAG, it might be misconstrued as excluding other offices and officials that were not listed explicitly in the definition. No action was taken on this bill.

### **Public Comment and Other Business**

The Council called for public comment. There was no comment, nor was any other business brought up for consideration.

### **Future Meeting**

The Council will next meet after the 2015 Session of the General Assembly has adjourned sine die. The Council directed staff to poll for meeting dates in March or April of 2015. The meeting was then adjourned.

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<sup>26</sup> The footnote at issue was based on similar considerations as were applied to the State Corporation Commission (SCC) when the Supreme Court of Virginia held that the SCC is not subject to FOIA. *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (2011).

## **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 annually, 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 1,494 inquiries and conducted 53 training seminars statewide. A listing of these training seminars appears as Appendix A.

### **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, 2013 to November 30, 2014, the Council, with a staff of two attorneys, fielded 1,494 inquiries. Of these inquiries, six 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 B. The table below



profiles who requested written advisory opinions for the period December 1, 2013 through November 30, 2014:

Written Advisory Opinions: 6

State and Local Government	1
Citizens of the Commonwealth	2
Members of the News Media	3

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, 2013 and November 30, 2014:

Telephone and E-mail Responses: 1,488

Government	873
Citizens	467
News Media	148

Appendix E to this report sets out the number of inquiries received by the Council each month from December, 2013 through November, 2014, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other).

### **The Council's Website**

The website address for the Council is <http://foiacouncil.dls.virginia.gov/>. 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**

In fulfilling its statutory mission to conduct FOIA educational programs, the Council conducts a series of day-long workshops around the state to provide FOIA training to recently-appointed public officials and employees. From 2000 through 2005 the workshops were held every year in multiple locations in an effort to maximize the availability of training throughout the Commonwealth. From 2005 through 2012, the workshops were

held every other year instead due to declining attendance as many interested persons had already attended a conference just the year before and as a sign that its basic training mission had been successfully accomplished. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without over-saturating any particular area, the Council will resume presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations will remain available by request, as always). The workshops will be held in the City of Richmond every year due to its central location and large concentration of interested participants. As is customary, the workshops as well as all of the Council's training programs, are approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys, in-service credit for law-enforcement personnel by the Department of Criminal Justice Services, academy points for school board officials by the Virginia School Board Association, and continuing education credit for municipal clerks by the Virginia Municipal Clerks 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. From December 1, 2013 to November 30, 2014, the Council conducted 53 such training programs. A listing of these trainings appears as Appendix A 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
- FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>27</sup>

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<sup>27</sup> Developed in cooperation with VACo and VML.

- Legislators Guide to FOIA
- Law-Enforcement Records and FOIA
- Law-Enforcement Guide for Handling 911 Requests
- FOIA Guide for Boards of Visitors
- Quick Reference Guide for Responding to FOIA Requests
- Guide to Geographic Information Systems Records

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. The Council continued to serve as a resource for the public, representatives of state and local government, and members of the media, responding to 1,494 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 53 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,

Senator Richard H. Stuart, Chair  
Delegate James M. LeMunyon, Vice-Chair  
Christopher Ashby  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Forrest M. "Frosty" Landon  
Timothy Oksman  
John G. Selph  
Robert L. Tavenner  
Sandra G. Treadway  
George T. Whitehurst

## APPENDIX A

### 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, 2013 through November 30, 2014, Council staff conducted 53 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 4, 2013	Associated Press and the Richmond Times Dispatch Richmond, VA
January 4, 2014	New Member Training Virginia Association of Counties Richmond, VA
January 8, 2014	Cabinet level Appointees Governor-Elect McAuliffe Richmond, VA
February 3, 2014	Office of the Attorney General Richmond, VA
February 20, 2014	Loudoun County Heritage Commission Leesburg, VA
March 4, 2014	Virginia Commonwealth University Open World Program - Delegation from Russia Richmond, VA
March 5, 2014	Office of the Governor Richmond, VA
March 11, 2014	Office of the Lieutenant Governor Richmond, VA
March 24, 2014	Virginia State University Petersburg, VA
April 3, 2014	Loudoun County Public Library System Leesburg, VA

April 4, 2014	Connecticut Freedom of Information Commission Annual Conference, Keynote Speaker Hartford, CT
April 9, 2014	Office of the Attorney General Richmond, VA
April 16, 2014	New Kent County New Kent, VA
April 22, 2014	Department of Aging and Rehabilitative Services Richmond, VA
April 24, 2014	Public Assistance Investigators of Virginia Charlottesville, VA
May 2, 2014	Virginia Association of Local Tax Auditors Germana Community College Culpeper, VA
May 6, 2014	Private Security Services Advisory Board Richmond, VA
May 7, 2014	Franklin County and Town of Rocky Mount Rocky Mount, VA
May 15, 2014	Department of Health Professions Richmond, VA
May 28, 2014	Department of Housing and Community Development Permit Technician's Course
June 4, 2014	FOIA and Records Management Seminar Virginia Coalition for Open Government Fredericksburg, VA
June 5, 2014	Virginia Executive Institute Leadership Challenge Richmond, VA
	Virginia Commonwealth University Communications Law and Ethics Class Richmond, VA
June 10, 2014	Circuit Court Clerks Conference Virginia Beach, VA

