



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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August 21, 2012

### Meeting of the Criminal Investigative Records Subcommittee of the FOIA Council

#### *Proposed Agenda* *\*Annotated\**

1. Call to order; introduction of subcommittee members.
2. Election of Chair. *As you will recall, Craig Fifer was the Chair of the Subcommittee. He was term-limited as of July 1, 2012, and the Governor has appointed his successor to the FOIA Council. As Mr. Fifer is no longer a member of the Council, the Subcommittee will need to elect a new Chair.*
3. Recap of the work of the Subcommittee and Stakeholder's Group to date. *The Subcommittee began its work in 2010 studying SB 711 (Edwards) and continued in 2011 studying SB 1467 (Edwards). In 2010, the Subcommittee met three times, after which the FOIA Council recommended a draft re-write of § 2.2-3706 that reorganized existing law without substantive changes. That draft was not introduced to the General Assembly. In 2011, the Subcommittee met once and asked the interested stakeholders to continue studying the issues presented. The stakeholders group met three times, studying a proposed re-write of § 2.2-3706 initially prepared by the Virginia Press Association (VPA). That resulted in a consensus draft that the stakeholders group felt was not ready to be recommended to the FOIA Council, as there were several remaining issues upon which the stakeholders were not agreed. At its first meeting of 2012, the Subcommittee asked the stakeholders to poll their constituents on certain specific issues, set forth below.*
4. Issues Presented.
  - A. Criminal Incident Information (CII).
    1. Response Time. *As you may recall, there have been different interpretations of the requirement that "law-enforcement agencies shall make available upon request criminal incident information relating to felony offenses" in subsection B of § 2.2-3706. At its last meeting the Subcommittee asked the interested parties to poll their*

constituents regarding what would be the best time frame for release of CII (five working days, as in other FOIA requests, or some lesser amount?).

2. Release of CII in misdemeanor cases. *The issue was also raised of whether a charging determination (i.e., misdemeanor or felony) must be made before the release of CII. At its last meeting the Subcommittee heard that in current practice, CII is usually released before a charging determination is made. It was suggested that CII be released in all cases, including misdemeanors, as that would obviate the need to consider whether a charging determination had been made. It was countered that releasing CII in misdemeanor cases would be too great a volume of work. No agreement was reached on these issues.*

3. Verbal response. *The Subcommittee has heard from the interested parties that the term CII includes the word "information" rather than "records," and in practice requesters are often satisfied by verbal responses from law-enforcement agencies. The Subcommittee has heard different interpretations regarding whether a verbal response to a request for CII is sufficient under current law.*

4. Whether a public body must create a record of CII if none already exists. *In Connell v. Kersey, 262 Va. 154, 547 S.E.2d 228 (2001), a prosecutor summarized from existing records to respond for a request for CII, rather than provide redacted copies of the original records. The requester wanted copies of the original records rather than the summary the prosecutor had created. The Virginia Supreme Court held that FOIA "does not require a Commonwealth's Attorney's office or other law enforcement official to release actual records relating to a criminal incident, but only to provide a summary of the information available from the specified records subject to any mandatory or discretionary exemptions provided for in the statute." The Subcommittee has heard that in practice, when CII is requested but records do not already exist, some agencies will create CII records, others will redact from existing records, and others will rely on § 2.2-3704(D), which states that "no public body shall be required to create a new record if the record does not already exist."*

5. Victim and witness information. *The Subcommittee has considered whether information such as the name, age, gender, and address of victims and witnesses should be released as part of CII. As of the last Subcommittee meeting, there was no agreement on this issue.*

B. 911 Records. *The Subcommittee and stakeholders have all agreed that it would be helpful if 911 records were explicitly addressed in the law. The Subcommittee has not discussed the substance or language of such a provision.*

C. Structure of the draft. *As you will recall, the 2010 rewrite would restructure existing § 2.2-3706 into six subsections: definitions, exemptions, required releases, noncriminal records, prohibited release, and conflicts resolution. The 2011 consensus draft, based on the VPA draft, would restructure existing § 2.2-3706 into two new sections: new § 2.2-3706.1, concerning criminal incident, arrest, charge, and investigative records, and new § 2.2-3706.2, concerning administrative and tactical records. At its last meeting, the Subcommittee asked the interested parties to poll their constituents regarding which structure is preferred as a vehicle moving forward.*

D. Adult arrestee photographs. *As you will recall, the Subcommittee was asked to study the issue of releasing adult arrestee photographs ("mugshots"), particularly in light of numerous commercial print and online publications that publish them along with arrest information. The Subcommittee has not yet addressed this issue.*

5. Public Comment.
6. Discussion.
7. Action.
8. Set future meeting dates.
9. Adjournment.

**Subcommittee Members**

**James Schliessman**

**John Selph**

**Sandra Treadway**

**Subcommittee Staff**

**Alan Gernhardt, Attorney**

The FOIA Council's web site is: <http://dls.state.va.us/foiacouncil.htm>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council Subcommittee members and the public.  
E-mail: [foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov).