

REPORT OF THE

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



HOUSE DOCUMENT NO. 11

COMMONWEALTH OF VIRGINIA
RICHMOND
2003



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

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

COMMONWEALTH OF VIRGINIA
DECEMBER 2003

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

Senator R. Edward Houck, Chair
Delegate S. Chris Jones, Vice-chair
David E. Anderson
Ralph L. "Bill" Axelle
Rosanna L. Bencoach
John Stewart Bryan, III
John B. Edwards
W. Wat Hopkins
E. M. Miller, Jr.
Thomas M. Moncure, Jr.
Roger C. Wiley
Nolan T. Yelich

Staff

Division of Legislative Services

Maria J.K. Everett, *Executive Director*
Lisa Wallmeyer, *Assistant Director*
Lynda L. Waddill, *Operations Staff Assistant*

TABLE OF CONTENTS

INTRODUCTION.....	1
EXECUTIVE SUMMARY.....	2
WORK OF THE COUNCIL.....	4
SERVICES RENDERED BY THE COUNCIL...	20
CONCLUSION.....	26

APPENDICES

A. 2004 Legislative Recommendations.....	A-1
B. Training and Educational Presentations.....	B-1
C. Index of Written Advisory Opinions.....	C-1
D. Meetings of the Council.....	D-1
E. Recap of 2003 Session; FOIA and related access legislation.....	E-1

REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**To: The Honorable Mark R. Warner, Governor of Virginia
and
The General Assembly of Virginia**

**Richmond, Virginia
December 2003**

INTRODUCTION

"Here [in the United States], we are, on the whole, doing well, and giving an example of a free system, which I trust will be more of a pilot to a good port, than a Beacon, warning from a bad one. A Government like ours has so many safety valves, ...that it carries within itself a relief against the infirmities from which the best of human Institutions can not be exempt."

--James Madison
25 February 1820

Established by the 2000 Session of the General Assembly¹, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act. As directed by statute, the Council is tasked with furnishing, upon request, advisory opinions regarding the Freedom of Information Act (FOIA) to any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA². The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is composed of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens. The Council elected Senator R. Edward Houck as chair and Delegate S. Chris Jones as vice-chair in June 2002, each

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

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

to serve a two-year term in his capacity as chair and vice-chair.

The Council provides guidance to those seeking assistance in the application of FOIA, but 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 help fashion creative solutions in an attempt to remedy disputes and keep parties in compliance with FOIA. The Council is a resource for the public, representatives of state and local government, and members of the media. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. 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.

EXECUTIVE SUMMARY

During this reporting period, December 2002 through November 2003, the Council continued to monitor the treatment of e-mails and other electronic communications in the context of FOIA, including following the developments in the case of Shelton v. Beck (2003). In that case, three plaintiffs filed suit in Fredericksburg Circuit Court against five members of the Fredericksburg City Council, alleging 18 illegal meetings under FOIA. The suit alleged that the plaintiffs illegally excluded the public and two City Council members from e-mail and face-to-face discussions of city business. The defendants included the mayor and vice-mayor of the City Council, as well as three newly elected City Council members. At trial, the judge held that one of set of e-mail correspondence violated FOIA. In those groups of e-mail, four of the defendants discussed who should be appointed to the local library board. The judge ruled that the defendants used e-mail to reach a consensus about who to appoint, which should have occurred in an open meeting. The judge dismissed the two other remaining counts involving the use of e-mail. The judge said that in those instances, the defendants did not violate the law because the e-mails were used to gather information only, and not to make a decision. The fourth remaining count involved the attendance of three of the defendants at a meeting arranged by neighborhood residents to discuss traffic problems. The judge found that this gathering did not violate FOIA, because the defendants attended the meeting to hear residents' concerns and obtain information, and not to conduct city business. The case is currently on appeal to the Supreme Court of Virginia.

The Council was successful in seeing its legislative recommendations enacted into law in 2003. Specifically, Senate Bill 737 added a record and meeting exemptions for the negotiation of a public contract by public bodies where disclosure would adversely affect the bargaining position or negotiating strategy of the public body. Senate Bill 738 provided that before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

At the request of the Virginia Press Association, the Council initiated a review of House Bill 2445 and Senate Bill 1149 from the 2003 Session which excluded the Sexually Violent Predator Commitment Review Committee from the provisions of FOIA. It was suggested that instead of excluding the Committee from FOIA completely, an exemption to address the need for the protection of certain Commission records and meetings from public disclosure be created. The Council concurred that perhaps that discussion of this alternative may have been missed during the press of the 2003 Session. The Council appointed a subcommittee that examined the new exclusion at subdivision A 5 of § 2.2-3703. It was noted that with a few exceptions, most public bodies were not wholly excluded from the requirements of FOIA. Instead, most public bodies must exercise narrowly tailored records and meetings exemptions to withhold records and close meetings, following the specific procedures in FOIA. Records and meetings of government agencies are presumed to be open, and an agency must justify which records and meetings require protection from disclosure. The public has an interest and a concern in following the actions of the Committee, and the Committee should have to follow the same procedures as other public bodies for exempting records and meetings.

The Council also initiated a study to examine the appropriateness of reorganizing § 2.2-3705 of FOIA. Section 2.2-3705 is the section that enumerates the various records that may be withheld under the provisions of FOIA. Currently, there are 87 record exemptions enumerated in the section. As a practical matter, inclusion of this section in any piece of legislation expands the size of the bill by 10 or more pages, while the proposed amendment to this section may be only a few sentences. This makes the bill cumbersome and confusing to the public and legislators alike. The Council appointed a subcommittee to begin work. Interested parties were invited to participate in the study, including the Virginia Press Association, the Virginia Municipal League, and the Virginia Coalition for Open Government. Consensus on the proposed outline for the reorganization of § 2.2-3705 was reached. Like a title revision, the reorganization of § 2.2-3705 involved only technical changes and no substantive changes were made to the section. Considerable work was done to ensure the reorganization achieved its purpose of making logical categories for existing record exemptions thereby reducing the size of bills before the General Assembly that contain a FOIA exemption and making the exemption section more user-friendly. Generally, the consensus draft would repeal § 2.2-3705, and create seven new sections grouping the exemptions by general subject area. The proposed groupings would include exemptions of general application, exemptions relating to public safety, exemptions relating to administrative investigations, exemptions relating to educational records and educational institutions, exemptions relating to health and social services, exemptions relating to proprietary records and trade secrets, and exemptions applicable to specific public bodies.

For the period of December 1, 2002, to November 30, 2003, the Council, with a staff of two attorneys, fielded more than 1000 inquiries. Of these inquiries, 24 resulted in formal, written opinions. Through its website, the Council provides increased public awareness of and participation in its work, and publishes, in addition to its written opinions, a variety of educational materials on the application of FOIA. During the past year, the website was visited more than 20,000 times. About 1,300 visitors viewed the educational materials developed by the Council.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period in which it considered a broad range of issues, including civil commitment of sexually violent predators and e-mail and other electronic communication means, all in the context of FOIA's open records and meetings provisions. The Council also undertook a rewrite of § 2.2-3705, the lengthy records exemption section of FOIA. A condensed agenda for each of the Council's meetings appear as Appendix D. The Council's discussions and deliberations are chronicled below.

April 8, 2003

2003 Legislative Update

The Council began its meeting with a legislative update recapping the FOIA and related access bills passed during the 2003 Session. Nineteen bills amended FOIA, including the creation of eight new meetings and records exemptions and the expansion of eight existing meetings and records exemptions. Several other bills did not amend FOIA directly, but addressed access-related issues.

Both bills recommended by the Council were passed. Senate Bill 737 (Houck) was the result of the subcommittee studying FOIA and the Virginia Public Procurement Act, and Senate Bill 738 (Houck) was a recommendation of the subcommittee studying HB 900 (Purkey, 2002). A complete listing and description of FOIA and other related access bills considered by the 2003 Session of the General Assembly are available on the Council's website and appear as Appendix E to this report.

Bills Referred to the Council for Study

The following five bills were referred to the Council for study by the 2003 Session of the General Assembly:

BILL NUMBER: House Bill 1649
PATRON: Marshall, R.G.
SUMMARY: **Freedom of Information Act; charges.** Provides that if a requester specifies in writing that he desires to be notified if the charges for his request exceed a specified amount, the public body shall suspend processing the request and notify the requester if the public body determines that the charges will exceed the specified amount. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between the notice by the public body and the response of the requester.

BILL NUMBER: House Bill 1797
PATRON: Jones, D.C.
SUMMARY: **Freedom of Information Act; closed meetings; disclosure of closed meeting discussions.** Provides that a public body may, by agreement of a majority of its members, adopt a rule prohibiting and providing appropriate sanctions for the disclosure by any member of information

discussed in a closed meeting of the public body lawfully convened in accordance with § 2.2-3711 and § 2.2-3712 until such time as the subject of the closed meeting is made public by the public body.

BILL NUMBER: House Bill 2626
PATRON: Spruill
SUMMARY: **Freedom of Information Act (FOIA); requests by inmates.** Removes the provision that denies access to records to persons incarcerated in any state, local or federal correctional facility. As a result, inmates will have a right of access to records under FOIA.

BILL NUMBER: House Bill 2664
PATRON: Jones, S.C.
SUMMARY: **Freedom of Information Act; closed meeting procedures; notice.** Provides that the notice provisions of the Freedom of Information Act shall not apply to closed meetings of any public body held solely for the purpose of taking testimony or the presentation of evidence concerning the disciplining of any student or employee of any state school system. Currently, notice is not required for closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer.

BILL NUMBER: House Bill 2665
PATRON: Jones, S.C.
SUMMARY: **Freedom of Information Act; closed meetings to discuss threats to public safety.** Expands the closed meeting exemption for discussions relating to terrorist activity to include other types of threats to the public safety.

The Council discussed the development of a study plan for the bills referred to it for study. Staff presented three study plan options: the Council could utilize informal workgroups, as it has done in the past; form subcommittees, an approach that would be slightly more formalized than the workgroup approach; or allow the full Council to consider the bills at bill-specific meetings. It was decided that the Council would invite the patrons of each bill to present the bills and any relevant background at the next meeting, and then subcommittees would be appointed to conduct the studies and report back to the full Council.

Development of Process for Review of Legislative Proposals

The Council discussed what its role should be in receiving legislative proposals, other than those referred to it by the General Assembly or recommended by the Council itself. The Council deliberated on whether it should provide a forum for persons to present proposals or whether it should be more actively involved in deciding whether a proposal furthers an appropriate public policy or needs additional study. The question was also raised as to whether the Council should proactively identify "global" access issues for discussion. After lengthy discussion and the receipt of public comment, it was decided to approach legislation and global access issues on a case-by-case basis. The Council will advertise the Council as a forum for

presenting legislative proposals as a sort of legislative preview. The Council may then decide on a case-by-case basis, which, if any, of those proposals it wishes to examine further, or whether the Council would initiate a study of global access issue(s) of interest or concern.

Other Business

It was suggested that the Council set an example by creating a publicly accessible repository for all Council business conducted by e-mail. Council members expressed concerns that before starting such a project, the relationship between FOIA and e-mail should be examined. It was noted that the classification of e-mails is often a very confusing area of the law. The Council adopted this as a global access issue for further discussion. To assist the Council, the Secretary of Technology will be invited to the next meeting to discuss the capabilities of technology for state agencies and to address other relevant technology issues.

Of Note

Staff briefed the Council on its plans to conduct FOIA workshops at six locations around the State during the second and third weeks of July. In addition to holding the workshops at community colleges, as has been done the past several years, staff will also look into the feasibility at holding sessions at other state institutions of higher education. The program tentatively will include segments addressing access to records and meetings, a segment to discuss "hot topics" such as access to social security numbers and on-line records, the new terrorism-related exemptions, and a segment about law-enforcement records. Cost to attend the workshops will likely be around \$30 to cover travel and expenses. The fee will include lunch and continuing legal education and law-enforcement credit for participants.