June 11, 2014	Town of Leesburg and Surrounding Localities Leesburg, VA
June 12, 2014	Department of Criminal Justice Services Board Richmond, VA
June 23, 2014	Virginia Outdoors Foundation, Department of Conservation and Recreation, and Department of Historic Resources Richmond, VA
July 11, 2014	New Member Training Virginia Municipal League
July 22, 2014	State Board of Elections Annual Conference Richmond, VA
July 30, 2014	Town of Tazewell and Surrounding Localities Tazewell, VA
August 1, 2014	National Business Institute CLE Program <i>Local Government Law: What Attorneys Need to Know</i> Richmond, VA
August 15, 2014	Steering Committee Virginia Association of Counties Richmond, VA
August 26, 2014	City of Petersburg Petersburg, VA
August 28, 2014	City of Portsmouth Portsmouth, VA
September 2, 2014	Town of Culpeper Culpeper, VA
September 3, 2014	Professional Fire Fighters Conference Virginia Beach, VA
September 5, 2014	Department of Historic Resources James City County, VA

September 10, 2014	FOIA and Records Management Seminar Virginia Coalition for Open Government Richmond, VA?
September 12, 2014	Capitol Area Purchasing Association Fall Conference Richmond, VA
September 24, 2014	Virginia Commonwealth University Communications Law and Ethics Class Richmond, VA
September 30, 2014	Alexandria Public Schools Alexandria, VA
October 1, 2014	Virginia Municipal Clerks Association Conference Richmond, VA
October 10, 2014	Virginia Department of Health Professions Board Orientation Program Henrico, VA
October 20, 2014	2014 Statewide FOIA Workshops Manassas, VA
October 21, 2014	2014 Statewide FOIA Workshops Richmond, VA
	New Member Training State Council of Higher Education of Virginia Richmond, VA
October 23, 2014	2014 Statewide FOIA Workshops Norfolk, VA
October 31, 2014	Capitol Area Purchasing Association Richmond, VA
November 6, 2014	Department of General Services Richmond, VA
	Administrative Law Conference Richmond, VA
November 10, 2014	Virginia Board of Workforce Development Richmond, VA

November 13, 2014

Board of Directors Meeting  
Virginia Coalition for Open Government  
Roanoke, VA

November 19, 2014

Department of Housing and Community Development  
Permit Technician's Course

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**Index of Written Advisory Opinions  
December 1, 2013 through November 30, 2014**

**ADVISORY OPINIONS ISSUED**

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<b><u>Opinion No.</u></b>	<b><u>Issue(s)</u></b>
<b>January</b>	
AO-01-14	Discusses the use of the contract negotiations and economic development records exemptions. FOIA allows a records custodian to disclose exempt records in his discretion. FOIA does not require a custodian to engage in a balancing test in exercising that discretion, or to justify or explain a decision not to disclose exempt records.
AO-02-14	FOIA does not define the term "custodian," but for FOIA purposes, generally the custodian is the person in charge of public records. Each public body may designate who is to act as custodian of its public records. FOIA does not apply to records that are not public records in the transaction of public business.
<b>April</b>	
AO-03-14	When members of a council attend and participate in meetings held by the council's subcommittees, the subcommittee meetings are in fact meetings of the council.
<b>May</b>	
AO-04-14	Suicide reports and related records may be withheld as criminal investigative files because suicide remains a crime in Virginia. To the extent it conflicts with this opinion, AO-10-03 is hereby rescinded.
<b>June</b>	
AO-05-14	Requesters and public bodies may reach their own agreements on the terms of production of public records. Such agreements should address any variations in response timing and charges to which the parties agree.

## September

AO-06-14

Public bodies have five working days to respond to a request for public records, and may invoke an additional seven working days to respond. The statutory remedy for a FOIA violation is to file a petition for mandamus or injunction supported by an affidavit showing good cause. Only a court may decide upon the appropriate remedy in each case.

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## APPENDIX C

### 2014 Meetings of the Council

**Tuesday, April 22, 2014**

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

Recap of the 2014 legislative session, review of the bills referred to the Council by the 2014 Session of the General Assembly, discussion of FOIA study as per HJR 96 (2014), and establishment of a work plan including the appointment of appropriate subcommittees.

**Tuesday, September 16, 2014**

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

Planning of 2014 Statewide FOIA Workshops; progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee. Review of application of FOIA to Office of Attorney General; and discussion of outdated terminology in FOIA concerning GIS, and annual legislative preview, part I.

