

REPORT OF THE

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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ADVISORY COUNCIL**

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

COMMONWEALTH OF VIRGINIA
DECEMBER 2004

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OF THE
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

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Delegate H. Morgan Griffith
Ralph L. "Bill" Axselle
John Stewart Bryan, III
John B. Edwards
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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 2004**

INTRODUCTION

"It is important to be mindful of the fact that what makes our nation great is not how well we can make and keep secrets. Rather it is our legacy of an open government--a defining factor of our democracy--a mark that sets us apart from most other nations in the world."

J. William Leonard
Director, Information Security Oversight Office
National Archives and Records Administration
2002

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 (FOIA). As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon request of any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA². The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for

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*.

changes in the law, to the Governor and the General Assembly.

The Council is composed of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens.

The Council provides guidance to those seeking assistance in the 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 assist in the resolution of FOIA disputes and keep the parties in compliance with FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council serves as a forum for the discussion, study, and resolution of FOIA and related public access issues and for its application of sound public policy considerations to resolve disputes and clarify ambiguities in the law. Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.

EXECUTIVE SUMMARY

During this reporting period, December 2003 to December 2004, the Council undertook four studies in addition to the examination of three bills referred by the 2004 Session of the General Assembly. Council-formed subcommittees and workgroups studied public access to meetings of the General Assembly, the feasibility of relaxing requirements for the conduct of electronic communication meetings, public access to geographic information systems (GIS) records, and obsolete technology terminology in FOIA. The work of the Electronic Meetings and Notice Subcommittee resulted in Council-recommended legislation for the 2005 Session of the General Assembly that would relax the requirements for the conduct of electronic communication meetings (telephone and audio/visual meetings) while strengthening the reporting requirements. The enhanced reporting requirements will ensure the receipt of meaningful data to assist in monitoring the occurrences and utility of and public participation in, electronic communication meetings held by state public bodies.

The Council was successful in seeing its 2003 legislative recommendations enacted into law in 2004. Specifically, SB 352 repealed former § 2.2-3705, the lengthy records exemption section of FOIA, and in its place created seven new sections grouping the exemptions by general subject area. The proposed groupings included exemptions of general application; those relating to public safety,

administrative investigations, educational records and educational institutions, health and social services, proprietary records and trade secrets; and other exemptions applicable to specifically enumerated public bodies. SB 354, another legislative recommendation of the Council, eliminated the total exclusion of the Sexually Violent Predator Commitment Review Committee from the provisions of FOIA and replaced it with specifically tailored record and meeting exemptions to protect certain Committee records and meetings from public disclosure.

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 *Beck v. Shelton*, 267 Va 482; 593 S.E.2d 195 (2004). In *Beck*, the Virginia Supreme Court issued an opinion concerning FOIA with a holding directly relevant to all elected officials in Virginia -- from members of the General Assembly to members of local school boards. *Beck* drew interest primarily because it is the first authoritative statement of law in Virginia as to whether use of electronic mail ("e-mail") by public officials could constitute a meeting under FOIA. *Beck* also examined broader issues as to the applicability of FOIA to members-elect of a public body and the parameters of the definition of a "meeting." The Virginia Supreme Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that the gathering of three members of a public body at a citizen-organized meeting did not violate FOIA.³

The Council was proactive in developing a FOIA rights and responsibility statement for implementation by state public bodies pursuant to HB 358.⁴ Each Secretary in the Governor's Cabinet was contacted and advised that the Council had developed a model FOIA rights and responsibilities document meeting the requirements of HB 358 for use by state agencies within each Secretariat. Additionally, the Council offered its expertise to assist in customizing the model document to meet the needs of each agency within the respective Secretariats.

The Council continued its commitment to FOIA training. The annual FOIA workshops, approved by the Virginia State Bar for continuing legal education credit, the Department of Criminal Justice Services for law-enforcement credit, and the Virginia School Board Association for academy points, were attended by

³ Excerpted from the Division of Legislative Services' *Virginia Legislative Issue Brief*, No. 37, March 2004, written by Lisa Wallmeyer and Maria J.K. Everett.

⁴ HB 358 requires all state public bodies created in the executive branch of state government and subject to FOIA to make available certain information to the public upon request and to post such information on the Internet, including: (i) a plain English explanation of the rights of a requester under FOIA, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with FOIA; (ii) contact information for the person designated by the public body to (a) assist a requester in making a request for records or (b) respond to requests for public records; and (iii) any policy the public body has concerning the type of public records it routinely withholds from release as permitted by FOIA.

approximately 450 people statewide, including government officials, media representatives and citizens. In addition to its annual statewide FOIA workshops, the Council was requested to conduct 36 specialized training programs by various groups and agencies of state and local government. This year Council staff added in-house FOIA training at the request of the Office of the Attorney General to the Council's list of Virginia State Bar-approved courses for continuing legal education credit for licensed attorneys.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,216 inquiries. Of these inquiries, 26 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: 8 by government officials, 15 by citizens, and 3 by media. The remaining 1,190 requests were for informal opinions, received via telephone and e-mail. Of the 1,190 requests, 616 were made by government officials, 429 by citizens, and 145 by media.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period in which it considered a broad range of issues, including public access to geographic information systems (GIS), application of FOIA to meetings of the General Assembly, and requirements for electronic communication meetings. A condensed agenda for each of the Council's meetings appears as Appendix D. The Council's discussions and deliberations are chronicled below.

March 29, 2004

The Council held its first quarterly meeting of 2004.⁵ The purpose of the meeting was to review legislative changes to FOIA made by the 2004 General Assembly, identify topics for study, including bills referred to the Council for further examination, and develop a study plan for its 2004 work. The Council began its meeting by examining the provisions of HB 1357. HB 1357 provided that public access to meetings of the General Assembly shall be governed by rules established by the Joint Rules Committee, except that floor sessions, committee or subcommittee meetings, and conference committee meetings would continue to be open to the public. The bill further provided that meetings of political party caucuses of either house of the General Assembly were not meetings as defined in FOIA. HB 1357 required the Joint Rules Committee to hold regional public hearings at least 60 days before the adoption of the rules and to provide a copy of any such rules to the Council. Finally, the bill requires the Council, upon request, to provide technical assistance to the Joint Rules Committee in the implementation of HB 1357. Delegate Griffith, patron of HB 1357, indicated that he looked forward to

⁵ All members of the Council were present, except E.M. Miller, Jr.

working with the Council to address the gray areas of the law and to resolve the issues expeditiously. Chairman Houck indicated that because the bill concerned public access and the General Assembly, an independent review by the Council was warranted. A subcommittee was created comprised of past and present General Assembly members and media representatives on the Council, including Senator Houck, Delegate Jones, Stewart Bryan, John Edwards, and Bill Axselle. The Council discussed the need to maintain the balance already expressed in the law between the right of public access and the need of government, in this instance the General Assembly, to meet its operational responsibilities. Public comment was invited by the Council. The Council directed that its website be used as a primary vehicle for receiving public comment on HB 1357 as well as providing updates on the work of the subcommittee.

2004 Legislative Update

Eighteen bills enacted by the 2004 Session of the General Assembly amended FOIA, including the addition of seven new meetings and records exemptions and the expansion of four existing meetings and records exemptions. Of note, both bills recommended by the Council were enacted -- SB 352 (Houck) reorganizing the FOIA record exemptions and SB 354 (Houck) relating to records and meeting exemptions for the Civil Commitment Review Committee. A complete listing and description of FOIA and other related access bills considered by the 2004 Session of the General Assembly was made available on the Council's website and appears as Appendix E to this report.

Bills Referred to the Council for Study

Three bills were referred to the Council for study by the 2004 Session of the General Assembly. A summary of each bill follows:

SB 182 (Blevins); FOIA and GIS systems; which would exclude from the mandatory disclosure requirements of FOIA maps contained in a geographic information system that are developed from a combination of high resolution technologies, including digital orthophotography, digital terrain models or related ancillary proprietary data produced by any local governing body or by the Virginia Geographic Information Network (VGIN) division of the Virginia Information Technologies Agency.

HB 487 (Cole); FOIA; record exemption; owner/operators of private aircraft; which would provide an exemption from the mandatory disclosure requirements of FOIA for records of licensed public use airports containing information concerning (i) the identity of the owners or operators of aircraft based at the airport, including the owner's or operator's name, home address and telephone number and (ii) the

tail numbers and other identifying information relating to the aircraft based at the airport .

HB 761(Hurt); Virginia State Bar; availability of membership lists; which would clarify that Virginia State Bar membership lists are excluded from the provisions of FOIA. The bill provides, however, that copies shall be made available, upon request, to Virginia organizations that regularly conduct continuing legal education programs in the Commonwealth and that such lists shall be provided at a reasonable cost. Currently, copies of this list are provided to legal aid societies and the Virginia Law Foundation as well as continuing legal education providers on a cost recovery basis.

The Council discussed each bill and its attendant issues at length. With regard to SB 182, the Council created a subcommittee, consisting of Council members Roger Wiley, Tom Moncure and David Anderson, to conduct an in-depth examination of the nature of GIS records and access to them. It was noted that the 2003 appropriations act contained language that exempted state-produced GIS records from FOIA. SB 182 was introduced to expand the GIS exemption for local governing bodies.

HB 487 was introduced in response to a situation involving a citizen who had previously complained about the operation of airplanes at a regional airport. The citizen eventually made certain threats against the airport related to his complaints and subsequently filed a FOIA request for the names and addresses of the owners of the aircraft housed at the airport. The operators of the regional airport had privacy and safety concerns about releasing the requested records. As part of the discussion of this issue, the Council was advised of the existence of a website maintained by the Federal Aviation Administration (FAA) that would allow any person to ascertain the name and address of owners of aircrafts as well as aircraft identifying information. The FAA website provides this information in a variety of formats, including the ability to search on a state-by-state basis or by a particular county within a state. It was the consensus of the Council that FOIA should not exempt records of licensed public use airports in light of the availability of the information contained on the FAA website.

HB 761 would have exempted from FOIA the attorney membership lists maintained by the Virginia State Bar. The Council had previously opined that membership lists maintained by the Virginia State Bar were subject to the mandatory disclosure requirements of FOIA. HB 761 was introduced to overturn the advisory opinion of the Council and to make it unequivocal that such lists are not subject to FOIA. HB 761 was carried over in the House Committee on General Laws. Given the background of this bill, the Council felt that further study was unnecessary.

Other Business

The Council discussed HB 358, which requires all state public bodies created in the executive branch of state government and subject to FOIA to develop a FOIA rights and responsibilities statement, to be made available to the public upon request and to be posted on the Internet. The rights and responsibilities statement is required to include the following information: (i) a plain English explanation of the rights of a requester under FOIA, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with FOIA; (ii) contact information for the person designated by the public body to (a) assist a requester in making a request for records or (b) respond to requests for public records; and (iii) any policy the public body has concerning the type of public records it routinely withholds from release as permitted by FOIA. The bill requires the Council, upon request, to assist state public bodies in the development and implementation of this requirement. Council staff advised that it was working on a model rights and responsibilities document to share with state agencies and had written to each cabinet secretary offering the expertise of the Council in customizing the model document to meet the needs of each individual agency within its respective secretariat.

The Council received a request from the Clerks' Offices of the Senate of Virginia and the House of Delegates to change the posting requirement for legislative meetings from the Clerk's office to the Internet. Representatives of the Clerks' offices stated that because of the remote location of the respective Clerks' offices, the public is not served by posting notice there. They stated that notice of legislative meetings would continue to be posted on the bulletin board in the lobby of the General Assembly Building as required by law. Additionally, the representatives requested the Council to review the electronic meeting notice requirements of § 2.2-3708 of FOIA. They stated that it was practically impossible to satisfy the requirement of 30 days advance notice of any electronic meeting. A subcommittee comprised of Council members Wat Hopkins, E.M. Miller, and David Hallock was appointed to study these requests.

The Council next discussed the need to form a workgroup to review the issue of obsolete "technology" nomenclature in FOIA and to make recommendations for change to the Council. At its last meeting, the Council agreed that while no formal study was necessary, a workgroup comprised of interested persons would be advisable to review obsolete technology language contained in FOIA. The Council directed staff to act as facilitator/moderator of the workgroup. Participation on the workgroup was open to all interested parties and included representatives of the Virginia Information Technologies Agency (VITA).

Fredericksburg E-mail case

Staff reported that on March 5, 2004, the Virginia Supreme Court issued an opinion concerning FOIA (*Beck v. Shelton*, 267 Va 482; 593 S.E.2d 195 (2004)), with a holding directly relevant to all elected officials in Virginia -- from members of the General Assembly to members of local school boards. *Beck* had primarily drawn interest because it is the first authoritative statement of law in Virginia as to whether use of electronic mail ("e-mail") by public officials could constitute a meeting under FOIA. *Beck* also examined broader issues of the applicability of FOIA to members-elect of a public body and the definition of a meeting. The Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that the gathering of three members of a public body at a citizen-organized meeting did not violate FOIA.⁶ Staff prepared an issue brief of the case that was made available on the Council's website and appears as Appendix F to this report.