Staff suggested to the Council that law-enforcement agencies should be commended for making FOIA training a priority. In connection with the Virginia FBI National Academy, nearly 200 law-enforcement officials from 60 agencies have received FOIA training and copies of the Law Enforcement Guide to FOIA.

Staff presented the latest statistics of the services rendered by Council. Since its meeting in November through April 4, 2003, the Council has answered 377 inquiries, including 15 written opinions. Six written opinions were provided to government, three to citizens, and three to media. One hundred and forty five informal responses (via phone or e-mail) were provided to government, 140 to citizens and 77 to media.

Public Comment

Public comment was received on several topics. The first comment related to House Bill 2445 and Senate Bill 1149 from the 2003 Session of the General Assembly which excluded the Sexually Violent Predator Commitment Review Committee from the provisions of FOIA. It was suggested that instead of excluding the Committee from FOIA completely, an exemption to address the need for the protection of certain Committee records and meetings from public disclosure be created. The Council was also apprised of an upcoming symposium about secret adoption records. A citizen expressed concern over VIPNet's contract with Game & Inland

Fisheries that allows VIPNet to sell information about people who have fishing and hunting licenses. Another citizen suggested that FOIA be clarified to ensure that the open meeting provisions cover informal telephonic assemblages, and that the new procurement exemption be narrowed. Finally, comment was heard from the Virginia Coalition for Open Government relating to recent policy statements by its board of directors relating to FOIA issues.

June 2, 2003

The Council began its meeting by discussing the disposition of the five bills referred to it for study by the 2003 Session of the General Assembly.³ The Council was advised that although the patrons had been invited to present and discuss the impetus for their bills with the Council, none had accepted the invitation. Delegate S. C. Jones, vice-chair of the Council, noted that his two bills referred to the Council for study had been introduced "by request" and that no further action on them was necessary. A motion was made and passed by a vote of 10-1⁴ that, in light of the fact that the patrons were notified and none elected to go forward with their bills, the Council should take no further action on the referred bills. Additionally, the Council agreed that, in the future, should other bills be referred to the Council that raise pressing or significant public policy issues and that warrant additional study and public comment, the Council would undertake further examination of the public policy issues raised by the bills.

³ House Bill 1649 (Marshall, R.G.); Freedom of Information Act; charges. Provides that if a requester specifies in writing that he desires to be notified if the charges for his request exceed a specified amount, the public body shall suspend processing the request and notify the requester if the public body determines that the charges will exceed the specified amount. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between the notice by the public body and the response of the requester.

House Bill 1797 (Jones, D.C.); Freedom of Information Act; closed meetings; disclosure of closed meeting discussions. Provides that a public body may, by agreement of a majority of its members, adopt a rule prohibiting and providing appropriate sanctions for the disclosure by any member of information discussed in a closed meeting of the public body lawfully convened in accordance with § 2.2-3711 and § 2.2-3712 until such time as the subject of the closed meeting is made public by the public body.

House Bill 2626,(Spruill); Freedom of Information Act; requests by inmates. Removes the provision that denies access to records to persons incarcerated in any state, local or federal correctional facility. As a result, inmates will have a right of access to records under FOIA.

House Bill 2664, (Jones, S.C.); Freedom of Information Act; closed meeting procedures; notice. Provides that the notice provisions of the Freedom of Information Act shall not apply to closed meetings of any public body held solely for the purpose of taking testimony or the presentation of evidence concerning the disciplining of any student or employee of any state school system. Currently, notice is not required for closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer.

House Bill 2665, (Jones, S.C.); Freedom of Information Act; closed meetings to discuss threats to public safety. Expands the closed meeting exemption for discussions relating to terrorist activity to include other types of threats to the public safety.

⁴ Ayes--Houck, Jones, Wiley, Bryan, Moncure, Edwards, Axselle, Benchcoach, Miller, and Yelich; Nays--Hopkins.

Under the next heading on the agenda, E-Mail and the Freedom of Information Act; Using Technology and Complying with the Law, the Council heard from a representative of the Office of the Secretary of Technology on the current e-mail retention practices of the Department of Information Technology and the feasibility of developing statewide e-mail guidelines. Additionally, staff updated the Council on the use of e-mail and the requirements of FOIA and the Public Records Act (PRA). The use of e-mail in the business place is becoming increasingly common and is often a preferred mode of communication. For state and local government officials and employees, the application of FOIA relating to access to records and the PRA relating to the retention of records comes into play. Government officials and employees frequently ask two key questions about the use of e-mail -- "Can the public and media access my e-mail under FOIA?" and "Do I have to save my e-mail?" E-mail is a generic term, and generally refers to any communication that requires an electronic device for storage and/or transmission.⁵ E-mail is a medium for correspondence -- essentially, e-mail is the "envelope" for the communication. It can be used to communicate one-to-one, or one-to-many over the computer. Each user has an e-mail address, and messages received at that address are stored in electronic mailboxes until the recipient retrieves the messages. After reading a message, the user may save it on his or her computer, forward it to other e-mail addresses, respond to it, or delete it. It is also possible to send attachments, such as word processing files, spreadsheets, or digital images along with an e-mail message.

For purposes of FOIA and the PRA, e-mail provides a medium for communication; much like a telephone or the U.S. Mail provides a means of communication. The fact that a communication is sent via e-mail is not alone conclusive of whether that e-mail must be accessible to the public under FOIA or retained pursuant to the PRA; one must look at the text and substance of the communication to determine whether it is indeed a public record.

Tips for using and managing e-mail

- All e-mails related to public business are subject to the provisions of FOIA and the PRA, and should be managed in the same manner as all other public records.
- There is a tendency with e-mail to hit the delete button as soon as you are finished with a particular message. However, consideration must be given to whether that particular e-mail must be retained for purposes of the PRA -- you can't automatically delete your e-mail, just as you can't automatically throw away paper correspondence and records.
- FOIA governs access to records. The PRA dictates how long you are required to keep certain records. If a government entity keeps an e-mail (or any other record) for longer than its retention schedule requires, that e-mail will still be subject to FOIA if requested. Conversely, if a government entity properly disposes of a record pursuant to a retention schedule, and a subsequent FOIA request is made for that record, FOIA does not require the government entity to recreate the record.

⁵ Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).

- E-mail is often used as a substitute for a telephone call and is quite informal. However, e-mail creates a record of that communication that must be retained pursuant to the PRA and will be available upon request to the public under FOIA. Consider the consequence of choice to use e-mail instead of the telephone -- it may not be in your best interest to be as informal on e-mail as you are on the telephone.
- The Library of Virginia discourages the practice of maintaining permanent records solely in electronic format, without a paper or microfilm backup.⁶ For records that do not need to be maintained permanently, these e-mails can be printed out and stored in a traditional, paper file (and the electronic copy can be deleted) or electronic folders can be created on the computer to organize e-mails based on functions, subjects or activities. The Library of Virginia suggests that these folders should be assigned to your home directory on the computer, and not on the network. By way of example, at the FOIA Council, staff prints a copy of all of the FOIA questions that we receive via e-mail, along with our corresponding response, and files the paper copy in a chronological file. After we have printed a copy to retain for our records, we delete the e-mail from the computer.
- Public officials and employees should not commingle personal and official e-mails. Private e-mails do not need to be retained; e-mails relating to the transaction of public business do. From an e-mail management perspective, it is probably not a good idea to mix personal and official business in the same e-mail. Official e-mails that need to be retained should be maintained in separate folders.

Public Comment

A representative of the Virginia Press Association again expressed concern related to House Bill 2445 and Senate Bill 1149 from the 2003 Session which excluded the Sexually Violent Predator Commitment Review Committee from the provisions of FOIA. It was suggested that instead of excluding the Committee from FOIA completely, an exemption to address the need for the protection of certain Committee records and meetings from public disclosure be created. The Council concurred that perhaps that discussion of this alternative may have been missed during the press of Session. As a result, the Council appointed a subcommittee of Messrs. Moncure and Edwards to examine the issues raised by HB 2445 and SB 1149. Meeting dates of this subcommittee were posted as soon as scheduled and also appeared on the Council's website to ensure participation by any and all interested parties.

Other Business

Mr. Moncure suggested that the Council consider a reorganization of § 2.2-3705 of the Code of Virginia, the records exemption section of FOIA. Currently, this section contains 81 exemptions from the release of records, with the addition of six more exemptions on July 1, 2003. As a practical matter, inclusion of this section in any piece of legislation expands the size of the bill by 10 or more pages, while the proposed amendment to this section may be only a few

⁶ Library of Virginia, Electronic Records Guidelines (effective June 10, 2002).

sentences. This makes the bill cumbersome and confusing to the public and legislators alike. He suggested that a subcommittee be formed to reorganize this section by identifying categories into which many of the exemptions could be grouped, and making each category a separate section in FOIA. The Council expressed concern that in so doing, it would be important not to broaden the current exemptions found in FOIA. A subcommittee was appointed, consisting of Messrs. Moncure, Miller, and Axselle, to undertake this task. Meeting dates of this subcommittee were posted as soon as scheduled and also appeared on the Council's website to ensure participation by any and all interested parties.

Staff suggested that the Council consider dedicating at least one meeting each year to setting an example for other public bodies to follow in complying with FOIA. This meeting segment would be titled, "Setting the Example" and would consist, among other things, of the Council conducting an electronic meeting to have first-hand experience with the issues raised by audio or audio/visual meetings, or both, authorized by FOIA for state public bodies. Because the Council is required by law to receive reports from public bodies conducting these types of meetings, it would be beneficial in identifying the advantages and disadvantages of electronic meetings as they relate to public access. Other topics suggested from "Setting the Example" included new member training, e-mail retention and access, and other related issues faced by public bodies.

Of Note

Staff presented the latest statistics of the services rendered by Council. Since its meeting in April through May 30, 2003, the Council has answered 179 inquiries, including 14 requests for written opinions. In that time frame, five written opinions have been completed, with nine requests for written opinions pending. Of the 165 informal responses (via phone or e-mail), 68 were provided to government, 79 to citizens and 18 to media.

Staff briefed the Council on its plans to conduct FOIA workshops at six locations around the State the second and third weeks of September (not July as had been tentatively planned). The program tentatively will include segments addressing access to records and meetings, a segment to discuss "hot topics" such as access to social security numbers and on-line records, and the new terrorism-related exemptions, and a segment about law-enforcement records. Cost to attend the workshops will likely be around \$35 to cover travel and expenses. The fee will include lunch and continuing legal education and law-enforcement credit for participants.

September 15, 2003

The Council began its meeting⁷ by receiving progress reports from its two subcommittees created to study (i) the FOIA exclusion for the Sexually Violent Predators Commitment Review Committee and (ii) a possible reorganization of § 2.2-3705 of the Code of Virginia (the current FOIA record exemption section).

⁷ Attended by members Houck, Anderson, Axselle, Bencoach, Bryan, Edwards, Hopkins, Moncure, Wiley, and Yelich.

Civil Commitment of Sexually Violent Predators

The civil commitment subcommittee⁸ reported that it examined the new exclusion found at subdivision A 5 of § 2.2-3703, which removes the Sexually Violent Predators Commitment Review Committee (the "Committee") from the requirements of FOIA. With a few exceptions, most public bodies are not wholly excluded from the requirements of FOIA. Instead, most public bodies must exercise narrowly tailored records and meetings exemptions to withhold records and to close meetings, following specific procedures in FOIA.

Records and meetings of government agencies are presumed to be open, and an agency must justify which records and meetings require protection from disclosure. The public has an interest and a concern in following the actions of the Committee, and the Committee should have to follow the same procedures as other public bodies for exempting records and meetings.

To better understand what kind of information would need to be protected by exemptions, subcommittee members discussed with Department of Corrections representatives the process by which a sexually violent predator is reviewed by the Committee. The Committee consists of seven members. A risk assessment is performed on inmates within 10 months of release who have been convicted of one of four specified sexually violent crimes. Those inmates who receive a certain score on the risk assessment are presented to the Committee for review. The Department of Corrections contracts with an outside evaluator to perform an in-depth mental health assessment as to whether a particular individual is likely to become a repeat offender. Based on this assessment, the Committee makes a recommendation to the Office of the Attorney General to release the individual, civilly commit the individual, or to establish a conditional release. The Attorney General reviews the recommendation and decides how to proceed. If the Attorney General decides to pursue a conditional release or civil commitment, the case is filed with the court system. At that point, the court case becomes a matter of public record.