**Tuesday, November 18, 2014**

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

Progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee, and annual legislative preview, part II.

## APPENDIX D

### STATUS OF FREEDOM OF INFORMATION AND OTHER RELATED ACCESS BILLS

NOTE: *Unless otherwise stated, the changes in the law described herein became effective on July 1, 2014.*

#### **I. Introduction**

The General Assembly passed a total of ten bills amending the Virginia Freedom of Information Act (FOIA) during the 2014 Session. One bill passed the General Assembly that was recommended by the FOIA Council: HB 219, which amends an existing record exemption for educational institutions for confidential letters and statements of recommendation placed in the records of educational agencies or institutions to include records respecting an application for promotion. This bill was the only legislation recommended by the FOIA Council this year.

One bill creates a new section in FOIA as follows:

- Provides that nothing in FOIA shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena, nor shall any discretionary exemption from mandatory disclosure be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law. HB 380 adding new § 2.2-3703.1.

One bill adds a new records exemption in FOIA as follows:

- Creates an exemption for certain records of the judicial performance evaluation program. HB 272 amending § 2.2-3705.7.

Eight of the ten bills amend existing provisions of FOIA as follows:

- Amends the current provision allowing individual members of public bodies to participate in public meetings by electronic means when a personal matter or emergency prevents their physical attendance. HB 193 and SB 161 amending § 2.2-3708.1;
- Amends an existing record exemption for educational institutions for confidential letters and statements of recommendation placed in the records of educational agencies or institutions to include records respecting an application for promotion. HB 219 amending § 2.2-3705.4;
- Amends an existing exemption for records of administrative investigations to include certain records of investigations conducted by a public institution of higher education

- relating to individual employment discrimination complaints or audits/investigations of any officer, department, or program at such institutions. HB 703 and SB 78 amending § 2.2-3705.3;
- Amends the existing requirement for state agencies in the executive branch to post a statement of FOIA rights and responsibilities on their website to add a statement regarding allowable charges. HB 837 amending § 2.2-3704.1;
- Adds internal auditors appointed by the head of a state agency or the board of visitors of a public institution of higher education to the list of those who may use a current exemption for audit investigation records. HB 1053 amending § 2.2-3705.3;
- Changes the names of the State Lottery Department to the Virginia Lottery, the State Lottery Board to the Virginia Lottery Board, and the State Lottery Fund to the Virginia Lottery Fund. The bill contains numerous technical amendments to accomplish these name changes. HB 1079 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.

In addition to bills amending FOIA, note that the General Assembly also passed House Joint Resolution 96 (LeMunyon), which directs the FOIA Council to study all exemptions contained in FOIA to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption from FOIA that the FOIA Council determines is no longer applicable or appropriate. The bill requires the FOIA Council to report its findings and recommendations by December 1, 2016.

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 2013 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes will become effective July 1, 2014.

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

### **§ 2.2-3703.1. Disclosure pursuant to court order or subpoena.**

**Virginia Freedom of Information Act (FOIA); disclosure pursuant to court order or subpoena.** Provides that nothing in FOIA shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena, nor shall any discretionary exemption from mandatory disclosure be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law. [NOTE: § 2.2-3703.1 is a new section created by this Act.] HB 380 (2014 Acts of Assembly, c. 319).

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

**Virginia Freedom of Information Act (FOIA); state agencies to post notice of allowable charges for producing records.** Requires state agencies in the executive branch to post on their respective public government websites the following statement: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen as set forth in subsection F of § 2.2-3704 of the Code of Virginia." HB 837 (2014 Acts of Assembly, c. 421).

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

**Office of the State Inspector General; powers and duties; internal auditors.** Provides that the performance review of a state agency, nonstate agency, or independent contractor of a state agency conducted by the Office of the Inspector General include assessment of the effectiveness, efficiency, or economy of the agency's programs. The bill gives the State Inspector General the discretion to refer certain complaints to the internal audit department of public institutions of higher education. The bill provides that the State Inspector General may provide assistance for investigations as may be requested by the public institution of higher education. In addition, the bill exempts from mandatory disclosure under the Virginia Freedom of Information Act the investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by law that are provided to or produced by or for internal auditors appointed by the head of a state agency or the board of visitors of a public institution of higher education. The bill contains technical amendments. HB 1053 (2014 Acts of Assembly, c. 788).

**Virginia Freedom of Information Act; record exemption for administrative investigations by public institutions of higher education.** Exempts from FOIA administrative investigations conducted by a public institution of higher education relating to individual employment discrimination complaints or audits/investigations of any officer, department, or program at such institutions. HB 703 (2014 Acts of Assembly, c. 414) and SB 78 (2014 Acts of Assembly, c. 609).