Public Comment

As is its custom at each meeting, the Council solicited public comment on issues before the Council or that may be appropriate for Council consideration. On the issue of the application of FOIA to meetings of the General Assembly (HB 1357), the Council was provided with the results of research conducted by a citizen on legislative rules of other states as well as such states' relevant constitutional provisions on this issue. The Virginia Press Association and the Virginia Association of Broadcasters expressed their interest in participating in the study and offered some issues for consideration in the conduct of the Council's review of HB 1357, including the differentiation between the various types and functions of General Assembly caucuses, the conduct of meetings of the General Assembly while in session versus meetings conducted during the interim, and whether the subject matter under discussion should be controlling in determining public access. The Virginia Coalition for Open Government (VCOG) expressed its opinion that legislative exemptions should continue to be placed within FOIA and not in House or Senate procedural rules. On the issue of SB 182, access to GIS maps, VCOG stated that it is opposed to "add-on" fees for high resolution GIS maps. The City of Virginia Beach provided background information on GIS maps and expressed its willingness to assist in the study of SB 182.

⁶ *Legislative Issue Brief*, No. 37, *supra* note 3, at 5.

June 9, 2004

The Council⁷ began its meeting by welcoming newly appointed member Delegate Morgan Griffith who replaced Delegate S. Chris Jones.

Subcommittee Reports

The Council received progress reports from its subcommittees. The Electronic Meetings and Notice Subcommittee reminded the Council that at the last full Council meeting, representatives from the Clerks' Offices of the Senate and the House raised several issues concerning electronic meeting requirements and requirements for notice of the meetings generally. The subcommittee reported that its meeting was well attended by representatives of the press, public, and state and local government.

The subcommittee reported that it had discussed several issues relating to the electronic meeting provisions found at § 2.2-3708 of FOIA and was considering the following areas where change may be warranted. It was suggested that requiring 30 days notice for an electronic meeting was onerous. Often times meetings are not planned 30 days in advance. Also, various situations may arise closer to the meeting day, such as personal emergencies or other exigent circumstances that prevent members of a public body from being physically present at a meeting. Another issue raised was the limitation of only allowing 25 percent of meetings annually to be conducted electronically. For example, if a public body only meets three or four times a year, such as a General Assembly study, it may be difficult or impossible to hold even one electronic meeting. The question was raised as to whether there should be an emergency provision that would allow a member of a public body to participate electronically at the last minute due to a personal emergency without triggering the additional requirements of an electronic meeting (i.e. no heightened notice, etc.). The law currently requires that an electronic meeting be suspended at all locations if there is an audio or visual malfunction -- even though a quorum must be at one location. The purpose behind this provision is to guarantee public participation at all locations, since all meeting locations must be open to the public. However, it was noted that it might be difficult for one site to realize that another site has lost the audio or the audio/visual feed. Finally, while electronic meetings are beneficial to the members of a public body, they can also be used as a means to increase public participation in meetings, and that technology can be used to enhance meetings for both members and the public.

The subcommittee reported that it had also discussed the general notice requirements for all meetings (and not just electronic meetings). The law currently

⁷ Members present: Houck, Griffith, Axselle, Bryan, Edwards, Hallock, Miller, Moncure, Wiley, and Yelich. Members absent: Anderson and Hopkins.

requires posting notice in two physical locations, and posting electronically is "encouraged." It was noted that the Internet is now a place where interested persons often look for notice of a meeting. Additionally, because the law already requires state public bodies to place their meeting minutes on the Internet, it makes sense to use the Internet to also post notice.

Under consideration by the subcommittee is draft legislation that would:

- Shorten the notice requirement for electronic meetings from 30 days to 7 days and remove the 25 percent limitation on the number of electronic meetings. This will be used as a springboard for further discussion. The subcommittee decided to not include an "emergency" provision for personal emergencies of members at this time, but stated that the issue may be discussed further at the next meeting.
- Address the malfunction of the audio or audio/visual feed issue. It was suggested that notice of electronic meetings include a phone number of a contact person that participants at the various sites can call during the meeting to notify others that they have lost audio or audio/video feed.
- Include a requirement that state executive public bodies post notice of all meetings on the Internet, in addition to posting notice at the two physical locations. These public bodies must already post minutes, and as of July 1, post FOIA rights & responsibilities statement on their website. Local governing bodies will be encouraged to post notice on the Internet, as there is no current requirement that local governing bodies have websites.

Representatives from the clerks' offices agreed to examine the possibility of establishing telephone numbers that members of the public could use to call to monitor any meeting, not just an electronic one, as a means of increasing public participation through technology.

Also of note, the subcommittee advised that they are attempting to set up an audio/visual meeting for its next meeting to allow Mr. Hopkins to join in the meeting from Blacksburg. Not only will this save him five or more hours of driving to physically attend the meeting, it will also give the subcommittee first-hand experience with electronic meetings.

The Geographic Information System (GIS) Subcommittee, comprised of Council members Wiley, Moncure, and Anderson, reported that its initial meeting was well attended by representatives of the media, public and state and local government officials, including many officials with GIS responsibilities. The subcommittee

advised that it had reviewed the provisions of SB 182 (Blevins). SB 182 would have excluded from the mandatory disclosure requirements of FOIA maps contained in a geographic information system that are developed from a combination of high resolution technologies, including digital orthophotography, digital terrain models or related ancillary proprietary data produced by any local governing body or by the Virginia Geographic Information Network (VGIN) division of the Virginia Information Technologies Agency. The subcommittee agreed that SB 182 as drafted should not be recommended. However, the subcommittee felt that the issues raised by the bill were worthy of further discussion and that, relying on the specific GIS knowledge of the interested parties, perhaps a resolution of the issues relating to the accessibility of GIS records could be achieved.

The issues identified included (i) whether portions of GIS records are adequately exempted under A57 of Sec. 2.2-3705; (ii) what additional exemption language may be needed to enable state and local public bodies to receive the data necessary to the preparation of GIS maps from utilities and other third parties; and (iii) whether GIS records can/should be copyrighted and the extent that copyrighting protects against further commercial use of GIS data obtained from public bodies.

Public Comment

The Council called for public comment as is its custom and no public comment was offered.

Of Note

Staff advised that the planning of the annual statewide FOIA workshops was underway. The workshops are tentatively scheduled for October in five locations, including Wytheville, Harrisonburg, Fairfax, Richmond, and Tidewater. Staff also advised the Council that for the period March 29 until June 8, 2004, Council staff has responded to 243 e-mail and telephone requests for assistance and has written 7 advisory opinions. Council staff also informed the Council about the model rights and responsibilities document it had prepared in response to HB 358⁸. The bill requires the Council to assist state public bodies in the development and implementation of this information, upon request. Council staff stated that all cabinet secretaries had been sent a letter in May informing them of the model rights and responsibilities document prepared by staff, along with an offer of

⁸ HB 358, effective July 1, 2004, requires all state public bodies created in the executive branch of state government and subject to FOIA to make available certain information to the public upon request and to post such information on the Internet, including: (i) a plain English explanation of the rights of a requester under FOIA, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with FOIA; (ii) contact information for the person designated by the public body to (a) assist a requester in making a request for records or (b) respond to requests for public records; and (iii) any policy the public body has concerning the type of public records it routinely withholds from release as permitted by FOIA.

further assistance made to any agency in the respective secretariats to help tailor the model document to the requirements of the specific agencies. After sufficient time for review and comment by the Council, the model rights and responsibilities document will be posted on the Council's website. It was suggested that the model rights and responsibilities document also be made available to local public bodies even though the provisions of HB 358 apply only to state public bodies.

The discussion of the Council then turned to the issue of allowable charges made under FOIA, noting that the amount of the charge is often times a contentious issue between a requester and a public body. Concern was raised that the only available remedy for disputes over charges was to seek redress through the courts. There was agreement that such disputes should come first to the Council for resolution as an inexpensive, common sense alternative to lawsuits. Staff advised that it frequently facilitates resolution of charge disputes.

September 16, 2004

The Council⁹ conducted its first teleconferenced meeting in accordance with § 2.2-3708 of FOIA. After the introduction of the members both physically present and located at a remote site in Roanoke, Senator Houck announced the recent appointment of Craig Fifer to fill the vacancy created by the expiration of David Anderson's term. Mr. Fifer is the E-Government Manager for the City of Alexandria and was unable to attend this meeting.

Report on work of Subcommittees

The Council received progress reports from its subcommittees and workgroups. Staff reported that the Electronic Meetings and Notice Subcommittee held an electronic meeting pursuant to the audio/visual meeting provisions of Chapter 704 of the Acts of Assembly of 1999 (as amended) ("the Pilot Project"). Subcommittee member David Hallock attended the meeting at the Richmond location, and subcommittee member Wat Hopkins participated in the meeting remotely from Virginia Tech via an audio/visual connection. Nine members of the public attended the meeting at the Richmond location, and one member of the public attended the meeting at the remote location.

The subcommittee reported that it had reviewed a draft legislative proposal that included electronic meeting and notice changes discussed at their first meeting. The draft would amend § 2.2-3707 of the Code of Virginia so as to require state public bodies in the executive branch of government to post notice of their meetings on the Internet. The subcommittee discussed whether it might be better to require all state public bodies, which would include public bodies in the legislative and judicial branch of government, to post notice on the Internet. Both subcommittee

⁹ Members present: Houck, Axselle, Bryan, Edwards, Hallock, Miller, Moncure, Wiley, and Yelich, with Griffith and Hopkins participating via teleconference. Member absent: Fifer.

members present voted to recommend that Internet notice be required of all public bodies.

The subcommittee next addressed proposed changes to § 2.2-3708 relating to electronic meetings. The draft would have shortened the notice required for electronic meetings from 30 days to seven days, to parallel the notice required by the Pilot Project. A representative of Senate Clerk's office stated that seven days was a good compromise, while representatives of the press and access groups expressed concern that seven days was not enough notice for electronic meetings. Both subcommittee members present voted to recommend that the notice for electronic meetings be changed to seven working days, as opposed to the calendar days presented in the draft.

Other issues were also addressed in the draft, such as eliminating the limitation that a public body may only hold 25 percent of its meetings each year via electronic means. This led to a discussion among the subcommittee members and the members of the public as to whether electronic meetings were a positive thing for which access should be made easier or whether more restrictive provisions concerning electronic meetings should be retained. It was noted that the Pilot Program, which contains less restrictive elements, was set to sunset in July 2005 and must be addressed by the 2005 Session of the General Assembly if it is to continue. It was also noted the Joint Commission on Technology and Science (JCOTS) had indicated that it would review the electronic meeting provisions and make recommendations concerning the Pilot Project. In light of JCOTS's involvement, the subcommittee decided that it would like to meet with representatives of JCOTS before deciding what further changes it would recommend concerning electronic meetings, with the hope of reaching an agreement with JCOTS and not presenting conflicting legislation at the 2005 Session.

Finally, the issue of making electronic public access more widely available through the use of public-access dial-in numbers to listen to meetings was discussed. The subcommittee requested that a representative from the House Clerks Office report on the feasibility and costs of this idea at the next full FOIA Council meeting.

GIS Subcommittee

The GIS subcommittee¹⁰ began its meeting by recapping the discussions from its first meeting for the benefit of those interested parties who were not in attendance. Senate Bill 182 (Blevins, 2004) was introduced at the request of the City of Virginia Beach to protect GIS information from release under FOIA. At its first meeting, the GIS subcommittee agreed that SB 182 did not achieve the objectives of the city and the subcommittee would not recommend the bill in its current form. However, the issues raised were significant enough for the

¹⁰ GIS subcommittee members Tom Moncure and Roger Wiley were present. David Anderson, the third subcommittee member, was not in attendance as his term on the FOIA Council had expired.

subcommittee to continue to meet. At its second meeting, the GIS subcommittee reported that it had focused on the protection of (i) information given to local governing bodies by private utilities and (ii) the economic value of GIS generally. Mr. Wiley stated that the cost of creating and maintaining GIS is very high and the government ought to be able to recover some of these costs. He pointed to New York law that distinguishes between individual use and commercial use of GIS.

Mr. Moncure pointed out that GIS records are public records by definition, and he was therefore opposed to a complete exemption of GIS information from FOIA. He did, however, agree that there might be a middle ground to address the release of GIS information, such as setting fees for release of GIS. Mr. Moncure stated that he has trouble with identifying back users for the basis of release, as motive under FOIA is irrelevant to the request. Mr. Moncure suggested that the language in the technology trust fund found at § 17.1-276¹¹ be examined to see if it could be used as a model to resolve the GIS issues. Under the technology trust fund the clerks of court have the ability to recoup some of the costs of putting certain court records on-line.

The subcommittee next discussed the issue of copyrighting GIS information. A representative of the Office of the Attorney General indicated that copyright protection is not available for protecting fact; but that compilations of fact are copyrightable. He noted, however, that commercial interests want the underlying data contained in GIS that cannot be copyrighted. The only way to protect secondary commercial use of GIS is through contract between the parties; but FOIA prohibits examination into motive for the request.

The subcommittee also looked at the charges for GIS currently available under FOIA. A public body may charge on a pro rata per acre basis for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. It was noted that the difficulty with this language is that the terms "topographic" and "pro rata" are not defined and are therefore hard to apply.