It was recognized that the in-depth mental health assessment should be protected from public disclosure as would any medical record. However, once a recommendation is made to the Attorney General, the names of the individuals identified as potential sexual predators and the basis for the recommendation made should become public. The Office of the Attorney General had indicated that it was essential to protect victim-identifying information from public disclosure. The subcommittee members and meeting participants generally concurred that these two elements should be protected by an exemption.

Representatives from the Department of Corrections indicated that there was some concern over releasing the Committee members' votes. The concern was based on both the safety of the members and concern that the Committee members may tend to vote in favor of commitment to avoid public backlash. Other meeting participants, however, noted that oversight of the Committee would be limited if the votes were not disclosed, pointing out that juries decide cases every day and their actions are subject to public scrutiny.

The subcommittee voted 2-0 to recommend a draft to the FOIA Council that would

⁸ Comprised of FOIA Council members Tom Moncure and John Edwards.

protect the mental health assessments of individuals subject to the Committee's review and other records identifying their victims from public disclosure, and to protect discussions of those records in a public meeting.

Reorganization of § 2.2-3705

The subcommittee studying the possible reorganization of the records exemptions found at § 2.2-3705 met on August 27, 2003. Subcommittee members Tom Moncure and Ralph L. "Bill" Axselle were present at the meeting. Council members John Edward and Roger Wiley were also present, along with representatives of the media and local government. The focus of the subcommittee was to determine whether a reorganization of § 2.2-3705 would be advisable to reduce the size of bills before the General Assembly that contain a FOIA exemption and generally to make the exemption section more user friendly.

On its own initiative, staff met with interested parties to receive comment and discuss possible categories to use to reorganize § 2.2-3705. A consensus draft was prepared that incorporated the suggestions made and was presented to the subcommittee at its first meeting. The subcommittee, satisfied that the draft reflected the consensus of divergent interests, voted 2-0 to accept the draft and to present it to the FOIA Council for deliberation. Like a title revision, the reorganization of § 2.2-3705 involved only technical changes and no substantive changes were made to the section. Considerable work was done to ensure the reorganization achieved its purpose of making logical categories for existing record exemptions thereby reducing the size of bills before the General Assembly that contain a FOIA exemption and making the exemption section more user-friendly. The draft would repeal § 2.2-3705 and create eight new sections grouping the exemptions by general subject area as follows:

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies (written legal advice, contract negotiations, etc., shared by all public bodies).

§ 2.2-3705.2. Exclusions to application of chapter; public safety records (terrorism, school safety audits, victims of crime, etc.).

§ 2.2-3705.3. Exclusions to application of chapter; administrative investigations records (investigations related to license applications, fraud, waste and abuse, risk management claims, EEOC, etc.).

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions (scholastic records, records of teaching hospitals, etc.).

§ 2.2-3705.5. Exclusions to application of chapter; health and social services records (medical and mental health records, records related to recipients of social services, etc.).

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets (self-explanatory).

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

§ 2.2-3705.8. Limitation on record exclusions (salary information about public employees is open and access to consultants' reports).

After review of both drafts, the Council, by consensus, decided to keep the drafts as agenda items for its next meeting to allow further reflection by Council members and additional public comment. It was noted that the proposed reorganization of § 2.2-3705 had been presented to the Code Commission at its August meeting. The Council also directed staff to publicize the drafts, including posting them on the Council's website with an invitation to interested parties to submit comment.

E-Mail and the Freedom of Information Act

Under the next heading on the agenda, E-Mail and the Freedom of Information Act; Using Technology and Complying with the Law, the Council heard from Robert F. Nawrocki, Director, Records Management and Imaging Services Division, Library of Virginia. Mr. Nawrocki educated the Council on the general requirements of the Virginia Public Records Act and the handling of e-mail, specifically. He noted that e-mail is no more than an electronic envelope. It is the content of the e-mail that controls whether it must be retained and not the medium in which it is transmitted. E-mail creates a new burden on government for record keeping and accordingly government must adapt to this now-prevalent mode of communication. In the 1970s, e-mail began as an analog to the phone message, but today it is much more. In managing e-mail, Mr. Nawrocki suggested that government think globally, but act locally. He suggested that e-mails fitting the definition of a public record under the Virginia Public Records Act be stored locally by the sender in an electronic folder appropriately named or, alternatively, cc'd to the administrator of the public body for retention. In this way, the disclosure requirements of FOIA can be easily managed.

Concern was expressed by members of the FOIA Council that the record retention requirements on local government officials are particularly onerous in light of the fact that local elected officials serve their communities part time, receive a small stipend, and use their personal resources (home computers, etc.) to conduct public business. The convergence of FOIA and the Virginia Public Records Act has created a significant burden on local officials who are expected to be record managers in addition to their other public duties. It was felt that this burden would have a chilling effect on well-intentioned citizens who are trying to help out their communities by seeking elective office. On the other hand, it was noted that record keeping is part of governing and that record-keeping requirements truly operate for the benefit of the citizen. In response, the Librarian of Virginia stated that his staff is aware that the Virginia Public Records Act, enacted more than 30 years ago, is due for reexamination, especially in light of issues raised by electronic communications. He indicated that the subcommittee created pursuant to HJR 159 (2003) has been asked to make a recommendation concerning a review of the Virginia Public Records Act and suggested that this subcommittee would be an appropriate place for those wishing to comment.

Status of Fredericksburg E-Mail Case

Staff briefed the Council on the status of the Fredericksburg e-mail case. The Supreme Court of Virginia granted an appeal to the defendants (Beck v. Shelton, Supreme Court Case Number 030723). Defendants appealed the circuit court's decision that the use of e-mail to reach a consensus among three or more members of a public body constituted a meeting under FOIA. The plaintiffs in the case have also cross-appealed the decision that certain other uses of e-mail by three or more members of a public body were not a meeting under FOIA. All of the appeal briefs, including the response and reply, are due by the end of October. At that point, the court will set a date to hear oral arguments of the case. The arguments will not likely take place until early 2004, with a decision not likely until spring of 2004.

Public Comment

The Council heard from the Superintendent of Recreation for Frederick County Parks and Recreation concerning the potential danger to children that could result from record requests made to the department under FOIA. Specifically, their records contain personal information about children enrolled in their camp and sports programs. Such personal information includes a child's name, address, birth date, phone number, parent's name and place of work, medical conditions if any, and custodial arrangements. It was noted that on prior advice from the Council the department could not properly invoke the scholastic record exemption because it is not an educational institution. The Council agreed to look into the issues raised at its next meeting.

Other Business

Council member David Anderson stated that he was aware that the Chief Medical Examiner was pursuing the amendment of the Code of Virginia, including FOIA, to limit access to records of that office. The Council directed staff to contact the medical examiner and report back to the Council at its next meeting.

Of Note

Staff advised the Council that it projected that the 2003 FOIA Workshops being held in September would reach approximately 650 registrants statewide. Additionally, staff presented the latest statistics of the services rendered by the Council. Since its meeting in June through September 12, 2003, the Council has answered 303 inquiries, including 10 written opinions. Three written opinions were provided to government and seven to citizens. Staff provided 148 informal responses (via phone or e-mail) to government, 78 to citizens and 67 to media.

December 1, 2003

The Council⁹ began its meeting by commending outgoing member Rosanna L. Bencoach for her service to the Council. The Council also welcomed David H Hallock, Jr. as the new member succeeding Ms. Bencoach.

⁹ All members of the Council were in attendance, except Mssrs. Axselle and Hopkins, and Delegate S. C. Jones.

The Council completed its final review of the legislative recommendations made by its subcommittees concerning FOIA exemptions for records and meetings relating to the civil commitment of sexually violent predators¹⁰ and the reorganization of § 2.2-3705¹¹. The Council had previously considered these drafts at its meeting in September 2003, but wanted to allow additional time to receive comment from interested parties. Although the drafts were widely publicized, as directed by the Council, staff reported that no further comments or changes to the drafts had been received. The Council unanimously adopted both drafts and recommended them to the 2004 Session of the General Assembly. With regard to the reorganization of § 2.2-3705, the Council directed staff to include in its 2003 annual report that the reorganization of § 2.2-3705 was purely a technical exercise and that no substantive changes to the current law were made.

Legislative Preview

At the forum for receiving or reviewing requests for legislation impacting FOIA, or both, the Council heard from several parties. A summary of each presentation follows:

- **Frederick County Department of Parks and Recreation;** protection of records about children enrolled in their camp and sports programs. It was noted that there are approximately 550 children enrolled in the camp and sports programs offered by Frederick County. As a matter of registration, the County routinely collects a minimum of information on each child, including the name, home address and telephone number, date of birth, social security number, and any disabilities. In addition, the county advised that an additional 300 children are enrolled in after-school programs through the local department of social services, which in addition to the information collected above, includes a listing of the child's medications, allergies, and the fees paid by the parent for a child's participation.
- **Virginia State Bar (VSB); availability of VSB membership lists.** This issue was the subject of the Council's advisory opinion that VSB membership lists were subject to FOIA's mandatory disclosure requirements. The VSB proposed language to "overturn" the Council's opinion and make VSB membership lists exempt from the mandatory disclosure provisions of FOIA.
- **City of Richmond/City of Norfolk; protection of investigations conducted by local auditors.** This request seeks to expand current record exemption # 43 of § 2.2-

¹⁰ The essence of the proposed draft would protect the mental health assessments of individuals subject to the Sexually Violent Predators Civil Commitment Committee's review and other records identifying their victims from public disclosure, and to protect discussions of those records in a public meeting. The removal of the Civil Commitment Review Committee from the provisions of FOIA, which was enacted in 2003, would be replaced with the proposed amendments.

¹¹ Generally, the proposed draft would repeal § 2.2-3705, and create seven new sections grouping the exemptions by general subject area. The proposed groupings would include exemptions of general application, exemptions relating to public safety, exemptions relating to administrative investigations, exemptions relating to educational records and educational institutions, exemptions relating to health and social services, exemptions relating to proprietary records and trade secrets, and exemptions applicable to specific public bodies.

3705 to include investigations conducted by local auditors. Currently, #43 provides protection for investigations of the Auditor of Public Accounts, Joint Legislative Audit and Review Commission, the State Internal Auditor and certain committees created by Fairfax County.

- **Virginia Information Technology Agency (VITA); update of technology terms in FOIA.** After Council staff conducted FOIA training for senior staff at VITA, they expressed concern that many of the technology terms used in FOIA, whether in definitions or exemptions are obsolete. VITA suggested that the Council, with the assistance of VITA, study this issue and make recommendations for updating the nomenclature.

As to the protection of children's records maintained by local departments of parks and recreation, it was noted that these records were similar to scholastic records of children in school, even though they are not maintained by an educational institution as required by FOIA. The consensus of the Council was that should legislation be introduced, it should not be limited to the specifically named localities. Instead, any such exemption should be universally applied but narrowly tailored to protect only those records that are sensitive. A suggestion was made that Virginia needs a coherent, consistent policy as it relates to records of children, and perhaps in the future, the Council could examine this issue further.

Discussion about the release of VSB membership lists centered on whether any other regulatory agency limits the distribution of the names and addresses of its regulants. The representative of the VSB indicated that to her knowledge, only the State Corporation Commission limited the distribution of a listing of licensed insurance agents. The concern of the VSB was the privacy of its members that were not actively engaged in the practice of law. It was noted that the name, address, and telephone number of individual members is always released if requested. However, the entire membership lists was routinely sold to persons offering continuing legal education and certain other requesters. The Council took no position of the legislative proposal of the VSB.

