

REPORT OF THE

**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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VIRGINIA FREEDOM OF INFORMATION  
ADVISORY COUNCIL**

**TO THE GOVERNOR AND  
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COMMONWEALTH OF VIRGINIA  
DECEMBER 2006

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OF THE  
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

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Delegate H. Morgan Griffith  
Ralph L. "Bill" Axelle  
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# REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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

**Richmond, Virginia**  
**December 2006**

## INTRODUCTION

*"In this court's view, under our system of government, it is by far more advantageous to the proper function thereof that all public business be done in the light of the sun at meridian than in the darkness of the midnight hour. Public business is public business, and the public is entitled to know why the government acts in the way that it does, especially when taxpayer funds are at stake."*

The Honorable James B. Wilkinson, Judge, Circuit Court of the City of Richmond,  
1997

Established by the 2000 Session of the General Assembly<sup>1</sup>, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA). As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon request of any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA<sup>2</sup>. The Council is also required to file an annual report on its activities and findings regarding FOIA, including

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

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

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

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

The Council provides guidance to those seeking assistance in the understanding and application of FOIA; although the Council cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of 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 is known 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**

FOIA was the subject of extensive legislative activity during the 2006 Regular and Special Sessions. The General Assembly passed a total of 16 bills amending FOIA in 2006. Fifteen of those bills were passed during the 2006 Regular Session; one was passed during the 2006 Special Session I. Of the 16 bills<sup>3</sup>, seven bills created five new record exemptions to FOIA and four bills added three new closed meeting exemptions. In addition, six other bills amend existing provisions of FOIA. A more detailed report of the bills passed during the 2006 sessions is available on the Council's website.

SB 76 (Houck), a recommendation of the Council, was passed by the 2006 Regular Session and ensured greater public access to procurement records under the PPEA and PPTA<sup>4</sup>. However, during the 2006 Special Session, SB 5011 was passed, which altered the Council's recommendation by expanding the FOIA exemption recommended by the Council in SB 76. SB 5011 also allowed procurement records under the PPTA to be withheld even after a comprehensive agreement has been entered into, if the process of bargaining or other interim agreements related to the qualifying transportation facility or all phases or aspects of the comprehensive agreement is not complete. The provisions of SB 5011, however, will expire on July 1, 2007. By design, the sunset provision was added to allow the Council time to revisit the issue during 2006 and recommend a permanent resolution. As a result,

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<sup>3</sup> SB 443 that created both a new record and a new meeting exemption was counted only once for the purposes of the total 2006 FOIA bill count.

<sup>4</sup> The Public-Private Education Facilities and Infrastructure Act of 2002 and the Public-Private Transportation Act of 1995.

the PPEA/PPTA subcommittee was continued by the Council to examine the issues raised by SB 5011.

In addition to the PPEA/PPTA Subcommittee, the Council continued the Electronic Communication Meetings Subcommittee to examine the issues raised by SB 465 (Edwards), which bill was referred to the Council by the 2006 General Assembly for further study. The Council appointed a new subcommittee to recommend final resolution of the issue concerning a required fifth response for FOIA requests--an issue that has been before the Council since 2005. Finally, the Council appointed a subcommittee to review a request by the Virginia Retirement System (VRS) to exempt from public disclosure records concerning (i) internal deliberations of or decisions by the retirement system on the pursuit of particular investment strategies, or the selection or termination of investment managers, prior to the execution of such investment strategies or the selection or termination of such managers and (ii) certain financial and investment information submitted to VRS by entities with which VRS has subscription or other agreements for investment purposes.

The work of the PPEA/PPTA Subcommittee during this reporting period<sup>5</sup> resulted in Council-recommended legislation to the 2007 Session of the General Assembly that would provide a FOIA exemption for records prepared by the responsible public entity, its staff, outside advisors, or consultants *exclusively* for the evaluation and negotiation of proposals filed under the PPTA or PPEA, where if such records were made public prior to or after the execution an interim or a comprehensive agreement, the financial interest or bargaining position of the public entity would be adversely affected; an exemption the Virginia Department of Transportation insisted it needed to protect its bargaining position. In addition, the Council-recommended legislation adds a closed meeting exemption in FOIA for any independent review panel appointed to review information and advise the responsible public entity concerning PPTA records.