¹¹ 17.1-276. Fee allowed for providing remote access to certain records. Any clerk who provides electronic access, including access through the global information system known as the Internet, to nonconfidential court records or other records pursuant to §§ 17.2-225 and 17.2-226 may charge a fee established by the clerk or by the agency of the county, city or town providing computer support to cover the operational expenses of such electronic access, including, but not limited to, computer support, maintenance, enhancements, upgrades, and replacements. The fee may be assessed for each inquiry, upon actual connect time, or as a flat rate fee. If charged, the fee shall be charged each user, paid to the clerk's office, and deposited by the clerk into a special nonreverting local fund to be used to cover the operational expenses of such electronic access. In addition, the clerk may charge users a clerk's fee not to exceed \$25 per month.

The subcommittee discussed expanding current public safety exemptions in FOIA to include GIS. However, it was noted that while there was consensus for this approach, the applicable public safety exemptions are so narrowly tailored that including GIS would not achieve the desired result.

Because of the divergent positions, the subcommittee felt that further discussion would not yield a consensus. The subcommittee decided the best way to move forward was for the City of Virginia Beach and other localities to work together on developing draft language to resolve their issues for the subcommittee's and others' review. The subcommittee directed, that should draft language be proposed, a copy be sent to Council staff so that it could be posted on the Council's website. One suggestion for legislation would exempt "GIS data furnished to the local government by nongovernmental entities in confidence or subject to a nondisclosure agreement." The subcommittee discussed this language and questioned if government received data under a confidentiality agreement, how it would then be able to use that data. The subcommittee decided that the draft language was not sufficiently refined to bring it forward to the full Council.

FOIA Technology Nomenclature Workgroup

The Technology Nomenclature Workgroup reported that it met on September 7, 2004 to discuss whether any amendments were needed to FOIA to correct obsolete technology terms. The workgroup meeting was attended by representatives of the Virginia Information Technologies Agency (VITA), the Virginia Press Association, the Virginia Coalition for Open Government, the Fairfax County Privacy Council, and the Virginia Association of Counties, as well as other interested parties. The focus of the workgroup was limited to the definition of "public records," the provisions concerning the production of electronic records found in § 2.2-3704, and the electronic meeting provisions found in § 2.2-3708.

A representative of VITA indicated that the agency had no problems with the technology terms found in the definition of "public records" and suggested that they should remain as is found in current law because the technologies mentioned were still in use.

The workgroup briefly discussed the distinction between uses of the terms "format" and "medium" found in § 2.2-3704 and decided that no further clarification was necessary.

The representative of VITA presented a draft that would introduce the use of the term "information systems" to describe the various technology systems in applicable sections of FOIA. However the draft did not define this term and it was the consensus of the work group that "information systems" did not help to clarify FOIA, but instead created ambiguity. Staff noted that the only definition in law for

"information systems" was found in § 2.2-3801 of the Government Data Collection and Dissemination Practices Act, applied only to that act¹² and included both automated and manual/paper record keeping systems. As a result, this recommendation was rejected by the workgroup. The Virginia Press Association (VPA) cautioned the workgroup about mixing up concepts. The VPA stated that for purposes of security, it did not matter whether the record was in paper or electronic form. The workgroup agreed and stated that it was not within their purview to make substantive changes to FOIA exemptions related to public safety. The workgroup did note, however, that the issue of the security of information systems was best addressed by rewriting the existing exemption found in subdivision 3 of § 2.2-3705.2¹³, but that such a revision should be a topic of future discussions by the Council.

Finally the workgroup discussed § 2.2-3708, which requires that notice of all electronic meetings be sent to VITA. Staff indicated that from a practical perspective, it was unclear to whom in VITA such notices should be sent and what, if anything, VITA did with the information. Section 2.2-3708 also requires reports from state public bodies concerning their experiences with electronic meetings be filed with VITA. The VITA representative stated that VITA had no problem with receiving the notices and reports, but was unsure of the utility in providing them to VITA specifically. It was also noted that under the pilot program for electronic meetings¹⁴, the Council was one of the recipients for reports required to be filed under the pilot program. It was recommended that the Council replace VITA as the agency for receiving notice and reports of electronic meetings to be consistent with the pilot program and because electronic meetings are within the purview of the Council. The workgroup recommended to the full Council that the above-described amendment be made to § 2.2-3708.

Upon completion of the reports of the subcommittees and workgroup, the Council indicated that final action on the recommendations made by these groups would occur at the December 2, 2004 Council meeting to give Council members and interested parties further opportunity to consider the recommendations made.

Public Comment

¹² "Information system" means the total components and operations of a record-keeping process, including information collected or managed by means of computer networks and the global information system known as the Internet, whether automated or manual, containing personal information and the name, personal number, or other identifying particulars of a data subject.

¹³ Subdivision 3 of § 2.2-3705.2 provides an exemption for " [D]ocumentation 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."

¹⁴ See 1999 Acts of Assembly, c. 704, as amended by Acts 2002, c.910; Acts 2002, c. 429; and Acts 2003 c. 346.

The Council moved to the public comment portion of the agenda and no public comment was offered.

Other Business

Staff briefed the Council on the status of HB 543 (May) from the 2004 Session. As enacted, the bill prohibits filing or creating public records that contain more than the last four digits of any unique identifying number, unless such use is required by law or the record is exempt from disclosure. The bill defines unique identifying number as any alphabetic or numeric sequence, or combination thereof, that is unique and assigned to a specific natural person at that person's request and includes, but is not limited to, social security number, bank account number, credit card number, military service number and driver's license number. The bill excludes from this definition any arbitrarily assigned alphabetic or numeric sequence, or combination thereof, that is assigned to a natural person for purposes of identification, in lieu of social security numbers, and used for a single, specific government purpose. Either preparers or filers of such documents must certify that the document complies with this prohibition before the documents can be filed. The bill, as passed, contained a reenactment clause, which means that it will not go into effect unless acted on by the 2005 Session of the General Assembly. Staff identified concerns with the bill as to its practical application. Another concern was that language in the bill states "which may become a public record." This phrase is confusing because by definition in FOIA, all records, regardless of physical form or characteristic, owned or prepared by or in the possession of a public body related to public business are public records and therefore subject to FOIA's mandatory disclosure requirements, absent any statutory exemption from release. It was suggested that the language of the bill should be clarified and written as a specific exemption in FOIA. It was noted that the Government Data Collection and Dissemination Practices Act (where the bill was placed) is essentially a data collection statute and may not be the best statutory placement for a provision that seeks to limit *dissemination* of social security numbers, bank account information, credit card numbers, and other individual identifying numbers.

Staff next discussed with the Council the feasibility of a Council-sponsored symposium on status of law relating to access to records of children. Staff noted that the 2004 Session of the General Assembly enacted HB 168 (Sherwood), which added an exemption from the mandatory disclosure requirements of FOIA for records of state or local park and recreation departments to the extent such records contain information identifying a person under the age of 18 years, where the parent or legal guardian of such person has requested in writing that such information not be disclosed. This exemption was needed because the exemption for scholastic records already in FOIA would not include park and recreation records. In light of the need for this new exemption, it occurred to Council staff that perhaps identification and examination of the various statutes relating to the accessibility of children's record

might be warranted with an eye toward determining whether current rules of access and/or confidentiality are consistent from a public policy perspective. Staff suggested that, if approved by the Council, the staff-run symposium would be scheduled for spring 2005 where the various state and local agencies holding such records would make presentations about the respective records and whether release of such records is restricted. The ultimate goal of the symposium would be the compilation and publication of the various statutes relating to access to children's records. The form of the symposium would be like other Council workgroups, with presentations and group discussions among interested persons.

The Council was reminded that the 2004 FOIA Workshops were scheduled for the weeks of October 4 and October 11, 2004 at five statewide locations- Wytheville, Harrisonburg, Fairfax, Richmond, and Norfolk.

Staff provided the latest statistics for services rendered by Council staff since its June 9, 2004 meeting. For the period from June 9 -- Sept. 10, staff reported that it responded to 310 requests for informal opinions (phone/email) as follows: Government: 156, Media: 31, and Citizen/out of state: 123. During that same time period, staff has issued 10 written opinions as follows: Government: 4, Media: 1, and Citizen: 5.

December 2, 2004

The Freedom of Information Advisory Council (the Council) held its last quarterly meeting of 2004¹⁵. The purpose of the meeting was to finalize its legislative recommendations for the 2005 Session of the General Assembly, conduct its annual legislative preview (where interested parties bring their proposed FOIA or other access legislation for the Council's consideration), and receive final reports from its study subcommittees and workgroups. The Council welcomed its newest member, Craig Fifer, who filled the vacancy created by the expiration of David Anderson's term. The Council also welcomed Alan Gernhardt, Esq. to the Council's staff.

¹⁵ Council members Houck, Griffith, Bryan, Fifer, Miller, Moncure, and Wiley were present. Council members Axselle, Edwards, Hallock, and Yelich were absent. Mr. Hopkins monitored the meeting by telephone.

Subcommittee Reports

The Electronic Meetings and Notice Subcommittee reported that it met on November 15, 2004 to review the draft legislation considered at its previous meeting. The proposed draft would (i) require all meeting notices of state public bodies to be posted on the Internet, (ii) reduce the notice requirement for electronic communication meetings from 30 days to seven working days, and (iii) require the inclusion of a telephone number that may be used during an electronic communication meeting to notify other meeting locations of an interruption in the broadcast from any site of the meeting. It was noted that no decision had been made concerning the elimination of the 25 percent limitation on the number of electronic meetings that could be conducted annually.

The subcommittee had solicited public comment on the proposed draft. A representative of the Virginia Information Technologies Agency (VITA) stated that VITA would like to see the 25 percent limitation eliminated, but was in agreement with requiring the quorum of the public body conducting the electronic communication meeting to be physically present at one primary location.¹⁶ VITA stated that boards within VITA did not use the pilot program. The Virginia Coalition for Open Government stated that the physical quorum at one primary location should be retained, seven working days' notice was adequate, and that there should be uniform rules for the conduct of electronic communication meetings. The Virginia Press Association (VPA) reminded the subcommittee that electronic communication meetings were not the rule under FOIA, but an exception to the open meeting provisions of FOIA. The procedural protections for notice, access, and preserving records of electronic communication meetings were put in place upon its enactment in 1984. The VPA noted that although technology has changed enormously since 1984, protections contained in the law should not be completely eliminated. Instead, the statutory provisions should be the subject of careful deliberation and amendment to maintain the policy objectives of FOIA. The VPA stated that the proper balance should be met between ensuring maximum public participation and access on the one hand and facilitating convenience for members of a public body on the other. The VPA also called for uniform rules governing notice and access to electronic communications meetings and stated that the requirement for a physically assembled quorum at one primary location should be maintained due to its importance to open government generally. The VPA stated that its major concerns with electronic meetings are the chronic nonparticipation by a minority of members of a public body and the lack of access to a "disembodied group." The VPA stated that the effect of overturning current law on electronic communications meetings is to lower the bar for expectations of our public officials. Additionally, VPA questioned whether the reporting requirements for the pilot program or the relevant provisions found in FOIA had produced ample data that could serve as a

¹⁶ As distinguished from the pilot program pursuant to Chapter 704 of the 1999 Acts of Assembly, as amended, which requires only that a quorum be physically present in Virginia.

basis for the amendment of the electronic meetings provisions. Staff indicated that very few reports had been made since the inception of the pilot program in 1999.

With regard to the potential for chronic nonparticipation by members of a public body, the subcommittee noted that current law addressed the situation by limiting the number of meetings that could be conducted electronically to 25 percent. One alternative to the 25 percent limitation was to identify the members physically present as well as those attending through remote locations in the minutes of the meetings. It was noted that the identity of the members present and absent is currently required to be recorded in the minutes of any meeting. It was also suggested that a limitation on the number of times a particular public official may use electronic communications meetings may be a solution. One subcommittee member noted that ours is a representative government and questioned how public policy discussions may be impacted by such a limitation.

Staff from the Joint Committee on Technology and Science (JCOTS) reported that JCOTS has a subcommittee looking at the provisions of electronic communications meetings due to the expiration of the pilot program. The goal of JCOTS was to codify the provisions of the pilot program. The difference between the positions of JCOTS and the Council subcommittee concerned the location of the quorum and the requirements for recording the meetings. Current law, including the pilot program, requires that in addition to minutes, a recording be made of the electronic communications meeting and retained for a three-year period.