As to the protection of records of local internal auditors, the Council again expressed its belief that if legislation is introduced, it should apply to all localities and not just individually named localities. It was noted that the public policy has already been articulated in FOIA by describing the records at the state level that may be exempted and also limiting protection of these records to ongoing investigations. It was brought to the Council's attention that there are a number of localities, usually cities, that have internal auditors and usually their responsibilities are set out in the respective charters.

The Council declined VITA's suggestion that it create a subcommittee to study the issue of obsolete technology nomenclature in FOIA. Although interested in pursuing the issue, the Council discussed the appropriate forum for what it perceived to be a technical issue. The consensus of the Council was for Council staff to convene a task force, similar to those convened by the Virginia Code Commission, to bring interested parties together to resolve the issue. Council staff would act as the facilitator/moderator of the task force.

An additional legislative issue was raised at the meeting concerning a proposal to exempt from release a listing of cellular phones numbers of local public safety employees. This proposal was a recommendation of the Virginia Association of Counties.

Other Business

As directed by the Council at its last meeting, staff advised the Council on the proposed legislation being considered by the chief medical examiner. Staff reported that the office of the chief medical examiner had been contacted and had reported that no legislation would be forthcoming from that office. Initially, the medical examiner had sought clarification about access to records in its possession from third parties, including law-enforcement agencies and others.

A draft of the Council's 2003 annual report was distributed. By law, the Council is required to report to the Governor and the General Assembly on its activities during the past year. At the direction of the chair, council members were asked to submit their changes or suggestions to Council staff within the next two weeks.

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 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 annual FOIA workshops held across the Commonwealth, the Council provides training for individual groups and agencies upon request. 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 more than 1,000 inquiries and conducted 40 training seminars. A listing of these training seminars appears as Appendix B.

FOIA Opinions

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of state government, local government, law enforcement, media, citizens, or out-of-state callers. 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.

For the period of December 1, 2002, to November 30, 2003, the Council, with a staff of two attorneys, fielded more than 1,000 inquiries. Of these inquiries, 24 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 only 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 serve" 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. A list of formal opinions issued during the past year appears as Appendix C. The table below profiles who requested written advisory opinions for the period December 1, 2002, through November 30, 2003:

Written Advisory Opinions: 24

State Government	1
Local Government	7
Law Enforcement	0
Citizens of the Commonwealth	13
Members of the News Media	3
Out-of-state	0

Typically, the Council provides advice over the phone or 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 like 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, 2002 and November 30, 2003:

Phone and E-mail Responses: 1001

State Government	200
Local Government	224
Law Enforcement	48
Citizens of the Commonwealth	313
Members of the News Media	198
Out-of-state	18

During this reporting period, the Council has answered a broad spectrum of questions about FOIA. The following table provides a general breakdown of the type and number of issues raised on FOIA inquiries.¹²

Records:

Making a request (i.e., how to make a request, who may request records, custodian of record, etc.)	57
Responding to a request (i.e., response time, appropriate response, FOIA applies to existing records, etc.)	75
Personnel records (including access to salary & job position of public employees)	104
Law-enforcement records	72
Charges for records	49
Definition of a public record	27
Format of requested record	10
Attorney-client privilege & work product exemptions	17
Working papers exemption	16
Scholastic records exemption	16
Tax records exemption	15
Procurement records	14
Licensing records exemption	13
Medical records exemption	11
Terrorism & public safety exemptions	7
Other specific exemption questions ¹³	22
Court records	16
E-mail as a public record	5
Draft records	5
Other questions relating to records ¹⁴	44

Meetings:

Mechanics of open meetings (notice, agenda, minutes, etc.)	61
--	----

¹² The numbers relating to the type of questions asked do not necessarily correspond with the number of inquiries received by the Council. One caller or one written opinion may address several different FOIA issues.

¹³ Generally, questions about specific exemptions not categorically listed above.

¹⁴ Generally, items in this category relate to a question as to whether a particular type of record not categorically listed above is subject to inspection and copying under FOIA.

Definition of a meeting	41
Electronic meetings ¹⁵	40
Voting	14
Public comment	11
Recording	9
Polling provision	5
Caucus	5
Special & emergency meetings	3
Closed meeting procedure	7
Personnel discussion	25
Consultation with legal counsel	16
Real property exemption	3
Scholastic exemption	3
Terrorism & public safety exemptions	3
Other exemptions ¹⁶	10
Other meeting questions	4

General:

Outside scope of FOIA ¹⁷	54
Definition of a public body	50
General FOIA questions	44
Remedies	26
Privacy/Government Data Collection & Dissemination Practices Act	8
Public Records Act	8
Other	23

¹⁵ Includes questions about *Beck v. Shelton* e-mail case and use of e-mail by three or more members of a public body.

¹⁶ Generally, questions about specific exemptions not categorically listed above.

¹⁷ Generally, these questions deal with access to records of private entities, application of federal FOIA, etc.

FOIA Services:

Request for FOIA Materials	47
Questions about FOIA Training	37
Questions about FOIA legislation	23
Questions about role of FOIA Council	19
Suggestions/FYI	22

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. During the past year, the website was visited over 20,000 times. About 1,300 visitors viewed the educational materials that the Council has developed and included on the website. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council's meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms, (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. 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

For the fourth year, Council staff conducted statewide FOIA training workshops. This year, workshops were conducted during the second and third weeks of September in Richlands, Roanoke, Weyer's Cave, Virginia Beach, Richmond and Alexandria. Each workshop contained a segment focusing on access to records, access to meetings, e-mail and other current FOIA issues, and law-enforcement records. Participants were provided with copies of the law and other educational materials designed to answer questions about FOIA and facilitate compliance with the law. The workshops were approved for 5.5 hours of continuing legal education credit for attorneys by the State Bar of Virginia, and for in-service credit for law-enforcement personnel through the Department of Criminal Justice Services. Nearly 650 people attended the workshops around the state. Attendees included state and local government employees and officials, law-enforcement personnel, and members of the public and the news media. Course evaluation forms turned in by the participants indicated that the workshops were well received. In addition to the Council, the workshops were sponsored by the Virginia Association of Broadcasters, the Virginia Association of Chiefs of Police, the Virginia Association of Counties, the Virginia Coalition for Open Government, the Virginia Local Government Attorneys Association, the Virginia Municipal League, the Virginia Press Association, the Virginia Sheriff's Association, and the Virginia School Boards' Association.

In addition to the workshops, the Council also provides training upon request to interested groups, such as the staff of state agencies, members of local governing bodies, media organizations, or any other group that wishes to learn more about FOIA. Staff from the Council travels extensively within 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. From December 1, 2002, to November 30, 2003, the Council conducted 40 training seminars. A listing of the training seminars appears as Appendix B.

Educational Materials

The Council continuously creates and updates educational materials that are relevant to both requesters as well as 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
- How to Make a Closed Meeting Motion
- Law Enforcement Guide to FOIA
- Guide to Electronic Meetings
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- 2003 FOIA & Access Bill Summaries

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. A sample request letter is also available for a person wishing to make a FOIA request. Response letters are provided to demonstrate how to follow the legal requirements to withhold records in part or in their entirety, as well as a letter notifying a requester of the public body's need for a seven-day extension to respond to the request.

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. During its third year of operation, the Council continued to serve as a resource for the public, representatives of state and local government, and members of the media, responding to more than 1,000 inquiries. It formed workgroups 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 annual statewide FOIA workshops and other specialized training sessions. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

R. Edward Houck, *Chairman*
S. Chris Jones, *Vice-Chairman*
David E. Anderson
Ralph L. "Bill" Axselle, Jr.
Rosanna L. Bencoach
John Stewart Bryan, III
John B. Edwards
W. Wat Hopkins
E. M. Miller, Jr.
Thomas M. Moncure, Jr.
Roger C. Wiley
Nolan T. Yelich

APPENDIX A

Legislative Recommendations

1. BILL SUMMARY: Freedom of Information Act; applicability; sexually violent predator commitment review committee. Provides that the records of the Commitment Review Committee involving the commitment of sexually violent predators under Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1 are exempt from disclosure under the Freedom of Information Act. The bill further provides that in no case shall records relating to the victims of sexually violent predators be disclosed. The bill also contains an open meeting exemption for the Commitment Review Committee when discussing or considering records excluded by the bill. Currently, the Commitment Review Committee is not subject to the Freedom of Information Act. The bill is a recommendation of the Virginia Freedom of Information Advisory Council.

Bill Text:

A BILL to amend and reenact §§ 2.2-3703, 2.2-3705, and 2.2-3711 of the Code of Virginia, relating to the Freedom of Information Act; applicability; sexually violent predator commitment review committee.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3703, 2.2-3705, and 2.2-3711 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records.

A. The provisions of this chapter shall not apply to:

1. The Virginia Parole Board, except that (i) information from the Virginia Parole Board providing the number of inmates considered by such Board for discretionary parole, the number of inmates granted or denied parole, and the number of parolees returned to the custody of the Department of Corrections solely as a result of a determination by such Board of a violation of parole shall be open to inspection and available for release, on a monthly basis, as provided by § 2.2-3704 and (ii) all records concerning the finances of the Virginia Parole Board shall be public records and subject

to the provisions of this chapter. The information required by clause (i) shall be furnished by offense, sex, race, age of the inmate, and the locality in which the conviction was obtained, upon the request of the party seeking the information;

2. Petit juries and grand juries;

3. Family assessment and planning teams established pursuant to § 2.2-5207;

and

4. The Virginia State Crime Commission.

B. Public access to voter registration and election records shall be governed by the provisions of Title 24.2 and this chapter. The provisions of Title 24.2 shall be controlling in the event of any conflict.

§ 2.2-3705. Exclusions to application of chapter.

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

1. Confidential records of all investigations of applications for licenses and permits, and all licensees and permittees made by or submitted to the Alcoholic Beverage Control Board, the State Lottery Department, the Virginia Racing Commission, or the Department of Charitable Gaming.

2. State income, business, and estate tax returns, personal property tax returns, scholastic and confidential records held pursuant to § 58.1-3.

3. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, which are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

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

5. Medical and mental records, except that such records may be personally reviewed by the subject person or a physician of the subject person's choice. However, the subject person's mental records may not be personally reviewed by such person when the subject person's treating physician has made a part of such person's records a written statement that in his opinion a review of such records by the subject person would be injurious to the subject person's physical or mental health or well-being.

Where the person who is the subject of medical records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the medical records if the administrator or chief medical officer has reasonable cause to believe that such confined person has

an infectious disease or other medical condition from which other persons so confined need to be protected. Medical records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the medical records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of medical and mental records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. In instances where the person who is the subject thereof is an emancipated minor or a student in a public institution of higher education, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services shall be open to inspection and copying as provided in § 2.2-3704. No such summaries or data shall include any patient-identifying information.

6. Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open to inspection under this chapter, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.

As used in this subdivision:

"Office of the Governor" means the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

"Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use.

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

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

9. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment, or (iii) receipt of an honor or honorary recognition.

10. Library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.

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

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

entitled to review and inspect all records relative to his performance on such employment tests.

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

12. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants. However, such material may be made available during normal working hours for copying, at the requester's expense, by the individual who is the subject thereof, in the offices of the Department of Health Professions or in the offices of any health regulatory board, whichever may possess the material.

13. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth.

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

15. Reports, documentary evidence and other information as specified in §§ 2.2-706 and 63.2-104.

16. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or § 62.1-134.1.

17. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.

18. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

19. Financial statements not publicly available filed with applications for industrial development financings.

20. Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

21. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.

22. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by the

Partnership, where competition or bargaining is involved and where, if such records are made public, the financial interest of the governmental unit would be adversely affected.

23. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

24. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.

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

26. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

27. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

28. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

29. Records and writings furnished by a member of the General Assembly to a meeting of a standing committee, special committee or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.

30. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address,

but excluding the amount of utility service provided and the amount of money paid for such utility service.

31. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

32. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; and other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2. However, nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

33. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or

persons on the waiting list for housing assistance programs funded by local governments or by any such authority; or (iv) filed with any local redevelopment and housing authority created pursuant to § 36-4 or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § 15.2-2304 or § 15.2-2305. However, access to one's own information shall not be denied.