SB 465 (Edwards), introduced during the 2006 Regular Session, would have clarified that political subdivisions of the Commonwealth, except any unit of local government, are authorized to conduct electronic communication meetings<sup>6</sup> under FOIA. The Electronic Meetings Subcommittee was continued to examine this issue as well as the feasibility of expanding authority for the conduct of electronic meetings to regional public bodies. In reconciling the SB 465 issue, the Subcommittee decided that it was best resolved by rewriting the applicability portion of § 2.2-3708. In studying regional public bodies and electronic meetings, the Subcommittee wrestled with how to define the term regional public body in a way that would make the use of technology available for these public bodies without eroding open meeting principles. The subcommittee considered defining regional public bodies in terms of distance between the participating localities; for example, four or more counties or cities that are separated by at least 100 miles. After extensive discussions, it became clear to the Subcommittee that a definition based primarily on the distance between the participating localities was unworkable. Additionally, at the request of the Statewide Independent Living Council (SILC), language was considered by the Subcommittee to make allowance for members of public bodies with disabilities to

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<sup>5</sup> December 1, 2005 through December 1, 2006.

<sup>6</sup> § 2.2-3708 of the Code of Virginia.

participate in meetings by electronic means. Based on its extensive deliberations on the above noted issues, the Electronic Meetings Subcommittee recommended (i) reducing the notice requirement for electronic communication meetings from seven to three working days, (ii) allowing a member of a public body to participate in a meeting through electronic communication means from a remote location that is not open to the public in the event of an emergency, temporary or permanent disability or other medical condition, or when a member of a regional public body resides more than 60 miles from the primary meeting location<sup>7</sup>, and (iii) clarifying that political subdivisions, other than units of local government (i.e. school boards, boards of supervisors, etc), may conduct electronic meetings. The Council voted to recommend the subcommittee's draft to the 2007 Session of the General Assembly.

The Fifth Response Subcommittee recommended legislation that would add a fifth response--the requested records do not exist or cannot be located-- to the list of responses a public body must make in responding to a FOIA request. Currently under FOIA, a public body is under no obligation to create records that do not exist in response to a specific request nor is a public body required to respond to a requester if the requested record does not exist or cannot be found. The lack of a required response in these instances leads to confusion and exacerbates any feelings of distrust. The Council, in a written opinion (AO-16-04) has previously opined that a public body should make this written response where applicable in order to avoid confusion and frustration on the part of the requester. Clearly, not responding in these instances, even though not currently required, does little to ensure the public trust in government. The Council recommends that legislation be introduced in 2007 that makes four primary changes to existing law. First, the term "custodian" is recommended to be removed from subsection § 2.2-3704(B). This change is being proposed because the term "custodian" is not defined in FOIA, and use of the term can lead to confusion regarding who is responsible for responding to a records request. Second, to change the presentation format of the responses to clarify unequivocally that if the public body is going to provide records in response to a request, it must do so within five working days of receipt of the request. Third, to add a fifth response allowing public bodies to indicate that the requested records do not exist or cannot be found. This portion of the recommendation also provides that if a public body has knowledge of where the records may be found (i.e., they are held by a different public body), it shall so inform the requester. Fourth, a public body may petition a circuit court for additional time to respond to a FOIA request where the request would require an extraordinarily lengthy search and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities.

The VRS Subcommittee met with VRS personnel and other interested persons, including the Virginia Press Association, to discuss the exemptions requested by VRS. Consensus was reached by all parties to the extent that the exemption, if approved, should be placed within FOIA rather than in VRS's basic law, that the exemption should be specific to VRS and local retirement systems, and that there should also be a corresponding open meetings

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<sup>7</sup> For a member to participate in the above described manner, a quorum of the public body be physically assembled at the primary or central meeting location and that the public body make arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.



exemption for discussion of such records by the VRS Board of Trustees. Neither the VRS Subcommittee nor the Council, however, made any policy recommendations or endorsements concerning the VRS draft.