After considerable discussion among subcommittee members and the interested parties, the subcommittee by consensus recommended draft legislation that would (i) amend § 2.2-3707 requiring minutes of electronic communication meetings to identify each member participating remotely and those physically located at the primary location of the meeting, as well as identifying the members who monitored¹⁷ the meeting from a remote location not noticed as a meeting site, (ii) eliminate the 25 percent limitation on the number of electronic communication meetings that may be conducted annually, (iii) require a quorum of the public body to be physically assembled at one primary location, (iv) require at least one meeting

¹⁷ The standing informal opinion of the Council is that if the requirements of § 2.2-3708 are met (i.e., 30-day notice and publicly accessible remote locations), but a member of a public body, due to unforeseen circumstances, cannot attend either a remote or the primary location, then that member may only monitor the meeting and may not actively participate in the meeting or vote. The same would be true where the meeting was not noticed as an electronic meeting and a member of a public body could not attend the meeting. The basis for this opinion is that while § 2.2-3708 prescribes the conditions under which electronic meetings may be held, it is an exception to the general FOIA requirement for open, physically assembled meetings. As an exception to the open meeting requirement, the provisions of § 2.2-3708 are subject to the narrow construction rule of FOIA. The provisions of subsections B and C of § 2.2-3708 establish the conditions precedent for holding electronic meetings. Further, the purpose of the electronic meeting requirements is to simulate the traditional open, physically-assembled meeting, notwithstanding that some of the members of the public body are separated spatially. The rules of access are the same.

annually to be conducted where members in attendance are physically located and where no members may participate electronically, (v) change the annual reporting period for public bodies conducting electronic meetings from December 1 to December 15, (vi) authorize the conduct of closed meetings during electronic meetings, (vii) eliminate the requirement for recording (either audio or audio and visual) of electronic meetings, (viii) require the annual filing of a written report to the Council and JCOTS, and (ix) eliminate the filing of notice with VITA. The subcommittee reported that it had requested JCOTS staff to advise JCOTS of the subcommittee's recommendations and that it strongly urged the adoption of one consensus draft to be introduced during the 2005 Session.

The HB 1357 Subcommittee, comprised of Council members Senator Houck, Delegate Griffith, and Messrs. Bryan, Edwards, and Axselle, met to discuss the actions of the subcommittee of the Joint Rules Committee also reviewing the provisions of HB 1357. The Joint Rules subcommittee had met immediately preceding the Council subcommittee. Delegate Griffith reported that the Joint Rules subcommittee had labored long and hard to develop rules to recommend to the full Joint Rules Committee concerning public access to meetings of the General Assembly, other than floor sessions, committee or subcommittee meetings and conference committee meetings or subcommittees of such entities, which under the provisions of HB 1357, are open to the public. Delegate Griffith stated that the Joint Rules subcommittee, after considerable deliberation and receiving comment from the public, had determined that no rules were required as HB 1357 had adequately addressed the issue of public access to meetings of the General Assembly. Delegate Griffith indicated that he would be making that recommendation to the Joint Rules Committee and stated that he believed the Joint Rules Committee would accept the recommendation of its subcommittee. Delegate Griffith was commended for the candid, open and inclusive manner used by the Joint Rules subcommittee as it deliberated on the provisions of HB 1357.

During the Council subcommittee meeting, Mr. Edwards stated that he believed that HB 1357 was a mistake and that the Council should so state. He added that the good faith work to date would not necessarily preclude the adoption of future rules doing the wrong thing. Representatives of the Virginia Press Association, while commending Delegate Griffith for the candid discussion of the Joint Rules subcommittee, noted that the Council should take the stand that HB 1357 took the process into the internal workings of the General Assembly and moved away from public access. The Virginia Coalition for Open Government echoed the sentiments of the Virginia Press Association.

Senator Houck commented that the deliberations of the Joint Rules subcommittee should be a comfort to everyone in that bright minds had endeavored to craft a rule, but found it was impractical to decide such a rule without undermining the policy of FOIA. Senator Houck, with the consensus of the Council

subcommittee, recommended that the HB 1357 Subcommittee of the Council be established as a permanent subcommittee to monitor and react to future attempts by the Joint Rules Committee should it decide to establish access rules to other meetings of the General Assembly. Additionally, the Council subcommittee recommended that the Council commit to do more work in educating members of the General Assembly about FOIA, including the preparation of training and reference materials not just for new members of the General Assembly, but as an ongoing training effort for all members of the General Assembly. The final recommendation was offered by Delegate Griffith and related to committees of conference. He stated that he was aware that one goal of HB 1357 was to grant access to budget conferences; however, he stated that the provisions of the bill should not be interpreted to require face-to-face meetings of all committees of conference when in practice no real meetings occur with the vast majority of committees of conference. He noted that scope of discussion in committees of conference is limited to the matter in controversy--not every provision in a bill.

Review of Legislative Recommendations

The Council reviewed the draft recommended by its Electronic Meetings and Notice Subcommittee as discussed above. There was discussion whether it would be advisable to keep the reporting date for public bodies conducting electronic meetings as December 1 to coincide with the annual report date of the Council. Staff was directed to investigate alternative reporting dates, including the feasibility of requiring quarterly reports for electronic meetings. As part of its discussions, the Council also reviewed the draft adopted by the JCOTS on the same subject. Staff from JCOTS advised that the two drafts had been conformed and were essentially identical, except that the JCOTS draft contained language that clarified that electronic meetings could not be conducted by the General Assembly during any regular, special or reconvened session. Delegate Griffith expressed concern that inclusion of this language would undermine the provisions of § 2.2 - 3707.01 which gives the Joint Rules Committee authority to prescribe rules for public access to meetings of the General Assembly. It was the consensus of the Council not to include this language in its draft. Additionally, the Council requested JCOTS staff to apprise JCOTS that in policy matters relating to FOIA, JCOTS should defer to the decisions of the Council. JCOTS staff advised the Council that the chairman of JCOTS had previously expressed the same sentiment. The Council unanimously voted to recommend the above-described amendments to the electronic meetings section of FOIA to the 2005 Session of the General Assembly.

Legislative Preview

As part of its annual legislative preview, the Council heard from the Office of the Chief Medical Examiner (OCME), the Department of Fire Programs, and the State Board of Elections concerning proposed amendments to FOIA.

Dr. Marcella Fierro, the Chief Medical Examiner, explained the need for exemptions that would maintain the confidentiality of third party records acquired by the OCME during death investigations as well as records created by the OCME through surveillance programs, research, and studies of death. Dr. Fierro advised that § 32.1-283.1 provided a FOIA exemption for records of the State Child Fatality Review Team, local and regional fatality review teams, and family violence fatality review teams, but that no such protections were available for records obtained from the National Violent Death Reporting System or for records of maternal mortality, infant metabolic testing population studies. Dr. Fierro stated that without the ability to maintain the confidentiality of third party records, the OCME lacked "the ability to do thorough medico-legal death investigations. In addition, data collection is incomplete and reports on these deaths provide only a partial picture of violent death in Virginia, thereby thwarting meaningful prevention efforts." The Council discussed whether current exemptions for medical records and criminal investigative records adequately protected the records of the OCME. It was the consensus of the Council that, generally, exemptions from public disclosure should follow the record and not be based on who is holding the record. Dr. Fierro stated that the OCME only sought to protect records not previously made public. She indicated that the OCME makes reports on their studies and findings, but that the records aggregate the information and do not contain individual identifying information. Dr. Fierro also indicated that without legislation, there would be an obstacle in obtaining federal grants and contracts to carry out Center for Disease Control surveillance and prevention research. The VPA stated that it needed to see the proposal in bill form before it could take a position. The VPA indicated that there are several levels relative to this proposal, including FOIA, federal law, and rules of court. Senator Houck requested Dr. Fierro to meet with the VPA and other interested parties to produce a workable draft. Dr. Fierro stated that her office would be happy to oblige.

Christy King, Policy, Planning and Legislative Affairs Manager, Virginia Department of Fire Programs, advised that the Department was seeking a FOIA exemption for training records of the Department relating to fire and emergency service personnel records. She indicated that after September 11, 2001, there are several potential terrorism-related vulnerabilities associated with the release of training records, including risk of impersonation of fire and rescue responders and identification of gaps in the fire and rescue agencies to address chemical, biological, and explosive events. The FOIA exemption suggested by the Department would be found in § 2.2-3705.2 and protect "fire and emergency service personnel training

records maintained by the Virginia Department of Fire Programs, including department name, fire department identification number, student name, instructor number, certifications approved by the Virginia Fire Services Board, certificates of attendance, course code, description of classes for certification, standard year, hours, create dates and certification." Representatives of the Virginia Fire Chiefs Association and the Professional Firefighters Associations stated that they supported the Department's proposed legislation. The VPA opposed the legislation on the grounds that the records described would be covered under the personnel exemption already found in FOIA. The VPA also stated that there was a tenuous connection between terrorism and the records sought to be protected by the Department.

Rosanna Bencoach, Manager, Policy Division, State Board of Elections (SBE), advised the Council that the SBE was seeking approval from the administration for an exemption from FOIA for reports detailing voting equipment and ballot security audits/assessments prepared by local electoral boards in order to prevent breaches of the new computerized voting equipment that could be obtained from public disclosure of SBE security audits. A corresponding meeting exemption was also proposed to protect discussions of such records. Members of the Council expressed concern that voting information and voting machine operational efficiency should be subjected to public scrutiny. The Council noted that FOIA currently provides a record exemption for "[D]ocumentation 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" that would protect many of the types of records identified by the SBE for protection. The Council acknowledged, however, that there was no corresponding meeting exemption found in current law. The Council requested the SBE to work with interested parties in an attempt to agree on a draft proposal.

Other Business

The Council discussed HB 543 (May) from the 2004 Session¹⁸. Staff advised the Council that JCOTS, which had recommended the bill originally, was not

¹⁸ HB 543 would prohibit the filing or creation of public records that contain more than the last four digits of any unique identifying number, unless such use is required by law or the record is exempt from disclosure. The bill defines unique identifying number as any alphabetic or numeric sequence, or combination thereof, that is unique and assigned to a specific natural person at that person's request and includes, but is not limited to, social security number, bank account number, credit card number, military service number and driver's license number. The bill excludes from this definition any arbitrarily assigned alphabetic or numeric sequence, or combination thereof, that is assigned to a natural person for purposes of identification, in lieu of social security numbers, and used for a single, specific government purpose. Either preparers or filers of such documents must certify that the document complies with this prohibition before the documents can be filed. The bill provides that it would not become effective unless reenacted by the 2005 Session of the General Assembly.

recommending the bill for reenactment due to practical and other concerns with the bill previously expressed by the Council and other parties. The Council by consensus agreed that the bill should not be reenacted. The Council, however, acknowledged that release of social security numbers and other unique identifying numbers is a problem, but one for which no workable solution has yet been developed.

The Council also reviewed HB 4874 (Cole) from the 2004 Session¹⁹. The Council had previously considered HB 487 as part of its study of bill referred to it by the 2004 General Assembly. In light of the fact that the Federal Aviation Administration (FAA) maintains a website which would allow any person to ascertain the name and address of owners of aircrafts as well as aircraft identifying information and that the FAA website includes the ability to search this information on a state-by-state basis or by a particular county within a state, the Council by consensus agreed that no such FOIA exemption was advisable.

A draft copy of the Council's 2004 annual report was distributed for review by the Council. Senator Houck requested that Council members review the draft and submit comments or revisions to staff before December 17, 2004 so that the annual report could be published before the start of the 2005 Session.

Of Note

Staff noted that since its last meeting on September 16, 2004, it had responded to 300 requests for assistance. Of those requests, 293 were for informal opinions (telephone or e-mail inquiries) and seven were for formal, written opinions. Of the informal inquiries, 147 were made by government officials, 103 by citizens, and 43 by media representatives. For written opinions, five were requested by citizens, and one each by government and the media.

SERVICES RENDERED BY THE COUNCIL

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

¹⁹ HB 487 would provide an exemption for records of licensed public use airports containing information concerning (i) the identity of the owners or operators of aircraft based at the airport, including the owner's or operator's name, home address and telephone number and (ii) the tail numbers and other identifying information relating to the aircraft based at the airport from the mandatory disclosure requirements of FOIA.

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 statewide FOIA Workshops, Council staff is available to conduct FOIA training throughout Virginia, upon request, to governmental entities, media groups and others interested in receiving a FOIA program that is tailored to meet the needs of the requesting organization. This service is provided free of charge. The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. During this reporting period, the Council, with its staff of two, responded to more than 1,200 inquiries and conducted 36 training seminars statewide. A listing of these training seminars appears as Appendix B.

FOIA Opinions

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of 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 2003 to December 2004, the Council, with a staff of two attorneys, fielded more than 1,200 inquiries. Of these inquiries, 26 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 served" basis. Response for a written opinion is generally about four weeks, depending on the number of pending requests for written opinions, the complexity of the issues, and the other workload of the staff. 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 2003 through December 2004:

Written Advisory Opinions:

State Government	1
Local Government	6
Law Enforcement	1
Citizens of the Commonwealth	15
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 are. 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 2003 and December 2004:

Telephone and E-mail Responses: 1,190

State Government	230
Local Government	328
Federal Government	2
Law Enforcement	56
Citizens of the Commonwealth	397
Members of the News Media	145
Out-of-state	32

During this reporting period, the Council has answered a broad spectrum of questions about FOIA. Appendix G to this report provides a breakdown of the type and number of issues raised by the inquiries received by the Council.

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 36,000 times. About 1,456 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 fifth year, Council staff conducted statewide FOIA training workshops. This year, workshops were conducted during the second and third weeks of October in Wytheville, Harrisonburg, Fairfax, Richmond and Norfolk. 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 by the State Bar of Virginia for 4.5 hours of continuing legal education credit (CLE) for attorneys. They were also approved for in-service credit for law-enforcement personnel by the Department of Criminal Justice Services and for three academy points for school board officials by the Virginia School Board Association. Approximately 450 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 Board Association.