**Virginia state lottery.** Changes the names of the State Lottery Department to the Virginia Lottery, the State Lottery Board to the Virginia Lottery Board, and the State Lottery Fund to the Virginia Lottery Fund. The bill contains numerous technical amendments to accomplish these name changes. HB 1079 (2014 Acts of Assembly, c. 225).

### **§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.**

**Virginia Freedom of Information Act; record exemption for certain letters of recommendation for promotion.** Adds a record exemption for educational institutions for confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting an application for promotion. HB 219 (2014 Acts of Assembly, c. 313).

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

**Judicial performance evaluation program.** Requires the judicial performance evaluation program, which provides a self-improvement mechanism for judges and a source of information for the reelection process, established by the Supreme Court of Virginia to submit evaluation reports on justices and judges whose terms expire during the next session of the General Assembly to the Chairmen of the House and Senate Committees for Courts of Justice by December 1 of each year. Such reports to the General Assembly are public records, but all other records created or maintained by or on behalf of the program are confidential and exempt from the mandatory disclosure provisions of FOIA. HB 272 (2014 Acts of Assembly, c. 808).

**Virginia state lottery.** *See summary under § 2.2-3705.3, supra.* HB 1079 (2014 Acts of Assembly, c. 225).

### **§ 2.2-3708.1. Participation in meetings in event of emergency; certain disabilities; distance from meeting location for certain public bodies.**

**Virginia Freedom of Information Act; participation in meetings in event of emergency or personal matters.** Removes the requirement that a public body approve by a majority vote of the members present at a meeting the remote participation in the meeting by one of its members. The bill instead requires the public body to have adopted a written policy allowing for and governing participation, including an approval process for such participation of its members by electronic communication means. Once adopted, the public body shall apply this policy strictly and uniformly, without exception, to its entire membership, and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting. HB 193 (2014 Acts of Assembly, c. 492) and SB 161 (2014 Acts of Assembly, c. 524).

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

**Virginia state lottery.** *See summary under § 2.2-3705.3, supra.* HB 1079 (2014 Acts of Assembly, c. 225).

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

#### **Title 1 General Provisions.**

**Courthouse; posting of notices; website.** Provides that documents required to be posted by a clerk on or at the front door of a courthouse or on a public bulletin board at a courthouse may instead be posted on the public government website of the locality served by the court. HB 143 (2014 Acts of Assembly, c. 269).

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

**Virginia Business One Stop electronic portal program; participation by State Corporation Commission.** Requires the State Corporation Commission (SCC) and the Department of Small Business and Supplier Diversity (DSBSD), by December 1, 2014, to implement a hyperlink from the SCC's eFile system to the Business Permitting Center that will facilitate the collection of a user's information to populate any forms that will be required to be completed at a future date. The measure also requires that the SCC and the DSBSD meet as necessary to further such collaboration. The Secretary of Commerce and Trade is directed to oversee the DSBSD's implementation of the provisions. The Secretary of Commerce and Trade and the Secretary of Technology shall have the opportunity to participate in such meetings. HB 167 (2014 Acts of Assembly, c. 758).

**Workforce development.** Recasts the Virginia Workforce Council as the Virginia Board of Workforce Development. The Governor is authorized to appoint a Chief Workforce Development Advisor, and related responsibilities of the Governor are assigned to the Chief Workforce Development Advisor, who shall serve as lead staff to the Board. The Office of the Chancellor of the Virginia Community College System will provide staff support to accomplish the federally mandated requirements of the federal Workforce Investment Act. Staff support for the other duties and functions of the Board are to be provided by personnel from the Offices of the Secretaries of Education and Commerce and Trade pursuant to a memorandum of agreement. The bill decreases the membership from 31 to 26 and authorizes the Governor to select his designee from among the cabinet-level officials appointed to the Board. The bill also directs the establishment of an executive committee of the Board, which shall establish meeting agendas, approve reports to the Governor, and respond to certain urgent issues between scheduled Board meetings. The Board is also authorized to establish such other committees as it deems necessary, including (i) a committee to accomplish the federally mandated requirements of the WIA, (ii) an advanced technology committee, (iii) a performance and accountability committee, and (iv) a military transition assistance committee. The bill also establishes the Advanced Manufacturing Advisory Council to advise the Governor, General Assembly, and Board and to coordinate services, resources, and requests among agencies and institutions of higher education involved or requesting to be involved in the delivery of education and advanced manufacturing workforce training. Finally, the measure repeals the Advantage Virginia



Incentive Program, Fund, and Foundation. [NOTE: The bill includes an exemption for certain records containing trade secrets.] HB 1009 ((2014 Acts of Assembly, c. 815).

**Office of the State Inspector General; powers and duties; internal auditors.** *See summary under § 2.2-3705.3, supra.* HB 1053 (2014 Acts of Assembly, c. 788).