The Council continued to monitor Supreme Court of Virginia decisions relating to FOIA. In the case of *William F. Shaw v. John T. Casteen, et al.*, William Shaw, a citizen of Louisa County, brought a petition for mandamus against the University of Virginia (the University) after the University denied his request for public records. The petition was filed in the Circuit Court of Louisa County, where Mr. Shaw resides, pursuant to subsection B of § 2.2-3713 (venue against state entities). The Circuit Court dismissed the petition on grounds that venue was improper. Mr. Shaw moved for a rehearing, which the Circuit Court denied. It appears that the Circuit Court determined that the University is not a state agency in initially dismissing the petition. In denying the motion to rehear, it appears that the Circuit Court found that because boards of visitors of public institutions of higher education are specifically mentioned in the definition of *public body* in § 2.2-3701, the University could only be sued under subsection A of § 2.2-3713 (venue against local public bodies), as that subsection uses the term *public body* whereas subsection B does not use the term *public body*. Mr. Shaw appealed to the Supreme Court of Virginia; the Supreme Court refused his petition for appeal, finding no reversible error in the Circuit Court's judgment. The Council recommends legislation to the 2007 Session of the General Assembly to clarify the venue provisions for FOIA petitions in order to prevent such a situation from arising in the future. Additionally, the Council recommends clarifying venue in the case of a FOIA petition against a regional public body.

On September 15, 2006, the Supreme Court of Virginia published its unanimous decision in the case of *White Dog Publishing v. Culpeper County Board of Supervisors*. The Supreme Court found that in closing a meeting to the public, the Culpeper County Board of Supervisors ("the Board") had improperly invoked the contract negotiations exemption, in violation of the FOIA<sup>8</sup>. This closed meeting exemption was added to FOIA in 2003 as an exemption to protect a public body's bargaining position and negotiating strategy in contractual matters, in order to ensure good stewardship and best use of the public money.<sup>9</sup> The Court's decision is the first interpreting this closed meeting exemption and sets precedent regarding the scope of the exemption and the type of contract negotiation discussions allowed to be held in closed meetings. While this decision will likely impact all public bodies in the Commonwealth, it will be especially relevant in the context of local school construction projects.<sup>10</sup> An issue brief that discusses the impact of the Court's decision is posted on the Council's website.

The Council continued its commitment to FOIA training. The Council welcomes the opportunity to provide FOIA training programs and views its training mission as its most important duty. During 2006, the Council conducted 55 FOIA training programs

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<sup>8</sup> Code of Virginia § 2.2-3711(A) (30).

<sup>9</sup> Note that the contract negotiations exemption was drafted originally as an exemption of general application, as opposed to the majority of FOIA exemptions which are both agency and conduct specific.

<sup>10</sup> Excerpted from the Division of Legislative Services' *Virginia Legislative Issue Brief*, No. 44, October 2006, written by Alan Gernhardt and Maria J.K. Everett.

throughout Virginia at the request of state and local government officials, the media, and citizens. These training programs are tailored to meet the needs of the requesting organization and are provided free of charge. All Council-sponsored training programs, whether the statewide workshops or specialized programs, are approved by the Virginia State Bar for continuing legal education credit for licensed attorneys.

For this reporting period, the Council, with a staff of two attorneys, responded to approximately 1,751 inquiries. Of these inquiries, 10 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: four by government officials and six by citizens. The remaining 1,741 requests were for informal opinions, received via telephone and e-mail. Of the 1,741 requests, 849 were made by government officials, 670 by citizens, and 232 by media.