In addition to the annual workshops, the Council also provides training, upon request, to interested groups. These groups include the staff of state agencies, members of local governing bodies, media organizations, and any other group that wishes to learn more about FOIA. Council staff travels extensively throughout the Commonwealth to provide this training. The training is individualized to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group. This year Council staff added in-house FOIA training to the Office of the Attorney General to the Council's list of Virginia State Bar-approved courses for CLE credit for licensed attorneys. From

December 2003 to December 2004, the Council conducted 36 such training programs. A listing of the training seminars appears as Appendix B.

Educational Materials

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

- ? Access to Public Records
- ? Access to Public Meetings
- ? How to Make a Closed Meeting Motion
- ? Law Enforcement Guide to FOIA
- ? Guide to Electronic Meetings
- ? E-Mail: Use, Access & Retention
- ? E-Mail & Meetings
- ? 2004 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, or to notify 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 fourth 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 1,200 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,

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Ralph L. "Bill" Axselle
John Stewart Bryan, III
John B. Edwards
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Roger C. Wiley
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APPENDIX A

Legislative Recommendation

BILL SUMMARY: Freedom of Information Act; electronic communication meetings. Reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually, (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707, (iii) allows for the conduct of closed meetings during electronic meetings, and (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science and expands the type of information required to be reported. The bill defines "electronic communication means."

BILL TEXT:

A BILL to amend and reenact §§ 2.2-3707 and 2.2-3708 of the Code of Virginia, relating to the Virginia Freedom of Information Act; electronic meetings; notice; minutes.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3707 and 2.2-3708 of the Code of Virginia are amended and reenacted as follows:

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

A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided in §§ 2.2-3708, 2.2-3709 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator. All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on the Internet. Publication of meeting notices by electronic means by other public bodies shall be encouraged. The notice shall be posted at least three working days prior to the meeting. Notices for meetings of state public bodies on which there is at least one member appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

D. Notice, reasonable under the circumstance, of special or emergency meetings shall be given contemporaneously with the notice provided members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body.

G. Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction

of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.

H. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings.

I. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall include, but are not limited to, (i) the date, time and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii)

a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708, minutes of state public bodies shall include (a) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (b) the identity of the members of public body who were physically assembled at the primary or central meeting location, and (c) the identity of the members of the public body who were not present at the locations identified in clauses (a) and (b), but who monitored such meeting through electronic communications means.

§ 2.2-3708. Electronic communication meetings.

A. It shall be a violation of this chapter for any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government or any committee thereof to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

B. For purposes of this section, ~~"public~~;

"Public body" means any public body of the Commonwealth, but excludes any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government.

"Electronic communication means" means any audio or combined audio and visual communication method.

State public bodies may conduct any meeting, ~~except closed meetings held pursuant to § 2.2-3711,~~ wherein the public business is discussed or transacted through ~~telephonic or video~~ electronic communication means. Where a quorum of a public body of the Commonwealth is physically assembled at one location for the purpose of

conducting a meeting authorized under this section, additional members of such public body may participate in the meeting through ~~telephonic~~electronic communication means provided such participation is available to the public.

If a public body holds an electronic meeting pursuant to this section, the public body shall also hold at least one meeting annually where members in attendance at the meeting are physically assembled at one location and where no members participate by electronic communication means.

C. Notice of any meetings held pursuant to this section shall be provided at least ~~30~~- seven working days in advance of the date scheduled for the meeting. The notice shall include the date, time, place and purpose for the meeting ~~and~~; shall identify the locations for the meeting; and shall include a telephone number that may be used at remote locations to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting to the remote locations. All locations for the meeting shall be made accessible to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.

~~Thirty-day~~ Seven working days' notice shall not be required for ~~telephonic or video~~ meetings authorized under this section continued to address an emergency as provided in subsection F or to conclude the agenda of a ~~telephonic or video~~ meeting of the public body authorized under this section for which the proper notice has been given, when the date, time, place and purpose of the continued meeting are set during the meeting prior to adjournment.

~~The public body shall provide the Virginia Information Technologies Agency with notice of all public meetings held through telephonic or video means pursuant to this section.~~

D. An agenda and materials that will be distributed to members of the public body and that have been made available to the staff of the public body in sufficient time for duplication and forwarding to all locations where public access will be provided shall be made available to the public at the time of the meeting. Minutes of all meetings held by ~~telephonic or video~~ electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through ~~telephonic or video~~ electronic communication means shall be recorded by name in roll-call fashion and included in the minutes. ~~In addition, the public body shall make an audio recording of the meeting, if a telephonic medium is used, or an audio/visual recording, if the meeting is held by video means. The recording shall be preserved by the public body for a period of three years following the date of the meeting and shall be available to the public.~~

E. ~~No more than 25 percent of all meetings held annually by a public body, including meetings of any ad hoc or standing committees, may be held by telephonic or video means.~~ Any public body that meets by ~~telephonic or video~~ electronic communication means shall ~~file with~~ make a written report of the following to the Virginia Information Technologies Agency Freedom of Information Advisory Council and the Joint Commission on Technology and Science by July 1/December 15 of each year ~~a statement identifying the total:~~

1. The total number of electronic communication meetings held during the preceding fiscal year, the dates on which;

2. The dates and purposes of the meetings were held and the number and purpose of those conducted through telephonic or video means;

3. The number of sites for each meeting;

4. The types of electronic communication means by which the meetings were held;

5. The number of participants, including members of the public, at each meeting location;

6. The identity of the members of the public body recorded as absent, and those recorded as present at each meeting location;

7. A summary of any public comment received about the electronic communication meetings; and

8. A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.

F. ~~Notwithstanding the limitations imposed by subsection E, a~~ A public body may meet by ~~telephonic or video~~ electronic communication means as often as needed if an emergency exists and the public body is unable to meet in regular session. Public bodies conducting emergency meetings through ~~telephonic or video~~ electronic communication means shall comply with the provisions of subsection D requiring minutes, ~~recordation and preservation of the audio or audio/visual recording~~ of the meeting. The nature of the emergency shall be stated in the minutes.

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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, 2003 through the end of November 2004, Council staff conducted 36 training seminars, which are identified below in chronological order identifying the group/agency requesting the training.

December 4, 2003	Virginia General Assembly New Member Orientation Richmond, Virginia
December 9, 2003	Virginia Constitutional Officers New Member Training Richmond, Virginia
March 10, 2004	Virginia Information Technologies Agency Richmond, Virginia
March 18, 2004	American Society for Public Administration Hampton Roads Chapter Norfolk, Virginia
March 24, 2004	WVEC, Channel 13 Norfolk, Virginia
April 5, 2004	E-mail and FOIA Panel Library of Virginia Richmond, Virginia
April 6, 2004	Department of Agriculture and Consumer Services Richmond, Virginia
April 21, 2004	Commonwealth Management Institute VCU Center for Public Policy Richmond, Virginia
April 29, 2004	Virginia Emergency Number Association and Association of Public-Safety Communications Officials Spring Conference

	Virginia Beach, Virginia
May 12, 2004	Fairfax County Public Safety Officials Fairfax County, Virginia
May 20, 2004	Rockingham County Sheriff's Office and Harrisonburg Police Department Harrisonburg, Virginia
May 21, 2004	Virginia Constitutional Officers New Member Training Roanoke, Virginia
May 25, 2004	Virginia Constitutional Officers New Member Training Richmond, Virginia
June 10, 2004	Division of Legislative Services Richmond, Virginia
June 23, 2004	"Keeping Current with FOIA and FLSA Workforce and Community Development Rappahannock Community College Warsaw, Virginia
July 12, 2004	Town of Bluefield Bluefield, Virginia
August 16, 2004	Small Business Advisory Board Richmond, Virginia
August 19, 2004	Virginia Retirement System Board Richmond, Virginia
September 8, 2004	Town of Smithfield Smithfield, Virginia
September 15, 2004	Blue Ridge Community College Weyers Cave, Virginia
September 17, 2004	NewsTrain at Virginia Press Association Richmond, Virginia

September 18, 2004	Society of Professional Journalists "Better Watchdog" Workshop Richmond, Virginia
September 29, 2004	Commonwealth Management Institute VCU Center for Public Policy Richmond, Virginia
October 4, 2004	2004 FOIA Workshops Wytheville, Virginia
October 5, 2004	2004 FOIA Workshops Harrisonburg, Virginia
October 6, 2004	2004 FOIA Workshops Fairfax, Virginia
October 12, 2004	2004 FOIA Workshops Richmond, Virginia
October 13, 2004	2004 FOIA Workshops Norfolk, Virginia
October 14, 2004	James City County James City County, Virginia
October 14, 2004	Shaping Effective Leadership for the Future James City County James City County, Virginia
October 15, 2004	Department of Education Richmond, Virginia
October 20, 2004	Commonwealth Management Institute VCU Center for Public Policy Richmond, Virginia
October 26, 2004	Office of the Attorney General Richmond, Virginia
November 9, 2004	Department of Rehabilitative Services Woodrow Wilson Rehabilitation Center Fishersville, Virginia

November 12, 2004

Access 2004 Conference
Virginia Coalition for Open Government
Williamsburg, Virginia

APPENDIX C

ADVISORY OPINIONS ISSUED

December 1, 2003, through November 30, 2004

<u>Opinion No.</u>	<u>Issue(s)</u>
AO-25-03	FOIA exemption for records containing attorney-client privilege parallels Common Law attorney-client privilege; exemption does not apply to records of public relations firm hired by law firm on behalf of city if the public relations firm is not acting as an agent of the law firm for purposes of rendering legal advice. Records are not subject to attorney-client privilege merely because they are sent to an attorney.
AO-26-03	Exemption in subdivision A 10 of § 2.2-3705 allows library to withhold records that identify Internet sites visited by a patron on a library computer.
AO-27-03	Records of homicide investigations may be withheld pursuant to subdivision F 1 of § 2.2-3706; the provisions at subsection G of § 2.2-3706 do not conflict with subdivision F 1.
AO-01-04	Metropolitan Washington Airports Authority is subject to FOIA.
AO-02-04	A public body must give notice of the time, date, and location of its meetings, even if the only item on the agenda for the meeting is a closed session; a public body may withhold records and conduct closed meetings relating to contract negotiations until a decision whether or not to enter into the contract is reached by the public body.
AO-03-04	The Peninsula SPCA is acting as the animal-control arm of local government, and its records and meetings are open under FOIA to the extent they relate to these animal control functions.
AO-04-04	FOIA requires a public body to make available salary records of public employees; however, FOIA does not

require a public body to create a spreadsheet or list out of these records, and cannot charge a requester to create such spreadsheets or lists unless the public body reaches an agreement with the requester prior to the creation of the record.

AO-05-04 Absent a specific court order, a public body cannot require a citizen of the Commonwealth to make a FOIA request through her attorney.

AO-06-04 Records of a committee established by a public body are public records subject to FOIA, even if the records are physically held by a private sector member of the committee at his private place of business; grant money received by a private organization from a government source is not considered "public funds" for purposes of determining whether an organization is supported wholly or principally by public funds.

AO-07-04 The records exemption at subdivision A 78 of § 2.2-3705 only exempts personal information provided to a public body for purposes of receiving e-mail from a public body; it does not apply to personal information provided to an individual elected official who chooses to send out e-mails or updates to constituents.

AO-08-04 Redevelopment plans submitted to the director of a Redevelopment and Housing Authority may not be withheld as working papers because the Authority, and not the director, is required to approve the plans.

AO-09-04 The records exemption at subdivision A 85 of § 2.2-3705 for portions of school safety audits does not allow a school to withhold all records relating to a visitor monitoring procedure.

AO-10-04 Billing statements received by a public body from a private attorney for legal services are not subject to exemption as attorney-client privilege or work product.

AO-11-04 Records of all investigations of the Department of Health Professions, and not just records of active investigations, are confidential, even to the subject of the records.

- AO-12-04 Gathering of chairmen and vice-chairmen of a board of supervisors and school board to discuss bond issues is not a meeting for purposes of FOIA when they were not appointed by their respective public bodies to advise the public bodies or perform delegated functions.
- AO-13-04 FERPA & FOIA give access to educational records to the subject of the records, except that "sole possession records" are excluded from this requirement; when a student is enrolled in an institution of post-secondary education, the student, and not the parent, has the right of access.
- AO-14-04 The exemption in subdivision 8 of § 2.2-3705.7 that allows for personal information concerning persons participating in federally funded rent-assistance programs to be withheld does not apply to records relating to landlords who enter into contracts with local housing authorities to provide such housing.
- AO-15-04 A gathering of three members of a school board at a citizen's home is a meeting under FOIA when the purpose of the gathering is to discuss matters of public business pending before the board.
- AO-16-04 A public body may request a deposit before proceeding with a request if it estimates that the request will exceed \$200 and may toll its response to the entire request until the deposit is received; a requester has the right to narrow a request in an attempt to lower the costs, but the requester must clearly state that he is narrowing the request, and not simply asking that certain records be provided immediately while the remainder of the request is being processed before paying the deposit; making a FOIA request is not an adversarial process, and clear communication from both parties is often the best way to avoid disputes.
- AO-17-04 The working papers exemption found in subdivision 2 of § 2.2-3705.7 was designed to provide an unfettered zone of privacy for the deliberative process. The exemption does not expire unless the working papers are disseminated or otherwise made public by the official to whom the

exemption applies. Absent such a release, a record created by or for one of the named officials for his personal or deliberative use retains the characterization of a working paper.