**State and Local Government Conflict of Interests Act and General Assembly Conflicts of Interests Act; Virginia Conflict of Interest and Ethics Advisory Council.** Establishes the Virginia Conflict of Interest and Ethics Advisory Council composed of 15 members: four appointments each by the Speaker of the House of Delegates, Senate Committee on Rules, and Governor; one designee of the Attorney General; one representative of the Virginia Association of Counties; and one representative of the Virginia Municipal League. The Council will elect its chairman and vice-chairman. The Council will review and post online the disclosure forms filed by lobbyists and persons subject to the conflict of interests acts and provide formal opinions and informal advice, education, and training. The bill requires the filing of the disclosure forms twice a year. It provides that the Division of Legislative Services will staff the Council, and the Council will transmit complaints of conflict law violations to the ethics advisory panels of the House of Delegates and Senate. The bill prohibits tangible gifts with a value of more than \$250 or a combination of tangible gifts with a value of more than \$250 to certain officers and employees of state or local governmental or advisory agencies or to legislators from a lobbyist; a lobbyist's principal; or a person, business, or organization who is a party to or seeking to become a party to certain governmental contracts. The bill also clarifies the distinction between gifts and other things of value received for travel, reduces a number of disclosure provision thresholds from \$10,000 to \$5,000, and requires the disclosure of gifts to immediate family members. Gifts from a relative or personal friend are not subject to disclosure, but a lobbyist; a lobbyist's principal; or a person, business, or organization who is a party to or seeking to become a party to certain governmental contracts cannot be considered a personal friend. Finally, the bill provides that the provisions of the conflict of interests acts do not preclude prosecution for any criminal law violation, including bribery. [NOTE: The bill provides for confidentiality of the proceedings of the Council, and exempts certain records from FOIA.] HB 1211 (2014 Acts of Assembly, c. 792) and SB 649 (2014 Acts of Assembly, c. 804).

**Address Confidentiality Program; victims of stalking.** Makes victims of stalking eligible for the Address Confidentiality Program. Under current law, only victims of domestic violence are eligible for participation. The bill also allows the Office of the Attorney General to cancel a program participant's certification if the participant obtains a name change through an order of the court and does not provide notice and a copy of the order to the Office of the Attorney General within seven days after entry of the order. HB 1233 (2014 Acts of Assembly, c. 439).

## **Title 12.1 State Corporation Commission.**

**State Corporation Commission; availability of records.** Requires the State Corporation Commission to make available for public inspection records that are related to matters related to the Commission's operational responsibilities and operational functions, including

revenues, expenditures, financial management and budgetary practices, personnel policies and practices, and procurement policies and practices. Disclosure of the records is not required if the records are otherwise covered by applicable legal privileges; disclosure of such records could threaten the safety or security of the Commission's employees, physical plant, or information technology assets or data; or the records are not publicly available from other public entities. In addition, the requirement does not apply to records related to the Commission's formal or informal regulatory or legal proceedings or activities. The Commission is required to respond within five business days of receiving requests for administrative records, which may be extended by an additional seven business days if it is impracticable to provide the records requested within that time period. If the scope of the records requested or length of search necessitates, additional time is allowed. When requested records are not provided, the Commission shall notify the requester of the basis of the denial. Records held by the clerk of the Commission related to business entities shall be made public or held confidential in accordance with laws and regulations applicable specifically to such records. HB 1036 (2014 Acts of Assembly, c. 347) and SB 119 (2014 Acts of Assembly, c. 174).

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

**Crime victim rights; offenses by juveniles.** Expands the list of offenses for which a victim of a delinquent act committed by a juvenile may request that the victim be informed of the charge brought, the findings of the court, and the disposition of the case to include violations of assault and battery, stalking, violation of a protective order, sexual battery, or attempted sexual battery that would be misdemeanors if committed by an adult. The bill also provides that the definition of "victim" for purposes of the Crime Victim and Witness Rights Act includes victims of certain delinquent acts. HB 171 (2014 Acts of Assembly, c. 230).

### **Title 17.1 Courts of Record.**

**Judicial performance evaluation program.** *See summary under § 2.2-3705.7, supra.* HB 272 (2014 Acts of Assembly, c. 808).

**Clerks; order books; remote access to court records; electronic filing; information technology fees; posting of certain information on the Internet.** Provides that circuit court clerks may keep an automated system in lieu of order books and land books as well as allow remote access to such system with regard to nonconfidential court records. The bill permits circuit court clerks to keep court records at a designated location outside of the clerk's office. The bill also exempts instruments and records that are more than 100 years old from the prohibition against the clerks' posting personal information on the Internet. SB 435 (2014 Acts of Assembly, c. 460).