With the passage of the passage of SJR 170 during the 2006 Regular Session designating March 16, in 2006 and in each succeeding year, as Freedom of Information Day in Virginia, the General Assembly renewed its commitment to open government principles. Virginia is ranked as one of the top ten states for effective FOIA laws. March 2006 also marked the continued observance of *Sunshine Week* statewide, which includes publication of various articles and reports by print and broadcast media to inform the public of its right to know. Because of the annual advent of *Sunshine Week*, awareness of the Council, its role, and FOIA generally has increased. On March 10, 2006, in concert with the Virginia Press Association, the Virginia Association of Broadcasters, and VCOG, the Council sponsored a "Sunshine Reception" in the General Assembly Building to help kick off Sunshine Week that began on March 13, 2006. The reception was attended by approximately 85 people, including 25 legislators, and provided attendees with various educational materials along with breakfast, sunshine cookies, and open government bracelets. The Council looks forward to commemorating Freedom of Information Day in 2007 and welcomes the opportunity to host another sunshine reception to highlight the importance of open government practices in keeping the government accountable to the public it serves, thereby increasing the public trust.

## **WORK OF THE COUNCIL**

The Council held three meetings during this reporting period in which it considered a broad range of issues, including the appropriateness of adding a fifth mandated response to FOIA requests, ensuring public access to PPEA/PPTA procurement records, providing limited exemptions for individual members of public bodies to participate in meetings through electronic communication means, and clarifying venue for enforcement of FOIA violations. A condensed agenda for each of the Council's meetings appears as Appendix D. The Council's discussions and deliberations are chronicled below.

*June 12, 2006*

The Council held its first meeting of 2006<sup>11</sup> on June 12, 2006<sup>12</sup>. The Council welcomed its newest member, Courtney Malveaux, who is the designee of the Attorney General. The meeting was an organizational meeting to adopt the Council's work plan for 2006. The Council was briefed by staff on FOIA and other related access bills enacted by the 2006 Regular and Special Sessions of the General Assembly and was advised of the latest Supreme Court of Virginia decision in the case of William F. Shaw v. John T. Casteen, et al., a case concerning proper venue for enforcement of FOIA violations. The Council also continued two subcommittees from 2005 relating to the PPEA/PPTA<sup>13</sup> and electronic communication meetings, respectively, as well as appointing a new subcommittee to recommend resolution of the issue concerning a required fifth response to FOIA requests.

### **2006 Legislative Update**

The General Assembly passed a total of 16 bills amending the Virginia Freedom of Information Act (FOIA) in 2006. Fifteen of those bills were passed during the 2006 Regular Session; one was passed during the 2006 Special Session I. One bill was recommended by the Council: SB 76 (Houck), concerning the release of certain records under the PPTA and the PPEA. SB 5011, passed during the 2006 Special Session I, also concerned the release of certain records and corresponding closed meetings under the PPTA and PPEA. Of the 16 bills, seven bills created five new record exemptions to FOIA and four bills add three new closed meeting exemptions. In addition to SB 76 and SB 5011, described above, four other bills amend existing provisions of FOIA. A more detailed report of the bills passed during the 2006 sessions is available on the Council's website and is attached to this report as Appendix E.

### **Subcommittee Reports**

PPEA/PPTA Subcommittee: The PPEA Subcommittee was initially formed in 2005 to study issues raised by HB 2672 (Plum), which would have amended an existing meeting exemption to allow for closed meetings to discuss records exempt from public disclosure relating to the PPEA. In the 2006 Regular Session, the General Assembly passed SB 76 (Houck), a recommendation of the Council, as a result of the work of the PPEA Subcommittee in 2005. The General Assembly also passed SB 5011 (Houck) during the 2006 Special Session, which addressed certain other issues under the PPEA and the PPTA proposed by the Virginia Department of Transportation. The provisions of SB 5011 will

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<sup>11</sup> Council members Senator Houck, Delegate Griffith, Bill Axelle, Stewart Bryan, John Edwards, Craig Fifer, Wat Hopkins, Courtney Malveaux, and Mary Yancey Spencer were in attendance at the meeting. Council members E.M. Miller and Nolan Yelich were absent.