34. Records regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of them would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions and provisions of the siting agreement.

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

36. Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exemption shall not apply to requests from the owner of the land upon which the resource is located.

37. Records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for the State Lottery Department relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such official records have not been publicly released, published, copyrighted or patented. Whether released, published or copyrighted, all

game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.

38. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.

39. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multi-family residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of

this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.

Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

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

41. Information and records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1.

42. Reports and court documents required to be kept confidential pursuant to § 37.1-67.3.

43. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; or (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying

information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.

44. Data formerly required to be submitted to the Commissioner of Health relating to the establishment of new or the expansion of existing clinical health services, acquisition of major medical equipment, or certain projects requiring capital expenditures pursuant to former § 32.1-102.3:4.

45. Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

46. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

47. Records of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of a local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23-76.1, relating to the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that: (i) such records contain confidential analyses

prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system or provided to the retirement system under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) disclosure of such confidential analyses would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system or the Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be construed to prevent the disclosure of records relating to the identity of any investment held, the amount invested, or the present value of such investment.

48. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

49. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

50. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

51. Names and addresses of subscribers to Virginia Wildlife magazine, published by the Department of Game and Inland Fisheries, provided the individual subscriber has requested in writing that the Department not release such information.

52. Information required to be provided pursuant to § 54.1-2506.1.

53. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

54. All information and records acquired during a review of any child death by the State Child Fatality Review team established pursuant to § 32.1-283.1, during a review of any child death by a local or regional child fatality review team established pursuant to § 32.1-283.2, and all information and records acquired during a review of any death by a family violence fatality review team established pursuant to § 32.1-283.3.

55. Financial, medical, rehabilitative and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.

56. Confidential proprietary records that are voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality from the responsible public entity or affected local jurisdiction, used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the

process of competition or bargaining would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. For the purposes of this subdivision, the terms "affected local jurisdiction", "public entity" and "private entity" shall be defined as they are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002. However, nothing in this subdivision shall be construed to prohibit the release of procurement records as required by § 56-573.1 or § 56-575.16. Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications.

57. Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public

disclosure is necessary to meet the objective of antiterrorism planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

58. All records of the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

59. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9, to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § 32.1-276.4.

60. Records of the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; data, records or

information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; and the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and data, records or information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such data, records or information have not been publicly released, published, copyrighted or patented.

61. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.

62. Confidential proprietary records that are provided by a franchisee under § 15.2-2108 to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from

the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.

63. Records of the Intervention Program Committee within the Department of Health Professions, to the extent such records may identify any practitioner who may be, or who is actually, impaired to the extent disclosure is prohibited by § 54.1-2517.

64. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Chapter 3.1 (§ 51.5-12.1 et seq.) of Title 51.5, to the extent such records contain (i) medical or mental records, or other data identifying individual patients or (ii) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

65. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.

66. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 18.2-340.34.

67. Personal information, as defined in § 2.2-3801, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or

savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23. Nothing in this subdivision shall be construed to prohibit disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information.

68. Any record copied, recorded or received by the Commissioner of Health in the course of an examination, investigation or review of a managed care health insurance plan licensee pursuant to §§ 32.1-137.4 and 32.1-137.5, including books, records, files, accounts, papers, documents, and any or all computer or other recordings.

69. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

70. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to §§ 3.1-622 and 3.1-624.

71. 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 (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such records shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the

nature of any environmental contamination that may have occurred or similar documents.

72. As it pertains to any person, records related to the operation of toll facilities that identify an individual, vehicle, or travel itinerary including, but not limited to, vehicle identification data, vehicle enforcement system information; video or photographic images; Social Security or other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use.

73. Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.

74. Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

75. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12 to the

Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

76. Records of the State Lottery Department pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations, and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed.

77. Records, information and statistical registries required to be kept confidential pursuant to §§ 63.2-102 and 63.2-104.

78. Personal information, as defined in § 2.2-3801, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record.

79. (For effective date, see note) All data, records, and reports relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such data, records, and reports that are in the possession of the Prescription Monitoring Program pursuant to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 and any material relating to the operation or security of the Program.

80. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act.

81. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body.

82. Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would

adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.

83. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

84. Records of the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result.

85. Security plans and specific vulnerability assessment components of school safety audits, as provided in § 22.1-279.8.

Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster or other catastrophic event, or (ii) any person on school property has suffered or been threatened with any personal injury.

86. Records, investigative notes, correspondence, and information pertaining to the planning, scheduling and performance of examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by or

for the State Treasurer, his agents, employees or persons employed to perform an audit or examination of holder records.

87. Records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2.

88. Records of the Commitment Review Committee concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1; except that in no case shall records identifying the victims of a sexually violent predator be disclosed.

B. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under subdivision A 4; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

C. No provision of this chapter or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person incarcerated in a state, local or federal correctional facility, whether or not such facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.). However, this subsection shall not be construed to prevent an incarcerated person from exercising his constitutionally protected rights, including, but not limited to, his rights to call for evidence in his favor in a criminal prosecution.

D. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

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

A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board.

2. Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any Virginia public institution of higher education or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

3. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

4. The protection of the privacy of individuals in personal matters not related to public business.

5. Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

6. Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

7. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

8. In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants and

contracts made by a foreign government, a foreign legal entity or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

9. In the case of the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, and The Science Museum of Virginia, discussion or consideration of matters relating to specific gifts, bequests, and grants.

10. Discussion or consideration of honorary degrees or special awards.

11. Discussion or consideration of tests, examinations or other records excluded from this chapter pursuant to subdivision A 11 of § 2.2-3705.

12. Discussion, consideration or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

13. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or

both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

14. Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

15. Discussion or consideration of medical and mental records excluded from this chapter pursuant to subdivision A 5 of § 2.2-3705.

16. Deliberations of the State Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of State Lottery Department matters related to proprietary lottery game information and studies or investigations exempted from disclosure under subdivisions A 37 and A 38 of § 2.2-3705.

17. Those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed.

18. Discussion, consideration, review and deliberations by local community corrections resources boards regarding the placement in community diversion programs of individuals previously sentenced to state correctional facilities.

19. Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.

20. Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law-enforcement or emergency

service officials concerning actions taken to respond to such activity or a related threat to public safety.

21. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23-76.1, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system or provided to the retirement system under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system or the Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment.

22. Those portions of meetings in which individual child death cases are discussed by the State Child Fatality Review team established pursuant to § 32.1-283.1, and those portions of meetings in which individual child death cases are discussed by a regional or local child fatality review team established pursuant to § 32.1-283.2, and those portions of meetings in which individual death cases are discussed by family violence fatality review teams established pursuant to § 32.1-283.3.

23. Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related

information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

24. In the case of the Virginia Commonwealth University Health System Authority, discussion or consideration of any of the following: the acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority; operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority; matters relating to gifts, bequests and fund-raising activities; grants and contracts for services or work to be performed by the Authority; marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority; members of its medical and teaching staffs and qualifications for appointments thereto; and qualifications or evaluations of other employees.

25. Those portions of the meetings of the Intervention Program Committee within the Department of Health Professions to the extent such discussions identify any practitioner who may be, or who actually is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

26. Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust

account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23 is discussed.

27. Discussion or consideration, by the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, of trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12, related to the provision of wireless E-911 service.

28. Those portions of disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation, Department of Health Professions, or the Board of Accountancy conducted pursuant to § 2.2-4019 or § 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory boards or conference committees of such boards to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

29. Discussion or consideration by a responsible public entity or an affected local jurisdiction, as those terms are defined in § 56-557, of confidential proprietary records excluded from this chapter pursuant to subdivision A 56 of § 2.2-3705.

30. Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

31. Discussion or consideration by the Commonwealth Health Research Board of grant application records excluded from this chapter pursuant to subdivision A 83 of § 2.2-3705.

32. Discussion or consideration by the Commitment Review Committee of records excluded from this chapter pursuant to subdivision A 88 of § 2.2-3705 relating to individuals subject to commitment as sexually violent predators under Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1.

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Intervention Program Committee within the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue bonds by general or special law, to identify a business or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.

#

2. BILL SUMMARY: Freedom of Information Act; reorganization of record exemptions.

Reorganizes current § 2.2-3705, the listing of records that are not subject to the mandatory disclosure requirements of the Freedom of Information Act (FOIA). The bill would repeal § 2.2-3705 and in its place, create seven new sections grouping the exemptions by general subject area. The proposed groupings would include exemptions of general application, exemptions relating to public safety, exemptions relating to administrative investigations, exemptions relating to educational records and educational institutions, exemptions relating to health and social services, exemptions relating to proprietary records and trade secrets, and exemptions applicable to specific public bodies. Like a title revision, the reorganization of § 2.2-3705 involves only technical changes and makes no substantive changes. The bill is a recommendation of the Virginia Freedom of Information Advisory Council.

NOTE: Numbers appearing in parenthesis at end of each subdivision refer to the current exemption as listed in § 2.2-3705. The actual bill introduced to the General Assembly will also include other housekeeping amendments to correct cross-references to § 2.2-3705 throughout the Code of Virginia.

The table below lists the proposed record exemption sections with reference to the current exemptions and provisions that would be included in each:

Proposed Section	Current Reference in § 2.2-3705
§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.	Subdivisions A 4, 7, 8, 11, 14, 18, 25, 35, 40, 78, 80, and 82.
§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.	Subdivisions A 24, 39, 45, 57, 65, 69, and 85.
§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.	Subdivisions A 1, 13, 26, 28, 31, 38, 43, 73, 74, and 81.
§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.	Subdivisions A 3, 9, 20, 58, 60 and 67.
§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.	Subdivisions A 5, 12, 15, 32, 41, 42, 44, 52, 54, 59, 63, 64, 68, 77, 79, and 87.
§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.	Subdivisions A 16, 19, 22, 23, 27, 46, 48, 49, 50, 53, 56, 61, 62, 66, 70, 75, and 83.
§ 2.2-3705.7. Exclusions to	Subdivisions A 2, 6, 10, 17, 21, 29, 30, 33, 34, 36, 37,

application of chapter; records of specific public bodies and certain other limited exemptions.	47, 51, 55, 71, 72, 76, 84, and 86.
§ 2.2-3705.8. Limitation on record exclusions.	Subsections B and D.
§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration records. ¹	Subsection C

Bill Text:

A BILL to amend and reenact § 2.2-3703 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, and 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, and 2.2-3705.8, and to repeal § 2.2-3705 of the Code of Virginia, relating to the Virginia Freedom of Information Act; reorganization of current record exemptions.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3703 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, and 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, and 2.2-3705.8, as follows:

§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.

A. The provisions of this chapter shall not apply to:

1. The Virginia Parole Board, except that (i) information from the Virginia Parole Board providing the number of inmates considered by such Board for discretionary

¹ § 2.2-3703 currently exists in FOIA, and would not be created by the reorganization bill. Instead, the proposal would move current subsection C of § 2.2-3705, relating to rights of prisoners under FOIA, to this existing section.

parole, the number of inmates granted or denied parole, and the number of parolees returned to the custody of the Department of Corrections solely as a result of a determination by such Board of a violation of parole shall be open to inspection and available for release, on a monthly basis, as provided by § 2.2-3704 and (ii) all records concerning the finances of the Virginia Parole Board shall be public records and subject to the provisions of this chapter. The information required by clause (i) shall be furnished by offense, sex, race, age of the inmate, and the locality in which the conviction was obtained, upon the request of the party seeking the information;

2. Petit juries and grand juries;

3. Family assessment and planning teams established pursuant to § 2.2-5207;

4. The Virginia State Crime Commission; and

5. The Commitment Review Committee and any documents, evaluations, assessments and proceedings involving the commitment of sexually violent predators under Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1.

B. Public access to voter registration and election records shall be governed by the provisions of Title 24.2 and this chapter. The provisions of Title 24.2 shall be controlling in the event of any conflict.