AO-18-04

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

AO-19-04

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

AO-20-04

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

AO-21-04

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

AO-22-04

It is the policy of this office not to issue an opinion once litigation is commenced or a judge of competent jurisdiction has rendered an opinion on the same factual question(s) raised in a request for an advisory

opinion of the Council. The court, and not the Council, is the appropriate body to decide and settle a dispute as a matter of law. An entity that was subject to FOIA by virtue of its receipt of sufficient public funds may later be excluded from the definition of a "public body" if it no longer is supported wholly or principally by public funds; it is a question of fact that must be decided on a case-by-case basis.

AO-23-04

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

APPENDIX D

2004 Meetings of the Virginia Freedom of Information Advisory Council

Monday, March 29, 2004, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Review of FOIA and access-related legislation passed by the 2004 Session of the General Assembly; review of bills referred to the Council by the 2004 Session of the General Assembly for study and appointment of study subcommittees and workgroups; discussion of Council's role as mandated by HB 1357 (04) concerning open meetings and the General Assembly; discussion of Virginia Supreme Court ruling in *Beck v. Shelton* (Fredericksburg e-mail case); updates on number of inquiries to the Council for opinions and plans for 2004 FOIA Workshops.

Wednesday, June 9, 2004, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Progress reports from subcommittees on electronic meetings and geographic information systems (GIS); review of HB 487 (04) Session concerning record exemption for regional airports concerning owner/operators of private aircraft; status report on development of model rights and responsibilities document for state agencies pursuant to HB 358 (04); updates on number of inquiries to the Council for opinions and plans for 2004 FOIA Workshops.

Thursday, September 16, 2004, 2:00 p.m.

Senate Room A, General Assembly Building, Richmond, VA

Council's first electronic meeting with members participating telephonically from Roanoke, Virginia; progress reports from subcommittees on electronic meetings and geographic information systems (GIS), and FOIA technology nomenclature workgroup; discussion of HB 543 (04) concerning access to social security numbers and other unique identifying numbers; discussion of feasibility of Council-sponsored symposium on status of law concerning access to children's records; updates on number of inquiries to the Council for opinions and plans for 2004 FOIA Workshops.

Thursday, December 2, 2004, 2:00 p.m.

House Room D, General Assembly Building, Richmond, VA

Introduction of newest Council member and staff attorney; progress reports from subcommittees on electronic meetings and geographic information systems (GIS), and FOIA technology nomenclature workgroup; adoption of legislative recommendations for 2005 Session of General Assembly concerning electronic communication meetings; preview of other FOIA legislation likely to be considered by the 2005 Session of the General Assembly, including exemptions for the Office of the Chief Medical Examiner and the Department of Fire Programs; distribution of draft copy of 2004 annual report; update on number of inquiries to the Council for opinions and recap of 2004 FOIA Workshops.

APPENDIX E

Recap of Freedom of Information and Other Related Access Bills Passed by the 2004 Session of the General Assembly

The 2004 Session of the General Assembly passed eighteen bills amending the Virginia Freedom of Information Act (FOIA). Of note, both bills recommended by the Freedom of Information Advisory Council passed -- SB 352 (Houck) reorganizes the records exemptions and SB 354 (Houck) relating to records and meeting exemptions for the Civil Commitment Review Committee.

A. FOIA Council Recommendations:

- **Senate Bill 352** (Houck) [2004 Acts of Assembly, c. 690]

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. 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 contains other technical amendments to correct cross references to § 2.2-3705, which is being repealed by this bill.

- **Senate Bill 354** (Houck) [2004 Acts of Assembly, c. 398]

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.

B. FOIA Bills with Emergency Clauses:

- **House Bill 1396** (Cosgrove) [2004 Acts of Assembly, c. 770]

Freedom of Information Act (FOIA); record and meeting exemptions for the Virginia Commission on Military Bases. Provides an exemption from the mandatory disclosure provisions of FOIA for the Commission on Military Bases created by the Governor pursuant to Executive Order No. 49 (2003) for records that contain information relating to vulnerabilities of military bases located in Virginia and strategies under consideration or developed by the Commission to limit the effect of or to prevent the realignment or closure of federal military bases located in Virginia. The bill also contains an open meeting exemption for the Commission when discussing these records. The provisions of the bill will expire on July 1, 2006.

- **House Bill 1483** (O'Bannon) [2004 Acts of Assembly, c. 773] / **Senate Bill 685** (Howell) [2004 Acts of Assembly, c. 1021]

Communicable diseases of public health threat; quarantine and isolation. Among other changes relating to quarantines generally, creates a FOIA exemption for records of the State Health Commissioner relating to the health of any person subject to an order of quarantine or isolation, except that statistical summaries and other aggregate information must be released.

C. Other FOIA Bills:

- **House Bill 168** (Sherwood) [2004 Acts of Assembly, c. 832]

Freedom of Information Act (FOIA); record exemption; certain park and recreation records. The bill adds an exemption from the mandatory disclosure requirements of FOIA for records of state or local park and recreation departments to the extent such records contain information identifying a person under the age of 18 years, where the parent or legal guardian of such person has requested in writing that such information not be disclosed. However, nothing in this subdivision shall operate to prohibit the disclosure of information defined as directory information under regulations implementing the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232 g, unless the public body has undertaken the parental notification and opt-out requirements provided by such regulations.

- **House Bill 347** (Sherwood) [2004 Acts of Assembly, c. 426]

Freedom of Information Act (FOIA); record exemption; citizen emergency response teams. Provides an exemption from the mandatory disclosure requirements of FOIA for records of the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams established pursuant to an ordinance of a local governing body, to the extent that such records reveal the name, address, including e-mail address, telephone or pager numbers, or operating schedule of an individual participant in the program.

- **House Bill 358** (Suit) [2004 Acts of Assembly, c. 730]

Freedom of Information Act; posting by certain state public bodies; minutes. Requires all state public bodies created in the executive branch of state government and subject to the Freedom of Information Act (FOIA) to make certain information available to the public upon request and to post such information on the Internet, including: (i) a plain English explanation of the rights of a requester under FOIA, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with FOIA; (ii) contact information for the person designated by the public body to (a) assist a requester in making a request for records or (b) respond to requests for public records; and (iii) any policy the public body has concerning the type of public records it routinely withholds from release as permitted by FOIA. The bill requires the Freedom of Information Advisory Council, upon request, to assist state public bodies in the development and implementation of this information. The bill also specifies what information must be included in minutes of open meetings.

- **House Bill 538** (May) [2004 Acts of Assembly, c. 735] / **Senate Bill 297** (O'Brien) [2004 Acts of Assembly, c. 685]

Freedom of Information Act; record exemption; cell phone numbers of law-enforcement personnel. Provides that records of the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided by a law-enforcement agency to its personnel for use in the performance of their official duties are exempt from the mandatory disclosure requirements of the Freedom of Information Act.

- **House Bill 877 (O'Bannon)** [2004 Acts of Assembly, c. 65] / **Senate Bill 337** (Stolle) [2004 Acts of Assembly, c. 1014]

Health records privacy; procedure for certain patients to obtain access to their records. Among other things, changes the FOIA exemption for medical and mental health records to apply to "health records" generally. This change in language is consistent with federal regulations concerning disclosure of protected health information. The bill also moves provisions relating to a patient's right of access to § 32.1-127.1:3, and provides a cross-reference to this section in the exemption.

- **House Bill 1246** (Scott, J.M.) [2004 Acts of Assembly, c. 766]

Freedom of Information Act (FOIA); record exemption; certain records of the Department of Criminal Justice Services. Adds a record exemption for confidential investigations of applications for licenses, certification or registration submitted by private security services businesses to the Private Security Unit of the Department of Criminal Justice Services, and records of active investigations connected with such applications or of any such licensee, certificate holder or registrant of the Department.

- **House Bill 1357** (Griffith) [2004 Acts of Assembly, c. 768]

Freedom of Information Act (FOIA); exclusions. Provides that public access to meetings of the General Assembly, except floor sessions and committee or subcommittee meetings, and conference committee meetings, shall be governed by rules established by the Joint Rules Committee. Floor sessions and committee and subcommittee meetings will continue to be open to the public. The Joint Rules Committee must hold regional public hearings at least 60 days before the adoption of the rule. The bill provides that meetings of political party caucuses of either house of the General Assembly are excluded from the meeting provisions of FOIA.

- **House Bill 1364** (Jones, S.C.) [2004 Acts of Assembly, c. 482]

Freedom of Information Act (FOIA); record exemption; certain emergency service records. Provides an exemption from the mandatory disclosure requirements of FOIA for subscriber data, which for the purposes of the exemption, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, provided directly or indirectly by a telecommunications carrier to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if the data is in a form not made available by the telecommunications carrier to the public generally. The bill provides that nothing shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

- **Senate Bill 149** (Deeds) [2004 Acts of Assembly, c. 666]

Freedom of Information Act (FOIA); record exemption; certain client lists. Adds an exemption from the mandatory disclosure requirements of FOIA for records containing the names and addresses or other contact information of persons receiving transportation services from a state or local public body or its designee under Title II of the Americans with Disabilities Act, (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § 63.2-600.

- **Senate Bill 394** (Norment) [2004 Acts of Assembly, c.593]

Freedom of Information Act; record exemption; economic development. Clarifies that the record exemption for proprietary information and other records related to economic development efforts applies to those enumerated state and local or regional economic development agencies to whom such information is provided or used.

- **Senate Bill 562** (Lambert) [2004 Acts of Assembly, c. 605]

Freedom of Information Act; record exemption; investigations of local auditors. Expands the current record exemption for investigative notes,

correspondence and information furnished in confidence to certain state auditors to the same records of designated internal auditors of any school board or local governing body having the authority by charter, statute or ordinance to conduct confidential investigations, including committees established pursuant to § 15.2-825, or any officer, department or program of such body.

D. Other Access-Related Bills:

❑ **UNIQUE IDENTIFYING NUMBERS**

- **House Bill 332** (Pollard) [2004 Acts of Assembly, c. 352]

Recordation of instruments; social security numbers. Provides that where the circuit court clerks have the power to decline to accept any instrument submitted for recordation that includes a grantor's, grantee's or trustee's social security number, the attorney or party who submits the instrument has responsibility for ensuring that the number is removed from the instrument before it is submitted for recordation.

- **House Bill 382** (Lingamfelter) [2004 Acts of Assembly, c. 355]/**Senate Bill 326** (Stolle) [2004 Acts of Assembly, c. 1012]

Concealed handgun permit applications; social security numbers. Allows a clerk of court to withhold from public disclosure the social security number in a concealed handgun permit application in response to a request to inspect or copy such permit application. However, the social security number shall not be withheld from a law-enforcement officer acting in the performance of his official duties. SB 326 also contains numerous other provisions relating to concealed handgun permits.

- **House Bill 543** (May) [2004 Acts of Assembly, c. 736]

Government Data Collection and Dissemination Practices Act; unique identifying numbers limited on public records. Prohibits filing or creating public records that contain more than the last four digits of any unique identifying number, unless such use is required by law or the record is exempt from disclosure. The bill defines unique identifying number as any alphabetic or numeric sequence, or combination thereof, that is unique and assigned to a specific natural person at that person's request and includes, but is not limited to, social security number, bank account number, credit card number, military service number and driver's license number. The bill excludes from this definition any arbitrarily assigned alphabetic or numeric sequence, or combination thereof, that is assigned to a natural person for purposes of identification, in lieu of social security numbers, and used for a single, specific government purpose. Either preparers or filers of such documents must certify that the document complies with this prohibition before the documents can be filed. The bill contains a reenactment clause.

□ **REMOTE ACCESS**

- **House Bill 465** (Drake) [2004 Acts of Assembly, c. 223]

Remote access fees; treasurers. Allows local treasurers who provide electronic access to public records to charge a fee to cover operational expenses. The fee goes into a special nonreverting local fund.

- **House Bill 977** (Reese) [2004 Acts of Assembly, c. 230]

Remote access fee. Allows clerks the additional option to assess the remote access fee by flat rate. Current law allows either for fees on each inquiry or fees for actual connect time.

- **Senate Bill 241** (Norment) [2004 Acts of Assembly, c. 676]

Technology Trust Fund Fee. Increases the fee from \$3 to \$5 and allows the use of the Trust Fund for developing and updating land records automation plans for individual clerks' offices; modernizing land records in individual clerks' offices and providing secure remote access to land records statewide; obtaining and updating office automation and information technology equipment; preserving, maintaining and enhancing court records, including, but not limited to, the costs of repairs, maintenance, service contracts and system upgrades; and improving public access to court records. The bill allows the clerk to use the Trust Fund for technology improvements in the law and chancery and criminal divisions after implementation of automation of land records with statewide secure remote access. The bill repeals the sunset provision of July 1, 2008, and declares that the intent of the General Assembly is that secure remote access be provided by all clerks by July 1, 2006.