<sup>12</sup> The first quarter meeting of the Council set for March 30, 2006 was rescheduled to June 12, 2006 because of the Special Session of the Virginia General Assembly convened on March 27, 2006.

<sup>13</sup> The Public-Private Education Facilities and Infrastructure Act of 2002 and the Public-Private Transportation Act of 1995.

expire on July 1, 2007. The PPEA/PPTA Subcommittee was continued by the Council to examine the issues raised by SB 5011 and consists of Council members Axelle (Chair), Edwards, Wiley, and Houck.

Electronic Meetings Subcommittee: The Electronic Meetings Subcommittee was initially formed in 2005 to study issues raised by HB 2760 (Delegate Reese), which would have allowed local public bodies to conduct meetings under FOIA through electronic communication means (telephone or audio/visual). Currently, only state public bodies may conduct meetings in this manner. SB 465 (Senator Edwards), introduced during the 2006 Regular Session, would have clarified that political subdivisions of the Commonwealth, except any unit of local government, are authorized to conduct electronic communication meetings. SB 465 was referred by the General Assembly to the Council for study. The Electronic Meetings Subcommittee was continued to examine this and other related issues, and consists of Council members Edwards (Chair), Fifer, Miller, Wiley, Bryan, Spencer, and Houck.

"Fifth Response" Subcommittee: During 2005, the Council considered whether to add a "fifth response" within FOIA to address situations where a public body receives a records request for records that do not exist or cannot be found. FOIA currently does not specify what response a public body is to provide in such a situation. The Council appointed a subcommittee consisting of Council members Fifer (Chair), Bryan, Griffith, and Malveaux to examine this issue.

### **Other Business**

Staff advised the Council of the concerns of the Statewide Independent Living Council (SILC) as they relate to conducting open meetings under FOIA. On behalf of SILC, Susan Prokop, Chair, by letter to the Council expressed concern that Virginia's open meetings law has an adverse impact on the ability of people with disabilities to participate on SILC. Specifically, SILC would like the ability to conduct meetings through teleconference without meeting the requirement for a physical quorum at one main location. Staff suggested that the concerns of SILC could be examined as part of the work of the Electronic Meetings Subcommittee. The Council concurred and added this issue to the work plan of that subcommittee.

Senator Houck and Delegate Griffith presented a framed copy of SJR 173 (adopted by the 2006 Regular Session of the General Assembly) to Frosty Landon, executive director of the Virginia Coalition for Open Government (VCOG) commending VCOG on the occasion of its 10th anniversary.

### **Of Note**

The Council was briefed by staff in the case of William F. Shaw v. John T. Casteen, et al., decided on April 13, 2006 by the Supreme Court of Virginia. William Shaw, a citizen of Louisa County, brought a petition for mandamus against the University of Virginia (the University) after the University denied his request for public records. The petition was filed

in the Circuit Court of Louisa County, where Mr. Shaw resides, pursuant to subsection B of § 2.2-3713 (venue against state entities). The Circuit Court dismissed the petition on grounds that venue was improper. Mr. Shaw moved for a rehearing, which the court denied. It appears that the Court determined that the University is not a state agency in initially dismissing the petition. In denying the motion to rehear, it appears that the Court found that because boards of visitors of public institutions of higher education are specifically mentioned in the definition of *public body* in § 2.2-3701, the University could only be sued under subsection A of § 2.2-3713 (venue against local public bodies), as that subsection uses the term *public body* whereas subsection B does not use the term *public body*. Mr. Shaw appealed to the Supreme Court of Virginia; the Supreme Court refused his petition for appeal, finding no reversible error in the trial court's judgment.