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

**Concealed handgun permits; records.** Provides that any references to the issuance of a concealed handgun permit in any order book before July 1, 2008, are exempt from the requirement that such orders be withheld from public disclosure. The bill also directs circuit court clerks to issue replacement permits to permit holders who undergo a lawful name change. HB 100 (2014 Acts of Assembly, c. 16) and SB 600 (2014 Acts of Assembly, c. 549).

**Concealed handgun permit applicant; access to information.** Allows a clerk of a circuit court to disclose information contained in a concealed handgun permit application to the applicant. Currently, the clerk may not disclose such information to anyone except a law-enforcement officer acting in the performance of his official duties. HB 357 (2014 Acts of Assembly, c. 401).

## **Title 19.2 Criminal Procedure.**

**Warrant requirement for certain telecommunications records; real-time location data.** Provides that a provider of electronic communication service or remote computing service shall not disclose real-time location data to an investigative or law-enforcement officer except pursuant to a search warrant, subject to certain exceptions. The bill defines "real-time location data" as data or information concerning the current location of an electronic device that is generated, derived from, or obtained by the operation of the device. HB 17 (2014 Acts of Assembly, c. 388).

**Background checks of applicants of the Metropolitan Washington Airports Authority.** Authorizes the chief of the Metropolitan Washington Airports Authority police department, or his designee, to conduct criminal background checks through the Central Criminal Records Exchange and the Federal Bureau of Investigation on applicants who have been conditionally offered employment with the Authority. The applicant's criminal history record information obtained by the chief must otherwise be kept confidential. The bill also establishes criteria that the Authority must consider in determining whether an applicant's criminal conviction directly relates to the position offered. HB 164 (2014 Acts of Assembly, c. 57).

**Crime victim rights; offenses by juveniles.** *See summary under Title 16.1, supra.* HB 171 (2014 Acts of Assembly, c. 230).

**Witness's right to nondisclosure of certain information.** Adds witnesses in criminal prosecutions of manufacturing, selling, giving, etc., a controlled substance and of violent felonies to the list of those witnesses who may request to have their addresses, telephone numbers, and places of employment withheld from disclosure. The bill also prohibits an attorney who issues a summons for a witness in a criminal case from filing the names and addresses of witnesses who are protected from disclosure of such information with the clerk of the court. SB 640 (2014 Acts of Assembly, c. 744).

## **Title 23 Educational Institutions.**

**Restrictions on student speech at institutions of higher education; limitations.** Prohibits public institutions of higher education from imposing restrictions on the time, place, and manner of student speech that occurs in the outdoor areas of the institution's campus and is protected by the First Amendment to the United States Constitution unless the restrictions (i) are reasonable, (ii) are justified without reference to the content of the regulated speech, (iii) are narrowly tailored to serve a significant governmental interest, and (iv) leave open ample alternative channels for communication of the information. HB 258 (2014 Acts of Assembly, c. 559).

## **Title 24.2 Elections.**

**Local electoral boards; meetings, proceedings, and records.** Provides that the general registrar shall determine a reasonable charge, not to exceed the statutory amount set for copies of court records, for copies made of local electoral board books, papers, and records. HB 275 (2014 Acts of Assembly, c. 395).

## **Title 33.1 Highways, Bridges and Ferries.**

**Revision of Title 33.1.** Creates proposed Title 33.2 (Highways and Other Surface Transportation Systems) as a revision of existing Title 33.1 (Highways, Bridges and Ferries), as well as portions of Titles 15.2 (Counties, Cities and Towns), 56 (Public Service Companies), and 58.1 (Taxation). Proposed Title 33.2 consists of 32 chapters divided into four subtitles: Subtitle I (General Provisions and Transportation Entities); Subtitle II (Modes of Transportation: Highways, Bridges, Ferries, Rail, and Public Transportation); Subtitle III (Transportation Funding and Development); and Subtitle IV (Local and Regional Transportation). This bill organizes the laws in a more logical manner, removes obsolete and duplicative provisions, and improves the structure and clarity of statutes pertaining to highways, bridges, ferries, rail and public transportation, transportation funding, and local and regional transportation. This bill has a delayed effective date of October 1, 2014. This bill is a recommendation of the Virginia Code Commission. [NOTE: Contains multiple references to records exemptions, as well as provisions concerning meetings of transportation district commissions.] HB 311 (2014 Acts of Assembly, c. 805).