C. No provision of this chapter or Chapter 21 (§ 30-178 et seq.) of Title 30 shall be construed to afford any rights to any person incarcerated in a state, local or federal correctional facility, whether or not such facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.). However, this subsection shall not be construed to prevent an incarcerated person from exercising his constitutionally protected rights, including, but not limited to, his rights to call for evidence in his favor in a criminal prosecution. (SOURCE: 2.2-3705 C)

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

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

1. Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying. (#4)

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege. (#7)

3. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711. (#8)

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

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

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or

examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests. (#11)

5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting. (#14)

6. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.(#18)

7. Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.(#25)

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease. (#35)

9. Records concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ 2.2-1832 et seq.) of Chapter 18 of this title, or by any county, city, or town; and investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body's insurance policy or self-insurance plan. However, nothing in this subdivision shall prohibit the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit. (#40)

10. Personal information, as defined in § 2.2-3801, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from

the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record. (#78)

11. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act. (#80)

12. Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act. (#82)

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

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

1. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses. (#24)

2. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multi-family residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.

Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event. (#39)

3. Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system. (#45)

4. Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any

public building, structure or information storage facility. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event. (#57)

5. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety. (#65)

6. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure. (#69)

7. Security plans and specific assessment components of school safety audits, as provided in § 22.1-279.8.

Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster or other catastrophic event, or (ii) any person on school property has suffered or been threatened with any personal injury. (#85)

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

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

1. Confidential records of all investigations of applications for licenses and permits, and all licensees and permittees made by or submitted to the Alcoholic Beverage Control Board, the State Lottery Department, the Virginia Racing Commission, or the Department of Charitable Gaming. (#1)

2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth. (#13)

3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation. (#26)

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1. (#28)

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.(#31)

6. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.(#38)

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; or (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the

person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.(#43)

8. Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.(#73)

9. Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information (#74)

10. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body. (#81)

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

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

1. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, which are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying. (#3)

2. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment, or (iii) receipt of an honor or honorary recognition. (#9)

3. Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented. (#20)

4. All records of the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be. (#58)

5. Records of the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; data, records or information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts or account status of any customer of the Authority; consulting or other reports paid for by the

Authority to assist the Authority in connection with its strategic planning and goals; and the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and data, records or information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such data, records or information have not been publicly released, published, copyrighted or patented. (#60)

6. Personal information, as defined in § 2.2-3801, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23. Nothing in this subdivision shall be construed to prohibit disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information. (#67)

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

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

1. Medical and mental records, except that such records may be personally reviewed by the subject person or a physician of the subject person's choice. However, the subject person's mental records may not be personally reviewed by such person when the subject person's treating physician has made a part of such person's records

a written statement that in his opinion a review of such records by the subject person would be injurious to the subject person's physical or mental health or well-being.

Where the person who is the subject of medical records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the medical records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Medical records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the medical records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of medical and mental records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. In instances where the person who is the subject thereof is an emancipated minor or a student in a public institution of higher education, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services shall be open to inspection and copying as provided in § 2.2-3704. No such summaries or data shall include any patient-identifying information. (#5)

2. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants. However, such material may be made

available during normal working hours for copying, at the requester's expense, by the individual who is the subject thereof, in the offices of the Department of Health Professions or in the offices of any health regulatory board, whichever may possess the material.(#12)

3. Reports, documentary evidence and other information as specified in §§ 2.2-706 and 63.2-104.(#15)

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; and other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2. However, nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.(#32)

5. Information and records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1.(#41)

6. Reports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.1-67.3. (# 42)

7. Data formerly required to be submitted to the Commissioner of Health relating to the establishment of new or the expansion of existing clinical health services, acquisition of major medical equipment, or certain projects requiring capital expenditures pursuant to former § 32.1-102.3:4. (#44)

8. Information required to be provided to the Department of Health Professions by certain licensees pursuant to § 54.1-2506.1.(#52).

9. All information and records acquired during a review of any child death by the State Child Fatality Review team established pursuant to § 32.1-283.1, during a review of any child death by a local or regional child fatality review team established pursuant to § 32.1-283.2, and all information and records acquired during a review of any death by a family violence fatality review team established pursuant to § 32.1-283.3.(#54)

10. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9, to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § 32.1-276.4. (#59)

11. Records of the Intervention Program Committee within the Department of Health Professions, to the extent such records may identify any practitioner who may be, or who is actually, impaired to the extent disclosure is prohibited by § 54.1-2517.(#63)

12. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Chapter 3.1 (§ 51.5-12.1 et seq.) of Title 51.5, to the extent such records contain (i) medical or mental records, or other data identifying individual patients or (ii) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.(#64)

13. Any record copied, recorded or received by the Commissioner of Health in the course of an examination, investigation or review of a managed care health insurance plan licensee pursuant to §§ 32.1-137.4 and 32.1-137.5, including books, records, files, accounts, papers, documents, and any or all computer or other recordings. (#68)

14. Records, information and statistical registries required to be kept confidential pursuant to §§ 63.2-102 and 63.2-104. (#77)

15. (For effective date, see note) All data, records, and reports relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such data, records, and reports that are in the possession of the Prescription Monitoring Program pursuant to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 and any material relating to the operation or security of the Program. (#79)

16. Records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2. (#87)

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

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

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or § 62.1-134.1.(#16)

2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq. of Title 15.2.(#19)

3. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by the Partnership, where competition or bargaining is involved and where, if such records are

made public, the financial interest of the governmental unit would be adversely affected.(#22)

4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.(#23)

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.(#27)

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.(#46)

7. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.(#48)

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.(#49)

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or

other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.(#50)

10. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.(#53)

11. Confidential proprietary records that are voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality from the responsible public entity or affected local jurisdiction, used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. For the purposes of this subdivision, the terms "affected local jurisdiction", "public entity" and "private entity" shall be defined as they are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and

Infrastructure Act of 2002. However, nothing in this subdivision shall be construed to prohibit the release of procurement records as required by § 56-573.1 or § 56-575.16. Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications. (#56)

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality. (#61)

13. Confidential proprietary records that are provided by a franchisee under § 15.2-2108 to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary. (#62)

14. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 18.2-340.34. (#66)

15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to §§ 3.1-622 and 3.1-624.(#70)

16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.(#75)

17. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.(#83)

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

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

1. State income, business, and estate tax returns, personal property tax returns, scholastic and confidential records held pursuant to § 58.1-3. (#2)

2. Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open

to inspection under this chapter, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.

As used in this subdivision:

"Office of the Governor" means the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

"Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use. (#6)

3. Library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.(#10)

4. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.(#17)

5. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision. (#21)

6. Records and writings furnished by a member of the General Assembly to a meeting of a standing committee, special committee or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.(#29)

7. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address, but excluding the amount of utility service provided and the amount of money paid for such utility service.(# 30)

8. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or persons on the waiting list for housing assistance programs funded by local governments or by any such authority; or (iv) filed with any local redevelopment and housing authority created pursuant to § 36-4 or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § 15.2-2304 or § 15.2-2305. However, access to one's own information shall not be denied. (#33)

9. Records regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of them would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions and provisions of the siting agreement. (#34)

10. Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exemption shall not apply to requests from the owner of the land upon which the resource is located. (#36)

11. Records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for the State Lottery Department relating to matters of a specific lottery

game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such official records have not been publicly released, published, copyrighted or patented. Whether released, published or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.(#37)

12. Records of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of a local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23-76.1, relating to the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that: (i) such records contain confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system or provided to the retirement system under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) disclosure of such confidential analyses would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system or the Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be construed to prevent the disclosure of records relating to the identity of any investment held, the amount invested, or the present value of such investment.(#47)

13. Names and addresses of subscribers to Virginia Wildlife magazine, published by the Department of Game and Inland Fisheries, provided the individual subscriber has requested in writing that the Department not release such information.(#51)

14. Financial, medical, rehabilitative and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive

Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.(#55)

15. 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 (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such records shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents. (#71)

16. As it pertains to any person, records related to the operation of toll facilities that identify an individual, vehicle, or travel itinerary including, but not limited to, vehicle identification data, vehicle enforcement system information; video or photographic images; Social Security or other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use. (#72)

17. Records of the State Lottery Department pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations, and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed.(#76)

18. Records of the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result. (#84)

19. Records, investigative notes, correspondence, and information pertaining to the planning, scheduling and performance of examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by or for the State Treasurer, his agents, employees or persons employed to perform an audit or examination of holder records. (#86)

§ 2.2-3705.8. Limitation on record exclusions.

A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under this subdivision; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.(2.2-3705 B)

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.(2.2-3705 D)**2. That § 2.2-3705 of the Code of Virginia is repealed.**

#

APPENDIX B

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

From December 1, 2002 through the end of November 2003, Council staff gave approximately 40 presentations, which are identified below in chronological order identifying the group/agency requesting the training.

December 2, 2002	Town of Mineral Mineral, Virginia
December 11, 2002:	Lorman Legal Education Seminar "What you need to know about access to public records and meetings in Virginia" Norfolk Virginia
January 3, 2003	Virginia General Assembly New Member Orientation Richmond, Virginia
January 6, 2003	Public Procurement Forum Richmond, Virginia
February 13, 2003	Public Relations Society of America, Blue Ridge Chapter, Roanoke Virginia
February 25, 2003	Hampton University, Reporting II Class Hampton Virginia
March 26, 2003	Madison County Madison, Virginia
April 2, 2003	Rural Water Association Williamsburg, Virginia
April 4, 2003	Department of Housing and Community Development Fairfax County Fairfax, Virginia
April 10, 2003	City of Richmond Public Library Board Richmond, Virginia
April 26, 2003	Virginia Press Women

	Jamestown, Virginia
May 8, 2003	Virginia Association of Defense Attorneys Charlottesville, Virginia
May 27, 2003	Public Relations Society of America Shenandoah Chapter Harrisonburg, Virginia
June 11, 2003	Senate Committee Operations Senate of Virginia Richmond, Virginia
June 13, 2003	Department of Emergency Management Richmond, Virginia
June 16, 2003	Town of Purcellville Purcellville, Virginia
June 18, 2003	Police Department City of Richmond Richmond, Virginia
July 31, 2003	Public Assistance Investigators of Virginia Henrico County, Virginia
August 9, 2003	FOIA Panel; Assessing Transparency in Legislative Operations Southern Legislative Conference Ft. Worth, Texas
August 28, 2003	Virginia Department of Health Office of Drinking Water Richmond, Virginia
September 8, 2003	Annual FOIA Workshop Richlands, Virginia
September 9, 2003	Annual FOIA Workshop Roanoke, Virginia
September 10, 2003	Annual FOIA Workshop Harrisonburg, Virginia
September 11, 2003	Virginia Public Library Directors Library of Virginia

Richmond, Virginia

September 12, 2003	Annual FOIA Workshop Virginia Beach, Virginia
September 16, 2003	Annual FOIA Workshop Richmond, Virginia
September 17, 2003	Annual FOIA Workshop Alexandria, Virginia
September 30, 2003	Journalism/Public policy class Virginia Commonwealth University Richmond, Virginia
October 2, 2003	Law Enforcement Officer Training Hampton Roads Area Agencies Chesapeake, Virginia
October 8, 2003	Commonwealth Competition Council Richmond, Virginia
October 16, 2003	Shaping Effective Leadership for the Future City of Williamsburg Williamsburg, Virginia
October 20, 2003	Town of Bowling Green Bowling Green, Virginia
October 22, 2003	VITA (Virginia Information Technology Agency) Richmond, Virginia
October 28, 2003	Office of the Clerk Virginia House of Delegates Richmond, Virginia
October 30, 2003	Police Department City of Newport News Newport News, Virginia
November 5, 2003	Police Department City of Newport News Newport News, Virginia
November 14, 2003	FOIA at 35 Conference Virginia Coalition for Open Government

	Charlottesville, Virginia
November 17, 2003	City of Manasas and surrounding areas Manasas, Virginia
November 18, 2003	Office of Public Utilities City of Richmond Richmond, Virginia
November 19, 2003	Virginia Sheriff's Institute New Member Training Roanoke, Virginia

APPENDIX C

ADVISORY OPINIONS ISSUED December 1, 2002, through November 30, 2003

<u>Opinion No.</u>	<u>Issue(s)</u>
AO-01-03	Members of a public body may reach a tentative agreement during a closed meeting, but no action will become effective until voted on in an open meeting; FOIA allows members to poll each other individually about their position on a matter of public business.
AO-02-03	Portions of records concerning the disciplining of an identifiable employee must be released to that employee under the personnel exemption, even if those records may be withheld from public disclosure under § 2.2-3705(A)(8) as records compiled specifically for use in an active administrative investigation.
AO-03-03	Public bodies may adopt rules governing the placement and use of recording equipment during a meeting; however, one must examine the practical implication of the rules' application. A rule may not essentially prohibit a recording from being made.
AO-04-03	Comments concerning identifiable employees on a "quality of work environment" survey may be redacted and withheld as personnel records.
AO-05-03	When records are requested from a public body pursuant to a subpoena, the Rules of the Supreme Court of Virginia --not FOIA - - apply.
AO-06-03	Deliberations of a school board to discuss whether a teacher's grievance is grievable may be kept private.
AO-07-03	Names of lawyers admitted to practice law in Virginia is public record and not subject to exemption.
AO-08-03	Public body may only make reasonable charges for its actual costs incidental to a particular request; public body may not charge a requester for the time spent compiling records prior to the request.
AO-09-03	The Appalachia Volunteer Fire Department appears to be a public body supported wholly or principally by public funds.