Prior to this case, it has appeared that the University of Virginia is a state entity for FOIA purposes, and venue against the University is therefore found under subsection B of § 2.2-3713. Subsection A of § 2.2-3713 provides a venue for petitions against local public bodies; it seems clear that the University is not a local public body, and that subsection A of § 2.2-3713 is inapplicable to it. However, the trial court ruled otherwise and the Supreme Court, in refusing Mr. Shaw's petition for appeal, found no reversible error in that judgment. Staff brought this matter to the attention of the Council as it appears there may be a need to revise the definition of *public body* and/or the venue provisions of FOIA in order to prevent such a situation from arising in the future. The Council discussed the issue and directed staff to recommend the necessary statutory amendments to clarify the venue provisions for FOIA petitions.

Staff advised the Council that Virginia's FOIA laws rated 5 on a scale of 7 by the Marion Brechner Center Citizen Access Project at the University of Florida's College of Journalism and Communications for FOIA laws that provide noncriminal penalties for violation by government officials of open records law. Virginia is one of only six states that were rated as high as 5. Sixteen states scored a 4, two states scored a 3, and 26 states and the District of Columbia scored a 1.

Staff advised the Council of the passage of SJR 170 during the 2006 Regular Session designating March 16, in 2006 and in each succeeding year, as Freedom of Information Day in Virginia. Staff advised that on March 10, 2006, in conjunction with the Virginia Press Association, the Virginia Association of Broadcasters, and VCOG, the Council sponsored a "Sunshine Reception" in the General Assembly Building to help kick off Sunshine Week that began on March 13, 2006. The reception was attended by approximately 85 people, including 25 legislators, and provided attendees breakfast, sunshine cookies, and open government bracelets.

Mr. Steven Shoon, a concerned citizen, had written to Council staff questioning the constitutionality of the FOIA provision limiting the rights of incarcerated persons to make FOIA requests. The Council had previously declined Mr. Shoon's request for an advisory opinion on the constitutionality of the provision citing its lack of statutory authority. Section 2.2-3703 C of FOIA affecting the rights of incarcerated persons applies only to persons incarcerated in a state, local or federal correctional facility, whether or not such

facility is (i) located in the Commonwealth or (ii) operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.). As such, the limitation would not affect the rights of persons institutionalized in settings other than correctional facilities.

As is customary, the Council was apprised of the latest statistics on the services rendered by the Council. For the period December 1, 2005 through May 31, 2006, Council staff responded to 874 informal requests for assistance-- 437 by government officials, 333 from citizens, and 104 from media representatives. Additionally, the Council issued six formal written opinions--four to citizens and two to government officials. For the next meeting, the Council requested to staff to present statistics on the services rendered by the Council on a year-to-year basis so that trends could be ascertained.

### **Public Comment**

Craig Merritt, Esq., on behalf of the Virginia Press Association, advised the Council of the provisions of HB 852 from the 2006 Regular Session of the General Assembly. HB 852 concerned hospital authorities and attempted to standardize powers and duties of hospital authorities in Virginia. As introduced, HB 852 contained broad FOIA exemptions for records and meetings of hospital authorities. These FOIA provisions were removed from the bill by the patron after discussions with the Virginia Press Association and other interested parties. Mr. Merritt questioned whether another bill might again be offered by the patron to exempt hospital authority records from the provisions of FOIA. He commented that it would be preferable to have the issues aired before the Council to ensure meaningful dialog before the press of session. Council directed staff to contact the patron to determine his plans for legislation in this area. If there are plans for legislation, the Council acknowledged the need to have a subcommittee to examine the issue before legislation is introduced.

### ***October 11, 2006***

The Council held its second meeting of 2006<sup>14</sup> on October 11, 2006. The Council heard progress reports from its three subcommittees, considered draft legislation concerning venue under FOIA, discussed public access to travel reimbursement records, received a presentation from representatives the Virginia Retirement System regarding possible FOIA legislation, and received a presentation concerning online access to records held by the clerks of court.