□ **RECORDS RETENTION**

- **House Bill 509** (Marrs) [2004 Acts of Assembly, c. 433]

Courts of record; disposition of papers. Allows the clerk of the circuit court to use an electronic format for the archival of records, papers, and documents of cases, as long as the clerk converts them in accordance with state electronic records guidelines.

- **House Joint Resolution 6** (Cox)

Study; Virginia Public Records Act. Creates a joint subcommittee to study the Virginia Public Records Act, electronic records, and their effect on the state depository system. In conducting its study, the joint subcommittee shall examine the Virginia Public Records Act and the extension of its scope to (i) provide and assign authority to establish and maintain guidelines or regulations for the creation, transfer, and archival preservation of electronic state records and publications; (ii) provide and assign authority to establish and maintain procedures for the official authentication of e-records and documents; and (iii) establish a

means to identify, describe, receive, and manage discrete electronic government information products covered by copyright. This resolution is a recommendation of the Joint Subcommittee to Study the Operations, Practices, Duties, and Funding of the Commonwealth's Agencies, Boards, Commissions, Councils, and Other Governmental Entities pursuant to HJR 159 (2002).

□ **OTHER**

- **House Bill 357** (Suit) [2004 Acts of Assembly, c. 729]

Settlements by the Commonwealth; confidentiality. Provides that no settlement of a civil action against the Commonwealth involving money damages shall be made subject to a confidentiality agreement that prohibits the Commonwealth, a state agency, officer or employee from disclosing the amount of such settlement except in cases where the confidentiality agreement is imposed by a court of competent jurisdiction or otherwise is required by law. A settlement may not be subject to a confidentiality agreement if the settlement requires that the matter be the subject of regulator action or legislation proposed to the General Assembly.

- **Senate Bill 280** (Wampler) [2004 Acts of Assembly, c. 586]

Provision of cable television services by certain localities. Provides that the Auditor of Public Accounts, in connection with the audit of a locality's cable television services, shall not disclose the portions of a comprehensive business plan that reveal marketing strategies of a municipal cable television service.

- **Senate Bill 318** (Howell) [2004 Acts of Assembly, c. 1011]

Adult Protective Services; reporting and investigation procedures; adult fatality review teams; penalties. Among other things, provides that criminal investigative reports received from law-enforcement agencies by agencies reviewing suspected cases of adult abuse, neglect or exploitation shall not be further disseminated and are not subject to public disclosure.

- **Senate Bill 336** (Stolle) [2004 Acts of Assembly, c. 332]

Judicial Inquiry and Review Commission; confidentiality. Eliminates confidentiality with respect to any evidence of alleged misconduct concerning a judge who is up for election or reelection when such evidence is transmitted to the House and Senate Committees for Courts of Justice or to any member of the General Assembly.

APPENDIX F

Beck v. Shelton:

The Virginia Supreme Court examines the parameters of a "meeting" under the Virginia Freedom of Information Act.

Lisa Wallmeyer, Staff Attorney
Maria J.K. Everett, Senior Attorney

On March 5, 2004, the Virginia Supreme Court issued an opinion concerning the Virginia Freedom of Information Act ("FOIA," § 2.2-3700 et seq. of the Code of Virginia) (*Beck v. Shelton*, No. 030723), with a holding directly relevant to all elected officials in Virginia -- from members of the General Assembly to members of local school boards. *Beck* has primarily drawn interest because it is the first authoritative statement of law in Virginia as to whether use of electronic mail ("e-mail") by public officials could constitute a meeting under FOIA. *Beck* also examines broader issues as to the applicability of FOIA to members-elect of a public body and the definition of a meeting. The Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that the gathering of three members of a public body at a citizen-organized meeting did not violate FOIA.

Facts

Three plaintiffs filed a petition for writ of mandamus and injunction in Fredericksburg Circuit Court against five members of the Fredericksburg City Council. The petition alleged that the defendants used e-mail to discuss and decide public business, and that such use of e-mail constituted an improper meeting under FOIA. Many of the e-mail exchanges took place after three of the five defendants had been elected to the City Council, but prior to those members taking their oaths of office. The trial court held that FOIA did not apply to the conduct of members-elect. The trial court also found that one e-mail exchange that took place after all of the defendants were sworn into office did constitute a meeting under FOIA, because the e-mails were used to reach a consensus on public business.

In the same suit, the plaintiffs alleged that three Council members held an improper meeting by attending a gathering organized by citizens to discuss traffic and safety issues ("the Charlotte Street gathering"). The three members were separately invited by citizens to attend the meeting to discuss concerns about the lack of a stop sign at a particular intersection. The Council members did not give notice of the gathering, nor were minutes taken, both of which are required for

meetings under FOIA. The trial court held that this gathering was not a meeting, and thus did not violate FOIA.

Holding

1. Members-elect

Because several of the e-mails in question were exchanged before three of the defendants were sworn into office, the facts necessitated a decision as to whether FOIA applied to the members-elect of the City Council; the Court held that it did not. Section 2.2-3702 requires that *[a]ny person elected or reelected to any body not excepted from FOIA to (i) be furnished...with a copy of FOIA within two weeks following the election and (ii) read and become familiar with the provisions FOIA.* The Court held that this requirement did not alter the plain language of the definition of a meeting at § 2.2-3701 as an informal assemblage of three or more **members** of a public body. Although the policy set forth in subsection B of § 2.2-3700 requires liberal construction of FOIA, the Court would not read the provision requiring members-elect to be furnished with a copy of FOIA to broaden the meaning of "member" in the definition of a meeting to include members-elect. The Court opined, "We do not believe that the legislature was inviting the judiciary, under the guise of 'liberal construction,' to rewrite the provisions of FOIA as we deem proper or advisable." The Court stated that it was in the prerogative of the legislature, and not the Court, to rewrite the plain language FOIA.²⁰

As members-elect, FOIA's application is limited to the requirement that they receive a copy of the law and read and become familiar with it -- ostensibly, to be aware of and digest the open government requirements of FOIA that will apply once they become sworn members of the public body. At that point, full responsibility for compliance with FOIA's procedural requirements applies.

Interestingly, but not brought about in response to this case, the 2004 Session of the General Assembly considered legislation that would apply FOIA to members-elect of any state or local public body in the Commonwealth. House Bill 389, offered by Delegate Lingamfelter, provided that any person elected or reelected would be subject to the provisions of FOIA upon receipt of the certificate of election as provided in § 24.2-676. The bill failed in the House of Delegates.

2. E-mail

The Court next turned to the question of whether use of e-mail could be a meeting under FOIA. The Court overturned the trial court's decision that use of e-mail to reach a consensus on a matter of public business was a meeting, on the

²⁰ *Beck* at 6.

grounds that the e-mails in question were similar to letters sent via U.S. Mail or facsimile.

The Court examined the definition of a meeting at § 2.2-3701, which includes *an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership*. The Court noted that e-mail can be similar to traditional forms of written correspondence, in that there may be significant delay between the time the communication is sent and received, or when a response is sent. In the instant case, the shortest interval between any two emails was more than four hours, and the longest was over two days. The Court agreed with the trial court that the dispositive consideration in examining e-mail is how the e-mail is used. In reviewing this standard, the Court focused on the language in the definition of a meeting that includes "an informal assemblage." "Assemblage," the Court concluded, means to bring together at the same time, and inherently entails simultaneity. The Court held that there is no "virtually simultaneous interaction" when e-mail is used as the functional equivalent of a letter communicated by U.S. Mail, courier, or facsimile transmission²¹. In further support of this conclusion, the Court noted that the Attorney General of Virginia had previously found that "transmitting messages through an electronic mail system is essentially a form of written communication."²² While not binding, the General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."²³

It is important to note that the Court did not hold that use of e-mail could never be a meeting under FOIA. Instead, the Court indicated that the dispositive determination in examining e-mail under the meeting provisions of FOIA was to look at how the e-mail was used. The trial court answered this question by reviewing the end result -- i.e., that e-mail was used to reach a consensus. According to the Supreme Court, this question is more appropriately answered by reviewing whether the e-mail was used as a functional equivalent of traditional correspondence. This opinion clarifies that members of a public body need not refrain from using e-mail, but they should be cautioned against using e-mail among three or more members of the public body that is akin to using the telephone and has an element of simultaneity. The court did not establish a time frame as to when the use of e-mail may be considered simultaneous, nor did it address the use of chat rooms, instant messaging, or listservs.

3. The Charlotte Street gathering

²¹ *Id.* at 7.

²² *Id.* at 11 (citing 1999 Op. Atty. Gen. 12).

²³ *Id.* at 12 (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E. 2d 603, 605-06 (1983)).

Finally, the Court upheld the decision that the Charlotte Street gathering was not a meeting under FOIA. The Court relied on the trial court's finding of fact that the gathering was scheduled by the citizens, the purpose was an informational forum concerning traffic issues, and the three Council members who attended did not discuss anything as a group of three. The Court also relied on the evidence that the City Council did not have any pending business concerning traffic control, nor was it likely to have such matter come before it in the future. The Court held that the trial court "was not plainly wrong or without evidence" in finding that these facts did not indicate that a meeting took place.²⁴

The Court cited three relevant FOIA provisions. First, the policy of FOIA at § 2.2-3700 *ensures the people of the Commonwealth...free entry to meetings of public bodies wherein the business of the people is being conducted*. Secondly, this same section states that FOIA *shall not be construed to discourage free discussion of government officials or employees of public matters with the citizens of the Commonwealth*. In construing these provisions together, the Court held that "the balance between these values must be considered on a case-by-case basis according [to] the facts presented."²⁵ In the instant case, the Court also found that the provision commonly referred to as the "bump-into" provision gives further guidance that the gathering was not a meeting. Subsection G of § 2.2-3707 allows members of a public body to gather at public forums, the purpose of which is not to transact public business or to hold discussions relating to the transaction of public business. The Court held that the Charlotte Street gathering was a citizen-organized "informational forum" that did not involve the discussion or transaction of public business.

The Court noted that whether a gathering is a meeting is a factual question to be determined on a case-by-case basis. The Court did not hold that any one of the instant facts -- who initiated the meeting, what was discussed by whom, or whether the issue was pending city business -- was determinative; instead, the Court based its decision on the totality of the factors. The bottom line appears to be that the Court's holding is predicated on the fact that it could not say that the trial court was plainly wrong.

Conclusion

Each of the Court's holdings has implications for members of all public bodies in the Commonwealth. It established conclusively that absent legislative change, FOIA does not apply to the conduct of members-elect of a public body. The case also examined what discussions may not be considered meetings under FOIA, regardless of whether they take place on the computer or in person. The determination as to whether a gathering or discussion falls outside FOIA's meeting provisions is fact

²⁴ *Id.* at 14

²⁵ *Id.* at 14

specific, to be determined case by case. With e-mail, the user must consider whether the e-mail is being used akin to traditional correspondence, or whether the e-mail has an element of simultaneity and is more like a telephone call between three or more members of the public body. Likewise, the decision that the Charlotte Street gathering was not a meeting was fact-specific, and the Court weighed the policy of guaranteeing citizens the right to witness the operations of government with the right of free discussion between citizens and their elected officials. Although no bright-line rules emerged in establishing what is or is not a meeting, this ruling underscores the notion that all meetings are presumed open under FOIA. Determining whether a particular discussion falls outside the parameters of a meeting must be considered carefully, on a case-by-case basis, examining all relevant facts.

APPENDIX G

December 2003 to December 2004

Breakdown of the type and number of issues raised by FOIA inquiries.

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. During this reporting period, the Council has answered a broad spectrum of questions about FOIA. This appendix provides a general breakdown of the type and number of issues raised by the inquiries received by the Council.