## **Title 38.2 Insurance.**

**Insurance holding companies.** Revises the requirements applicable to insurance holding companies to conform to the National Association of Insurance Commissioners' Insurance Holding Company System Regulatory Act and Insurance Holding Company System Model Regulation. The measure expands insurance regulators' examination authority to ascertain the financial condition of the insurer. The bill (i) requires the ultimate controlling person of an insurance holding company system to submit a confidential Enterprise Risk filing; (ii) requires the parent company seeking to divest its interest in an insurance company

subsidiary to provide notice to the domestic regulator prior to the divestiture; (iii) requires the insurer's board of directors to make statements regarding the corporate governance and internal control responsibilities within the registration statement; (iv) subjects the cost-sharing services and management agreements among affiliated entities to minimum reporting requirements; and (v) adds confidentiality protections for information shared. The State Corporation Commission will be authorized to participate in supervisory colleges, which will be used by regulators to coordinate supervision of an insurance holding company system that has national and international operations. The measure also makes dental and optometric services plans subject to the insurance holding company provisions, and dental plan organizations subject to requirements regarding risk-based capital. The holding companies requirements in effect on June 30, 2014, will continue to apply to any insurance holding company transaction commenced prior to January 1, 2015, unless otherwise provided. HB 109 (2014 Acts of Assembly, c. 309).

**Insurance contracts; principle-based reserve basis; use of valuation manual.** Requires insurance companies to use (i) a principle-based reserve basis for life, annuity, and accident and health insurance contracts and (ii) a Valuation Manual adopted by the National Association of Insurance Commissioners (NAIC). The measure implements the NAIC's revised Standard Valuation Law model (SVL). The revised model authorizes a principle-based reserve (PBR) basis for life, annuity, and accident and health contracts. A PBR valuation is a reserve valuation that uses one or more methods or one or more assumptions determined by the insurer pursuant to requirements contained in the SVL and the Valuation Manual. The NAIC's Valuation Manual contains both PBR and non-PBR requirements and requirements regarding actuarial opinions and corporate governance. The Valuation Manual will become effective on January 1 of the first calendar year following the first July 1 as of which certain requirements have been met, including a condition that at least 42 states or other U.S. jurisdictions have enacted the revised SVL or substantially similar terms and provisions. The measure has a delayed effective date of January 1, 2015. [Note: The bill contains several provisions concerning the confidentiality of certain records.] HB 631 (2014 Acts of Assembly, c. 571).

## **Title 44 Military and Emergency Laws.**

**First informer broadcaster.** Provides that state and local governmental agencies shall grant first informer broadcasters access to their broadcasting station or television system within an area declared a state of emergency area by the Governor for the purpose of provision of news, public service and public safety information, and repairing or resupplying their facility or equipment. A first informer is defined as the critical personnel of a radio or television broadcast station engaged in (i) the process of broadcasting; (ii) the maintenance or repair of broadcast station equipment, transmitters, and generators; or (iii) the transportation of fuel for generators of broadcast stations. HB 310 (2014 Acts of Assembly, c. 561).

## **Title 46.2 Motor Vehicles.**

**Commercial driver's licenses, etc.; compliance with federal requirements.** Amends several sections relating to commercial driver's licenses to comply with new Federal Motor

Carrier Safety Administration requirements relating to commercial motor vehicles and prohibited use of handheld mobile telephones in commercial motor vehicles. The bill also requires distracted driving to be included as a part of the driver's license knowledge examination to comply with MAP-21 (Moving Ahead for Progress in the 21st Century Act, P.L. 112-141). In addition, the bill provides that DMV may continue to disclose personal information from crash reports, but only if otherwise authorized by law in order to comply with federal law. HB 662 (2014 Acts of Assembly, c.77) and SB 565 (2014 Acts of Assembly, c. 803).

## **Title 51.5 Persons With Disabilities.**

**Office of the State Long-Term Care Ombudsman.** Provides that the entity designated by the Department for Aging and Rehabilitative Services to operate the programs of the Office of the State Long-Term Care Ombudsman shall have access to facilities, clients, patients, individuals receiving services, and the records of such clients, patients, and individuals in licensed assisted living facilities, licensed adult day care centers, home care organizations, hospice facilities, certified nursing facilities and nursing homes, providers as defined in § 37.2-403, state hospitals operated by the Department of Behavioral Health and Developmental Services, and providers of services by an area agency on aging or any private nonprofit or proprietary agency whenever the entity has the consent of the client, patient, or individual receiving services or his legal representative. The bill provides that if a client, patient, or individual receiving services is unable to consent to the review of his medical and social records and has no legal representative, and access to the records is necessary to investigate a complaint, access shall be granted to the extent necessary to conduct the investigation. The bill provides that access also shall be granted if a legal representative of the client, patient, or individual receiving services refuses to give consent and the entity has reasonable cause to believe that the legal representative is not acting in the best interests of the client, patient, or individual receiving services. HB 240 (2014 Acts of Assembly, c. 120) and SB 572 (2014 Acts of Assembly, c. 98).

## **Title 54.1 Professions and Occupations.**

**Prescription Monitoring Program; disclosure method.** Specifies that when the Director, in his discretion, discloses information that is in the possession of the program concerning a recipient who is over the age of 18 to that recipient, the information shall be mailed to the street or mailing address indicated on the recipient request form. HB 923 (2014 Acts of Assembly, c. 12) and SB 526 (2014 Acts of Assembly, c. 97).