- AO-10-03 A suicide report is a noncriminal incident report subject to disclosure under FOIA, but portions of the report of a personal, medical or financial nature may be redacted.
- AO-11-03 A public body must disclose the salary of public employees for a particular date, upon request; dialogue between public body and requester to clarify request facilitates the production of records and is the intent of the law.
- AO-12-03 Failure to respond to a FOIA request is deemed a denial of the request and is a violation of FOIA; person denied rights under FOIA may file a petition for mandamus or injunction.
- AO-13-03 The Virginia Baseball Stadium Authority is a public body subject to FOIA. All of its records must be available for inspection and copying and its meetings open to the public unless specifically exempted by statute.
- AO-14-03 Onancock Business and Civic Association is not a public body under FOIA; it is not supported wholly or principally by public funds, nor is it acting as an agent of the town council in its participation in the Main Street Program.
- AO-15-03 A FOIA request from a government employee should not be treated differently than a request from a citizen or representative of the media; FOIA does not prohibit a public body from advising a third party that a particular FOIA request has been made; public body should not make promise of confidentiality about certain records when no FOIA exemption exists that would allow those records to be withheld.
- AO-16-03 Specific mandate in the Code of Virginia that schools provide school safety audits to Virginia Center for School Safety supercedes general FOIA exemption that allows portions of audits to be withheld; local school board retains the authority to determine which portions of the audits are subject to the exemption in response to a FOIA request.
- AO-17-03 A public body may hold a closed meeting under the personnel exemption to discuss the performance and discipline of a fellow member of the public body only if the public body has the authority to censure, reprimand or otherwise discipline a member of the public body.
- AO-18-03 Student organizations at public institutions of higher education are public bodies if supported wholly or principally by public funds;

the organization, and not the university, is the appropriate entity to ask for records of the organization.

AO-19-03 Records held by a private company that has contracted to run a public university bookstore are subject to FOIA if the bookstore is acting as an agent of a public body; agency is a question of fact; the public body, acting as principal, would be the appropriate entity to request records of the agent.

AO-20-03 FOIA requires that a custodian of public records take all necessary precautions to preserve and safekeep the records; FOIA does not prohibit a public officer from lending out a CD for a requester to copy public records so long as the original records are kept safe.

AO-21-03 Circuit court clerk must provide digital copies of digital records upon request; electronic records must be made available at a reasonable cost, not to exceed the actual cost.

AO-22-03 FOIA does not require a public comment period during public meetings, nor does it set forth procedures for receiving public comment.

AO-23-03 Notice of meetings must contain the date, time and location of the meeting. If a member of the public body is appointed by the Governor, notice must also indicate whether or not public comment will be received during the meeting and, if so, the approximate point during the meeting when public comment will be received.

AO-24-03 Protocols and procedures relating to the execution of prisoners may be withheld by the Department of Corrections under FOIA.

APPENDIX D

2003 Meetings of the Virginia Freedom of Information Advisory Council

Tuesday, April 8, 2003, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Review of FOIA and access related legislation passed by 2003 Session of the General Assembly; review of bills referred to the Council by the 2003 Session of the General Assembly for study; discussion of role of the Council in receiving other legislative proposals and decision to open Council as a forum for presenting potential legislative proposals; discussion of possibility of Council creating a publicly accessible repository for e-mail of Council members and decision to further examine the relationship between FOIA and e-mail.

Monday, June 2, 2003, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Review of bills referred to Council by 2003 Session of the General Assembly and vote to take no further action on the bills; presentation by representative of the Office of the Secretary of Technology relating to e-mail retention practices of the Department of Information Technologies; update on requirements of FOIA and the Public Records Act concerning e-mail; public comment concerning exclusion of Sexually Violent Predator Commitment Review Commission from FOIA and appointment of subcommittee to study this issue; discussion concerning potential need for reorganization of FOIA records exemption and appointment of subcommittee to undertake the task; update on number of number of inquiries to Council for opinions and plans for FOIA workshops.

Monday, September 15, 2003, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Progress reports from subcommittees studying exemption for civil commitment of sexually violent predators and reorganization of records exemptions in § 2.2-3705; presentation by Robert F. Nawrocki, Director, Records Management and Imaging Services Division, Library of Virginia, on e-mail and the Virginia Public Records Act; update on status of *Beck v. Shelton*; public comment concerning protection of personal information about children enrolled in Frederick County Parks & Recreation programs and possible need for new exemption; discussion of potential legislative proposal from Medical Examiner's office to limit access to records; update on FOIA workshops and number of inquiries to Council for opinions.

Monday, December 1, 2003, 2:00 p.m.

House Room C, General Assembly Building, Richmond, VA

Adoption of subcommittee's legislative recommendations concerning access to records relating to the civil commitment of sexually violent predators and the reorganization of records exemptions in § 2.2-3705; preview of other FOIA legislation likely to be considered by the 2004 session of the General Assembly, such as protection of personal information about children, membership lists of the Virginia State Bar, investigations of local auditors, and cellular phone

numbers of local public safety employees; discussion Virginia Information Technology Agency's suggestion that the Council study definitions and technology terms in FOIA and make recommendations for updating the nomenclature; report from staff that the chief medical examiner's office would not be pursuing legislation related to access to its records; distribution of draft copy of annual report.

APPENDIX E

Recap of Freedom of Information and Other Related Access Bills Passed by the 2003 Session of the General Assembly

A. FOIA Council Recommendations:

BILL NUMBER: Senate Bill 737

PATRON: Houck

SUMMARY: *Virginia Freedom of Information Act; exemptions for contract negotiations.* Adds a record exemption for records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. The bill provides that such records shall not be withheld after the public body has made a decision to award or not to award the contract and shall not apply to the release of records in connection with procurement transactions governed by the Virginia Public Procurement Act. The bill also provides an open meeting exemption for the discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

BILL NUMBER: Senate Bill 738

PATRON: Houck

SUMMARY: *Freedom of Information Act; payment of charges for record production.* Provides that before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing. The bill also contains a technical amendment.

B. Other FOIA Bills:

BILL NUMBER: House Bill 1545

PATRON: Marshall, R.G.

SUMMARY: *Release of procurement records under the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities and Infrastructure Act of 2002.* Provides that once a comprehensive agreement has been entered into under the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities and Infrastructure Act of 2002, a responsible public entity shall make available, upon request, procurement records in

accordance with § 2.2-4342. The bill provides that procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications. The bill also contains a technical amendment.

BILL NUMBER: House Bill 1651

PATRON: Albo

SUMMARY: *Freedom of Information Act; record exemption for employment discrimination investigations conducted by certain local public bodies.* Expands the record exemption for investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management to include any such investigations conducted by such personnel of the local governing body who are authorized by law to conduct these investigations in confidence, including local school boards.

BILL NUMBER: House Bill 1727

PATRON: Sherwood

SUMMARY: *FOIA; Protection of certain records in the possession of building officials.* Expands the current exemption under the Freedom of Information Act relating to building permit records to include critical structural components, security systems, telecommunications equipment, etc., submitted for the purpose of complying with the Uniform Statewide Building Code or the Statewide Fire Prevention Code, the disclosure of which would jeopardize the safety or security of any public or private commercial, multi-family residential or retail building or its occupants in the event of terrorism or other threat to public safety. The bill requires the owner or lessee to invoke these protections in writing, identify the drawings, plans, or other materials to be protected; and state the reasons why protection is necessary. The bill provides that nothing shall prevent disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event. The bill also requires building officials to institute procedures to ensure these sensitive records are securely stored, handled, and released in accordance with law.

BILL NUMBER: House Bill 1776
PATRON: Woodrum
SUMMARY: FOIA; unclaimed property; State Treasurer's records. Provides an exemption from disclosure for records, investigative notes, correspondence, and information pertaining to the planning, scheduling and performance of examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by or for the State Treasurer, his agents, employees or persons employed to perform an audit or examination of holder records.

BILL NUMBER: House Bill 2048
PATRON: Woodrum
SUMMARY: FOIA; Virginia Birth-Related Neurological Injury Program. Among other things, provides that the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 are included in the definition of "public body" under FOIA. The bill further provides a FOIA records exemption for records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2. This bill incorporates HB2307.

BILL NUMBER: House Bill 2086
PATRON: Abbitt
SUMMARY: Freedom of Information Act; penalties for violation. Increases the minimum civil penalty for willful and knowing violations of the Freedom of Information Act from \$100 to \$250 for the first violation and from \$500 to \$1,000 for any subsequent violation.

BILL NUMBER: House Bill 2131
PATRON: Gear
SUMMARY: Freedom of Information Act; Board for Branch Pilots; confidentiality of information obtained from chemical testing. Provides a FOIA exemption for records of the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result.

BILL NUMBER: House Bill 2209

PATRON: Jones, S.C.

SUMMARY: *Freedom of Information Act; closed meetings; State Lottery Board.* Allows the State Lottery Board to convene a closed meeting for its deliberations in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent.

BILL NUMBER: House Bill 2211

PATRON: Jones, S.C.

SUMMARY: *Freedom of Information Act; critical infrastructure and vulnerability assessments.* Expands the current record exemption for engineering and architectural drawings to protect the safety of any public building or its occupants, by clarifying that records relating to critical infrastructure or structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems, as well as vulnerability assessments are exempt. The bill applies to all buildings, whether public or private. The bill requires certain procedures to be followed to protect such records. The bill also provides that nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event. The bill also contains a corollary open meeting exemption for the discussion of such records in a closed meeting. The bill consolidates two related exemptions and contains other technical amendments.

BILL NUMBER: House Bill 2445

PATRON: Griffith

SUMMARY: *Freedom of Information Act; civil commitment of sexually violent predators.* Provides that the Commitment Review Committee and any documents, evaluations, assessments and proceedings involving the commitment of sexually violent predators under Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of Title 37.1 are not subject to the provisions of FOIA. This bill is identical to SB 1149 (Stolle).

BILL NUMBER: House Bill 2492

PATRON: Bolvin

SUMMARY: *Freedom of Information Act; record exemption; investigative records of insurance claims.* Expands an existing exemption to include investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or potential claim against a public body's insurance policy or self-insurance plan. The bill provides, however, that nothing shall prohibit the disclosure of information, taken from inactive reports upon expiration of the period of limitations for the filing of civil suits.