APPENDIX G

Time period: December 1, 2003 to November 30, 2004

Total number of inquiries: 1216 *

I. Who Made Inquiries of the FOIA Council

A. Requests for Written Advisory Opinions:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Federal Government	0	0	0	0	0	0	0	0	0	0	0	0	0
State Government	0	0	0	0	0	0	0	0	1	0	0	0	1
Local Government	1	0	0	0	1	0	0	1	2	1	0	0	6
Law Enforcement	1	0	0	0	0	0	0	0	0	0	0	0	1
Citizens of the Commonwealth	1	2	0	2	1	2	1	3	1	0	1	1	15
Members of the News Media	0	0	1	0	0	1	1	0	0	0	0	0	3
Out-of State	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	3	2	1	2	2	3	2	4	4	1	1	1	26

B. Telephone and Email Inquiries:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Federal Government	0	1	0	0	0	1	0	0	0	0	0	0	2
State Government	17	14	14	15	18	11	30	18	28	21	15	29	230
Local Government	28	41	23	30	27	30	19	17	23	20	33	37	328
Law Enforcement	1	5	7	7	6	4	5	5	2	2	6	6	56
Citizens of the Commonwealth	16	35	33	29	39	29	31	46	31	24	30	54	397
Members of the News Media	10	18	11	19	8	7	3	11	13	11	10	24	145
Out-of State	1	0	2	4	3	0	1	5	3	4	8	1	32
TOTAL	73	114	90	104	101	82	89	102	100	82	102	151	1190

II. Records Inquiries

A. Inquiries regarding FOIA procedures for records requests:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Making a request (i.e. how to make a request, who may request records, custodian of record, etc.)	1	10	6	14	11	5	7	9	10	8	4	12	97
Responding to a request (i.e. response time, appropriate response, FOIA applies to existing records, etc.)	7	6	20	14	11	11	9	6	5	4	7	7	107
Charges for records	5	2	4	9	4	4	2	8	4	7	9	6	64
Definition of "public records"	2	4	7	1	6	3	0	1	1	3	3	6	37
Format of records	1	1	2	3	1	1	1	0	0	0	0	0	10
Other inquiries regarding FOIA procedure for records requests	2	3	1	0	0	0	2	1	1	1	1	0	12
SUBTOTAL	18	26	40	41	33	24	21	25	21	23	24	31	327

B. Inquiries regarding specific types of records or exemptions:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Draft records	0	2	2	1	0	2	0	0	1	1	0	0	9
E-mail as a public record	1	1	2	2	3	0	0	3	4	1	1	4	22
Court records	0	1	3	2	1	0	0	0	0	1	0	0	8
Personnel records (including access to salary & job position of public employees)	5	9	9	12	11	9	8	9	11	10	11	16	120
Licensing records exemption	1	0	0	0	0	1	1	1	1	0	0	2	7
Law enforcement records	4	11	10	13	12	9	6	7	12	6	15	12	117
Tax records exemption	4	5	3	1	3	4	1	2	1	1	1	4	30
Scholastic records exemption	1	0	0	2	2	0	1	3	1	0	1	0	11
Medical records exemption	1	0	0	0	1	2	0	2	1	2	0	2	11
Working papers exemption	2	2	3	4	0	2	1	0	3	1	1	2	21
Attorney/client privilege & work product exemptions	1	2	1	1	1	2	3	0	0	0	1	1	13
Terrorism & public safety	1	0	3	0	1	4	1	1	0	0	0	0	11
Procurement	1	2	0	1	3	1	2	2	4	1	2	0	19
Other inquiries regarding specific types of records or exemptions	6	10	5	14	7	14	8	8	14	6	12	17	121
SUBTOTAL	28	45	41	53	45	50	32	38	53	30	45	60	520

C. Total Number of Records-Related Inquiries:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
TOTAL	46	71	81	94	78	74	53	63	74	53	69	91	847

III. Meeting Inquiries

A. Inquiries regarding FOIA procedures for records requests:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Definition of a "meeting"	2	6	1	4	8	6	1	4	6	3	4	6	51
Closed meeting procedure	7	8	4	2	4	2	1	3	4	7	8	6	56
Electronic meetings	7	0	0	2	1	1	0	3	5	7	5	4	35
Voting	0	3	1	0	0	2	0	2	0	1	1	0	10
Minutes	2	3	1	1	0	1	0	2	3	3	2	1	19
Chance meetings	0	1	0	0	0	0	0	1	0	0	0	0	2
Agenda	0	5	0	0	1	1	0	0	0	0	0	0	7
Notice	1	10	3	0	2	2	1	1	3	1	0	8	32
Public Comment	0	0	1	2	0	0	1	0	1	1	0	4	10
Polling	0	0	0	0	0	0	0	1	2	0	0	0	3
Special & emergency meetings	0	2	2	0	0	0	0	0	0	0	0	1	5
Agenda packets	1	1	0	0	0	0	0	0	0	2	3	1	8
Other inquiries regarding procedural matters	1	2	1	6	1	0	1	2	0	2	0	1	17
SUBTOTAL	21	41	14	17	17	15	5	19	24	27	23	32	255

B. Inquiries Regarding the Subject Matter of Meetings: and Meeting Exemptions:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Personnel	4	3	3	2	1	0	1	2	2	2	4	1	25
Real Estate	0	2	1	1	2	0	0	0	0	0	0	1	7
Consultation with legal counsel	2	2	0	1	2	0	0	1	0	2	0	0	10
Scholastic	1	1	0	0	0	0	0	0	0	0	0	0	2
Terrorism & public safety	0	1	0	0	0	0	0	0	1	0	0	0	2
Other inquiries regarding subject-matter	0	2	0	0	0	0	0	1	0	0	2	0	5
SUBTOTAL	7	11	4	4	5	0	1	4	3	4	6	2	51

C. Total Number of Meetings-Related Inquiries:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
TOTAL	28	52	18	21	22	15	6	23	27	31	29	34	306

IV. Other Types of Inquiries

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Remedies	0	5	2	4	2	3	2	2	5	2	4	10	41
Definition of a public body	2	8	4	3	4	5	2	5	7	5	7	4	56
Role of FOIA Council	1	3	1	4	6	1	1	3	4	1	4	4	33
Outside scope of FOIA	2	6	4	8	8	3	4	5	6	6	7	8	67
Privacy issues	0	0	0	0	0	0	0	0	0	0	0	1	1
Request for document review	1	1	0	0	0	0	3	2	1	0	1	0	9
Suggestions/FYI	2	3	2	3	2	1	2	1	1	1	0	2	20
Request for FOIA Materials	4	3	3	1	4	6	11	9	5	2	3	12	63
Public Records Act	0	3	1	0	2	1	2	1	2	0	1	2	15
Request for FOIA Training	2	5	0	1	4	4	6	5	3	1	2	0	33
FOIA Legislation	3	3	1	1	1	2	3	0	3	2	1	2	22
Other general inquiries	4	6	5	12	6	5	9	10	5	6	13	11	92
TOTAL	21	46	23	37	39	31	45	43	42	26	43	56	452

* DISCLAIMERS:

1. 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.
2. The time periods used to count the number of inquiries received between each Council meeting are not the same as the time period used to for purposes of the Annual Report. There may be some discrepancy between the totals reported at each meeting and those contained in this Annual Report due to this difference in counting periods.

APPENDIX H

FOIA Rights & Responsibilities

Effective July 1, 2004, § 2.2-3704.1 of the Code of Virginia [House Bill 358 (c. 730) (2004)] required state agencies in the executive branch of government to post information on their websites concerning the rights of requesters of Virginia government records and the responsibilities of state agencies under the Virginia Freedom of Information Act.

To assist agencies in complying with these new requirements, the FOIA Council developed a model template that can be used, with some modification, by each agency in developing and posting this policy statement. The changes and additions that will need to be made by each agency include:

- Making the document agency-specific. The template refers generically to "the Department." A specific agency name would need to be inserted in its place.
- The new law requires that contact information be provided for a person within each agency designated to assist requesters, and to whom FOIA requests can be sent. Space has been provided on the template for this information to be filled in.
- The new law requires each agency to state its policy about types of records it routinely withholds. The template lists a few records exemptions applicable to all state agencies. However, each agency will need to identify other exemptions it routinely uses for inclusion in the document.
- An agency may also wish to amend any other provisions of the template to more accurately reflect its policies concerning FOIA requests. For example, an agency may have an existing policy to only charge a requester for records if the cost of the request exceeds \$15. In that case, the agency would want to amend the section of the template addressing costs to capture this agency-specific policy.

Model Rights & Responsibilities Template

Staff of the FOIA Council will be happy to assist any agency in adapting this template to reflect its particular policies and commonly-used exemptions. Please contact the FOIA Council at (804) 225-3056, [toll free] 1-866-448-4100, or at foiacouncil@leg.state.va.us to set up an appointment.

While the new requirements of § 2.2-3704.1 only apply to state public bodies in the executive branch of government, this model template may also be useful to local

public bodies. Localities are encouraged to use this template in formulating a policy for responding to FOIA requests and to aid requesters in making requests. Staff of the FOIA Council will also be happy to assist localities in using this template.

Rights & Responsibilities: The Rights of Requesters and the Responsibilities of [the Department] under the Virginia Freedom of Information Act

The Virginia Freedom of Information Act (FOIA), located § 2.2-3700 et seq. of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials, and public employees.

A public record is any writing or recording -- regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format -- that is prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. All public records are presumed to be open, and may only be withheld if a specific, statutory exemption applies.

The policy of FOIA states that the purpose of FOIA is to promote an increased awareness by all persons of governmental activities. In furthering this policy, FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld must be interpreted narrowly.

Your FOIA Rights

- You have the right to request to inspect **or** receive copies of public records, or both.
- You have the right to request that any charges for the requested records be estimated in advance.
- If you believe that your FOIA rights have been violated, you may file a petition in district or circuit court to compel compliance with FOIA.

Making a Request for records from [the Department]

- You may request records by U.S. Mail, fax, e-mail, in person, or over the phone. FOIA does not require that your request be in writing, nor do you need to specifically state that you are requesting records under FOIA.
 - From a practical perspective, it may be helpful to both you and the person receiving your request to put your request in writing. This allows you to create a record of your request. It also gives us a clear statement of what records you are requesting, so that there is no misunderstanding over a verbal request. However, we cannot refuse to respond to your FOIA request if you elect to not put it in writing.
- Your request must identify the records you are seeking with "reasonable specificity." This is a common-sense standard. It does not refer to or limit the volume or number of records that you are requesting; instead, it requires that you be specific enough so that we can identify and locate the records that you are seeking.
- Your request must ask for existing records or documents. FOIA gives you a right to inspect or copy **records**; it does not apply to a situation where you are asking general questions about the work of [the Department], nor does it require [the Department] to create a record that does not exist.
- You may choose to receive electronic records in any format used by [the Department] in the regular course of business.
 - For example, if you are requesting records maintained in an Excel database, you may elect to receive those records electronically, via e-mail or on a computer disk, or to receive a printed copy of those records
- If we have questions about your request, please cooperate with staff's efforts to clarify the type of records that you are seeking, or to attempt to reach a reasonable agreement about a response to a large request. Making a FOIA request is not an adversarial process, but we may need to discuss your request with you to ensure that we understand what records you are seeking.

To request records from [the Department], you may direct your request to [contact person]. She can be reached at [Contact information: address, phone, fax, e-mail]. You may also contact her with questions you have concerning requesting records from [the Department]. In addition, the Freedom of Information Advisory Council is available to answer any questions you may have about FOIA. The Council may be contacted by e-

mail at foiacouncil@leg.state.va.us, or by phone at (804) 225-3056 or [toll free] 1-866-448-4100.

[The Department's] Responsibilities in Responding to Your Request

- [The Department] must respond to your request within five working days of receiving it. "Day One" is considered the day after your request is received. The five-day period does not include weekends or holidays.
- The reason behind your request for public records from [the Department] is irrelevant, and we cannot ask you why you want the records before we respond to your request. FOIA does, however, allow [the Department] to ask you to provide your name and legal address.
- FOIA requires that [the Department] make one of the following responses to your request within the five-day time period:
 - 1) We provide you with the records that you have requested in their entirety.
 - 2) We withhold all of the records that you have requested, because all of the records are subject to a specific statutory exemption. If all of the records are being withheld, we must send you a response in writing. That writing must identify the volume and subject matter of the records being withheld, and state the specific section of the Code of Virginia that allows us to withhold the records.
 - 3) We provide some of the records that you have requested, but withhold other records. We cannot withhold an entire record if only a portion of it is subject to an exemption. In that instance, we may redact the portion of the record that may be withheld, and must provide you with the remainder of the record. We must provide you with a written response stating the specific section of the Code of Virginia that allows portions of the requested records to be withheld.
 - 4) If it is practically impossible for [the Department] to respond to your request within the five-day period, we must state this in writing, explaining the conditions that make the response impossible. This will allow us seven additional working days to respond to your request, giving us a total of 12 working days to respond to your request.

- If you make a request for a very large number of records, and we feel that we cannot provide the records to you within 12 days without disrupting our other organizational responsibilities, we may petition the court for additional time to respond to your request. However, FOIA requires that we make a reasonable effort to reach an agreement with you concerning the production or the records before we go to court to ask for more time.

Costs

- You may have to pay for the records that you request from [the Department]. FOIA allows us to charge for the actual costs of responding to FOIA requests. This would include items like staff time spent searching for the requested records, copying costs or any other costs directly related to supplying the requested records. It cannot include general overhead costs.
- If we estimate that it will cost more than \$200 to respond to your request, we may require you to pay a deposit, not to exceed the amount of the estimate, before proceeding with your request. The five days that we have to respond to your request does not include the time between when we ask for a deposit and when you respond.
- You may request that we estimate in advance the charges for supplying the records that you have requested. This will allow you to know about any costs upfront, or give you the opportunity to modify your request in an attempt to lower the estimated costs.
- If you owe us money from a previous FOIA request that has remained unpaid for more than 30 days, [the Department] may require payment of the past-due bill before it will respond to your new FOIA request.

Commonly used exemptions

The Code of Virginia allows any public body to withhold certain records from public disclosure. [The Department] commonly withholds records subject to the following exemptions:

- Personnel records (§ 2.2-3705.1 (1) of the Code of Virginia)
- Records subject to attorney-client privilege (§ 2.2-3705.1 (2)) or attorney work product (§ 2.2-3705.1 (3))
- Vendor proprietary information (§ 2.2-3705.1 (6))
- Records relating to the negotiation and award of a contract, prior to a contract being awarded (§ 2.2-3705.1 (12))