## **Title 55 Property and Conveyances.**

**Condominium and Property Owners' Association Acts; notice for requests to examine association records.** Provides that, notwithstanding any provision of law to the contrary, the right of examination of association books and records may be exercised upon five business days' written notice for a professionally managed association and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose

for the request and the specific books and records of the association requested. HB 550 (2014 Acts of Assembly, c. 207).

### **Title 58.1 Taxation.**

**Unlawful dissemination or publication of tax information.** Changes the unlawful dissemination or publication of tax information from a Class 2 to a Class 1 misdemeanor. HB 99 (2014 Acts of Assembly, c. 194).

**Disclosure of certain tax information.** Requires the Department of Taxation to disclose the total aggregate amount of an income tax deduction or credit taken by all taxpayers, regardless of how few the number of taxpayers, upon request by the General Assembly or any duly constituted committee of the General Assembly. Under current practice, the Department of Taxation does not disclose such information if fewer than four taxpayers took the deduction or credit. HB 121 (2014 Acts of Assembly, c. 195).

### **Title 64.2 Wills, Trusts, and Fiduciaries.**

**Filing of evaluation reports for incapacitated persons; requirement for filing under seal.** Requires that medical evaluation reports filed in guardian or conservator proceedings before the circuit court be filed under seal. The bill also requires that a copy of the report be provided to the guardian ad litem, the respondent, and all adult individuals and entities whose names and post office addresses appear in the petition within a reasonable time prior to the hearing on the petition. HB 413 (2014 Acts of Assembly, c. 402).

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## APPENDIX E

### Breakdown of Inquiries to Council December 1, 2013 through November 30, 2014

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, 2013 through November 30, 2014

Total number of inquiries: 1,494

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	0	1	0	0	0	0	0	0	0	0	0	0	1
Citizens	0	0	0	0	0	0	1	0	0	1	0	0	2
News Media	0	1	0	0	1	1	0	0	0	0	0	0	3
<b>TOTAL</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>6</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	59	77	63	68	71	68	84	93	73	69	91	57	873
Citizens	32	49	41	44	42	35	33	52	45	30	35	29	467
News Media	10	8	15	23	10	16	11	10	9	15	12	9	148
<b>TOTAL</b>	<b>101</b>	<b>134</b>	<b>119</b>	<b>135</b>	<b>123</b>	<b>119</b>	<b>128</b>	<b>155</b>	<b>127</b>	<b>114</b>	<b>138</b>	<b>95</b>	<b>1488</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	59	78	63	68	71	68	84	93	73	69	91	57	874
Citizens	32	49	41	44	42	35	34	52	45	31	35	29	469
News Media	10	9	15	23	11	17	11	10	9	15	12	9	151
<b>TOTAL</b>	<b>101</b>	<b>136</b>	<b>119</b>	<b>135</b>	<b>124</b>	<b>120</b>	<b>129</b>	<b>155</b>	<b>127</b>	<b>115</b>	<b>138</b>	<b>95</b>	<b>1494</b>



<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	1	0	0
Citizens	2	0	0
News Media	2	1	0
<b>TOTAL</b>	<b>5</b>	<b>1</b>	<b>0</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	546	200	188
Citizens	280	42	193
News Media	92	36	43
<b>TOTAL</b>	<b>918</b>	<b>278</b>	<b>424</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	547	200	188
Citizens	282	42	193
News Media	94	37	43
<b>TOTAL</b>	<b>923</b>	<b>279</b>	<b>424</b>

## APPENDIX F

### OPINIONS ISSUED BY THE COUNCIL DECEMBER 2005 THROUGH NOVEMBER 2014

The purpose of this appendix is to show trends over time. In order to save space, we have chosen to present a ten-year time span rather than the full history of all opinions issued since the inception of the Council in July, 2000. For opinion count totals from prior years not shown in this appendix, please see previously issued Annual Reports.

#### Written Opinions:

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Government</b>	4	4	2	1	3	2	3	3	2	1
<b>Citizens</b>	11	6	8	8	10	3	4	2	5	2
<b>News Media</b>	1	0	3	2	0	1	0	0	3	3

#### Informal Opinions:

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Government</b>	756	845	854	827	910	899	820	846	872	873
<b>Public</b>	687	664	674	641	618	620	560	433	452	467
<b>News Media</b>	209	232	167	206	150	165	152	124	173	148

#### Total Number of Opinions:

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Government</b>	760	849	856	828	913	901	823	849	874	874
<b>Public</b>	698	670	682	649	628	623	564	435	457	469
<b>News Media</b>	210	232	170	208	150	166	152	124	176	151
<b>GRAND TOTAL</b>	1668	1751	1708	1685	1691	1690	1539	1408	1507	1494