BILL NUMBER: House Bill 2621

PATRON: Sherwood

SUMMARY: *School safety audits.* Directs local school boards to require schools to conduct school safety audits annually, requires the audits to include specific recommendations, and provides that the results of such school safety audits shall be made public within 90 days of completion. However, the local school board retains authority to withhold or limit the release of any security plans and specific vulnerability assessment components, which are provided a qualified exemption from the Freedom of Information Act. The exemption from FOIA will not be construed to prohibit the disclosure of records relating to the effectiveness of security plans after a fire, explosion, natural disaster or other catastrophic event, or after any person has been injured or threatened with personal injury. Current law defines the school safety audit as a written assessment of the safety conditions in each public school that identifies and develops solutions for various physical and personal safety and security concerns.

BILL NUMBER: House Bill 2658

PATRON: Woodrum

SUMMARY: *Freedom of Information Act; exemptions for the Commonwealth Health Research Board.* Adds an exemption for records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant. The bill also contains a closed meeting exemption

for the Commonwealth Health Research Board for discussion of the above records.

BILL NUMBER: House Bill 2738

PATRON: Armstrong

SUMMARY: *Freedom of Information Act; Virginia Museum of Natural History.* Allows the Virginia Museum of Natural History to hold closed meetings to discuss or consider matters relating to specific gifts, bequests, and grants. This exemption from the Freedom of Information Act currently extends to the Virginia Museum of Fine Arts and The Science Museum of Virginia.

BILL NUMBER: Senate Bill 1203

PATRON: Newman

SUMMARY: *Freedom of Information Act; electronic communication meetings.* Extends the exemption of certain public bodies from the Virginia Freedom of Information Act's electronic communication meeting restrictions to public bodies in the legislative branch and any authority, board, bureau, commission, district or agency of the Commonwealth whose membership includes persons who reside or work more than 55 miles from the meeting location as stated in the required notice for such meeting. The bill also provides that these public bodies make an audio or audio/visual recording of the meeting that must be retained for three years. All authorized public bodies are required to submit a report detailing their experience with meetings held under this pilot program to the Freedom of Information Advisory Council and the Joint Commission on Technology and Science. The chairman of any meeting so held is required to make an announcement of the reporting provision during the course of such meeting. The bill also changes the required reporting date from April 15, 2003, to September 1 of each year and extends the sunset from July 1, 2003, to July 1, 2005. The bill contains an emergency clause.

BILL NUMBER: Senate Bill 1329

PATRON: Stosch

SUMMARY: *Board of Accountancy; powers.* Among other things, provides a closed meeting exemption for the Board of Accountancy for those portions of disciplinary proceedings conducted pursuant to § 2.2-4019 or § 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory boards or conference committees of such boards to consider settlement proposals in

pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

BILL NUMBER: Senate Bill 1344

PATRON: Stolle

SUMMARY: *Freedom of Information Act; electronic meetings of the Board of Visitors of the University of Virginia; authority for holding telephonic or video broadcast meetings.* Modifies the exception to the Freedom of Information Act requirements for holding telephonic or video broadcast meetings that has been accorded to the Board of Visitors of the University of Virginia. This exception currently requires that two-thirds of the board be physically assembled at its regular or primary location and that no more than 25 percent of all annual meetings be held via electronic means. This provision reduces the requirement for physical presence to a quorum of the Board and provides for electronic meetings to be held at locations other than the regular or primary location of the Board's meetings. The Board of Visitors of the University of Virginia consists of 16 members; however, § 23-74 provides that five members "constitute a quorum." In addition to these changes, public access is limited to hearing the participation during public sessions and the interruption of the telephonic or video broadcast of the meeting will result in suspension of public sessions. The original act authorizing the Board to hold electronic meetings that are removed from the Freedom of Information Act's general rules includes an enactment clause mandating that the Board keep a record of its electronic meetings, record complaints about such meetings, and report on these records to the Secretary of Education and the General Assembly. The bill also extends the sunset clause to July 1, 2005.

C. Other Access-Related Bills:

- **TERRORISM/CRITICAL INFRASTRUCTURE**

BILL NUMBER: House Bill 2210

PATRON: Jones, S.C.

SUMMARY: *Emergency services and disaster law; release of records.* Provides that the Governor or agencies acting on his behalf may receive information, voluntarily submitted from both public and nonpublic entities, related to the protection of the nation's critical infrastructure sectors and components that are located in Virginia or affect the health, safety, and welfare of the citizens of Virginia. The bill provides that information submitted by any public or nonpublic entity in accordance with the procedures set forth in

subdivision A 57 of § 2.2-3705 shall not be disclosed unless: (1) it is requested by law-enforcement authorities in furtherance of an official investigation or the prosecution of a criminal act; (2) the agency holding the record is served with a proper judicial order; or (3) the agency holding the record has obtained the written consent to release the information from the entity voluntarily submitting it.

BILL NUMBER: House Bill 2816

PATRON: Bolvin

SUMMARY: *Preparedness and Coordination Program; submission of annual report.*

Among other things, adds a requirement that the State Department of Emergency Management submit annually to the Governor and General Assembly an executive summary and report on the status of emergency response plans throughout the Commonwealth. Information submitted pursuant to subdivision A 57 of § 2.2-3705 may be withheld unless: (1) it is requested by law-enforcement authorities in furtherance of an official investigation or the prosecution of a criminal act; (2) the agency holding the record is served with a proper judicial order; or (3) the agency holding the record has obtained the written consent to release the information from the State Department of Emergency Management.

- **SOCIAL SECURITY NUMBERS**

BILL NUMBER: House Bill 1593

PATRON: Byron

SUMMARY: *Driver's license numbers.* Eliminates optional use of social security numbers as driver's license numbers for licenses issued or renewed on or after July 1, 2003.

BILL NUMBER: House Bill 1716

PATRON: Hogan

SUMMARY: *Student social security numbers.* Authorizes the division superintendent or his designee to assign another identifying number to students who are ineligible to obtain a federal social security number or if the student's parent is unwilling to present such number or waive the requirement.

BILL NUMBER: House Bill 1744

PATRON: Byron

SUMMARY: *Social security numbers.* Prohibits agency-issued identification cards, student identification cards or license certificates issued or replaced after July 1, 2003, from displaying an individual's entire social security number. The bill provides exceptions from the

general prohibition for the following circumstances: (i) certain licensing and identification cards issued by the Department of Motor Vehicles issued prior to July 1, 2003, which are required to be replaced no later than July 1, 2006, (ii) voter registration cards, which are required to be replaced by the December 31 next following the decennial redistricting from the 2010 census, (iii) insurance licenses issued by the State Corporation Commission, which shall be replaced no later than 12 months after the creation and implementation in all states of a national insurance producer identification number, and (iv) road tax licenses issued by the Department of Motor Vehicles to motor carriers under the terms of the International Fuel Tax Agreement.

BILL NUMBER: House Bill 2175

PATRON: Bell

SUMMARY: *Identity theft.* Limits the appearance of social security numbers on identification cards and parcels. The bill punishes the distribution or possession with intent to distribute another's personal identifying information or the distribution of the means by which personal information may be stolen. The bill creates a mechanism whereby a victim may expunge a criminal charge resulting from identity theft. The bill punishes obtaining goods and services, and identification documents and information of another. The bill requires the Library Board to develop regulations providing for the destruction of social security numbers in public records. The bill allows a clerk of court to refuse to record a document upon which there appears a grantor's or grantee's social security number. The bill sets up a procedure for blocking credit misinformation appearing in a credit report.

BILL NUMBER: Senate Bill 979

PATRON: Mims

SUMMARY: *Identity theft.* Limits the appearance of social security numbers on identification cards and parcels. The bill expands limits on acquisition and use of the personal identifying information of another, including use of identifying information of a dead person. The bill requires the Library Board to develop regulations providing for the destruction of social security numbers in public records. The bill sets up a procedure for blocking credit misinformation appearing in a credit report and expungement of false identity information in police and court records.

- **COURT RECORDS**

BILL NUMBER: House Bill 2294
PATRON: Devolites
SUMMARY: *Remote access to land records.* Requires remote access to land records to be by paid subscription service through circuit court clerk's offices or designated application service providers.

BILL NUMBER: House Bill 2426
PATRON: Nixon
SUMMARY: *Posting certain information on the Internet; prohibitions.* Provides that beginning January 1, 2004, no court clerk shall post on a court-controlled website any document that contains the following information: (i) an actual signature; (ii) a social security number; (iii) a date of birth identified with a particular person; (iv) the maiden name of a person's parent so as to be identified with a particular person; (v) any financial account number or numbers; or (vi) the name and age of any minor child. The bill also provides an exception for court clerks providing remote access to their records if their network or system that is used to provide the access has been certified by the Department of Technology Planning. It also requires the Department to establish security standards that must be followed by court clerks providing remote access to records in consultation with circuit court clerks, the Supreme Court, the Compensation Board, users of land and other court records, and other interested citizens. The bill has a July 1, 2005, sunset provision.

BILL NUMBER: House Joint Resolution 631
PATRON: Devolites
SUMMARY: *Court records.* Continues the joint subcommittee studying the protection of court records. The joint subcommittee shall review the findings and recommendations of the Executive Secretary of the Supreme Court concerning information in court records and recommend necessary changes in the statutory law.

BILL NUMBER: Senate Bill 714
PATRON: Wampler
SUMMARY: *Circuit court clerks; recordation of documents.* Allows the clerk to refuse to file any instrument that includes a grantor's, grantee's or trustee's social security number.

- **MISCELLANEOUS**

BILL NUMBER: House Bill 1546
PATRON: Marshall, R.G.
SUMMARY: *State and Local Conflict of Interest Act; written opinions.* Amends several provisions of the State and Local Conflict of Interest Act. Among other things, the bill clarifies that when an attorney for the Commonwealth provides a written opinion to a local government official under the Act, then such opinion is a public record that must be released upon request. The bill is the recommendation of the Joint Subcommittee Studying the State and Local Conflict of Interest Act, HJR 31, (2002).

BILL NUMBER: House Bill 1679
PATRON: Rapp
SUMMARY: *Meetings of the planning commission and board of zoning appeals.* Provides that the planning commission and board of zoning appeals may by resolution fix the day to which any meeting shall be continued if weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting shall be conducted at the continued meeting and no further advertisement is required. This authority is similar to that which currently exists for local governing bodies.

BILL NUMBER: House Bill 1686
PATRON: Landes
SUMMARY: *Governor; disposition of official correspondence and other records.* Attempts to tighten the provision that requires the Governor to deliver to The Library of Virginia all correspondence and other records of his office during his term. As to correspondence or other records of a strictly personal or private nature, the Governor must consult with the Librarian of Virginia before deciding which records are not required to go to The Library of Virginia.

BILL NUMBER: House Bill 2731
PATRON: Woodrum
SUMMARY: *Government Data Collection and Dissemination Practices Act; definition of agency.* Clarifies that the definition of "agency" in the Government Data Collection and Dissemination Practices Act includes constitutional officers, except as otherwise expressly provided by law. The bill contains a technical amendment. The bill is in response to a recent Virginia Supreme Court decision that held that the Government Data Collection and Dissemination Practices Act does not apply to constitutional officers.

BILL NUMBER: Senate Bill 1032

PATRON: Colgan

SUMMARY: *Local "Crime Stoppers" programs; confidential information.* Grants authority for local "Crime Stoppers" programs. Among other things, requires that law enforcement agencies receiving information about alleged criminal activity from a crime stoppers organization shall maintain confidentiality of that information pursuant to subsection E of § 2.2-3706. This bill is identical to HB 1752 (Parrish).

BILL NUMBER: Senate Bill 1107

PATRON: Whipple

SUMMARY: *Elections; administration of elections and election procedures; penalties.* Among other things, changes the notice required to members of electoral boards for meetings from one day to three business days, except in the case of an emergency. Specifies that all meetings shall be conducted pursuant to FOIA unless otherwise provided. Allows two or more members of an electoral board to meet on an election day, notwithstanding the notice provisions, to discuss a matter relating to that day's election. Also clarifies that the gathering of two or members of an electoral board to prepare election materials, inspect polling places or train election officials is not considered a meeting if no discussion or deliberation takes place that would otherwise be a meeting. This bill also incorporates numerous clarifications and revisions in the election laws.