### **Subcommittee Reports**

PPEA/PPTA Subcommittee: The PPEA/PPTA Subcommittee met on August 9, 2006, and on August 23, 2006. The main topic for consideration was SB 5011, which passed during the 2006 Special Session with a sunset provision such that it expires July 1, 2007. Bill Axselle, Chairman of the Subcommittee, reported that the Virginia Department of Transportation (VDOT) had requested that the sunset provision of SB 5011 be removed so

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<sup>14</sup> All Council members were present.

that its provisions will not expire. Mr. Axselle indicated that the Subcommittee had agreed to recommend that legislation be passed similar to SB 5011 but narrower in scope. The recommended draft would preserve the position that the public body can keep certain records confidential after the signing of a comprehensive or interim agreement, as does SB 5011, but would be narrower in scope of application. In response to questions from the Council, Mr. Axselle noted that VDOT had participated in the Subcommittee meetings, but deferred to VDOT to make any comments of its own regarding the recommended draft. Senator Houck asked the Subcommittee to submit its recommendation for the full Council's consideration at the next Council meeting, which will include the annual preview of upcoming legislation. Note that the Virginia Press Association (VPA) distributed a proposed change to the draft bill at today's meeting, but the Subcommittee had not had an opportunity to review the VPA's proposal before making its report.

Electronic Meetings Subcommittee: The Electronic Meetings Subcommittee met on August 9, 2006, August 23, 2006 and October 11, 2006. John Edwards, Chairman of the Subcommittee, reported that the work of the Subcommittee was not yet finished. Mr. Edwards indicated that the Subcommittee members had agreed to propose reducing the notice requirements for electronic meetings from the seven working days currently required down to three working days; to keep the current requirement that a quorum be physically assembled; to add an emergency participation provision to FOIA to allow members of a public body to participate by electronic means in emergency situations where the member originally intended to be physically present but is unable to do so; and to authorize regional public bodies to hold electronic meetings. There was a divergence of opinion regarding the definition of "regional public body," and the Subcommittee intends to meet again to reach consensus on that definition. Additionally, at the request of the Statewide Independent Living Council (SILC), language was drafted to make allowance for members of public bodies with disabilities to participate in meetings by electronic means. However, the Subcommittee has not yet been able to meet with a representative of SILC. Mr. Edwards indicated that the Subcommittee was not comfortable recommending language on this issue without first getting feedback directly from SILC.

Senator Houck agreed that the Subcommittee should meet again to work out the unresolved issues and to hear from SILC, and report back to the Council at its next meeting.

"Fifth Response" Subcommittee: The Fifth Response Subcommittee met on July 27, 2006. Craig Fifer, Chairman of the Subcommittee, reported that the Committee had agreed to propose a draft that made four primary changes to existing law. First, the draft removes the term "custodian" from subsection § 2.2-3704(B). The Subcommittee proposed this change because the term "custodian" is not defined in FOIA, and use of the term can lead to confusion regarding who is responsible for responding to a records request. Second, the draft changes the presentation format of the responses to clarify unequivocally that if the public body is going to provide records in response to a request, it must do so within five working days of receipt of the request. Third, the draft adds a fifth response allowing public bodies to indicate that the requested records do not exist or cannot be found. This section of the draft also provides that if a public body has knowledge of where the records may be found (i.e., they are held by a different public body), it shall so inform the requester.

Fourth, the draft allows a public body to invoke additional time to respond if the request requires an extraordinarily lengthy search for records. Currently additional time may be invoked if the request is for an extraordinary volume of records, but no provision is made for situations where other factors increase the time needed to search for records.

Council members expressed concern regarding the removal of the term "custodian," and how it may affect the attribution of responsibility for responding to requests. Concern was also expressed regarding new language in the draft that could be interpreted as attributing knowledge to the public body itself, rather than to individual persons. The Council also asked the Subcommittee to consider the effects of the draft on the particular situation where an elected official receives numerous requests immediately prior to an election (i.e., someone abusing FOIA as a means of political harrassment). Senator Houck directed the Subcommittee to continue its work and present a revised draft for consideration at the next full Council meeting.

### **Other Business**

Venue: At the June meeting of the Council, staff briefed the case of Shaw v. Casteen, which highlighted confusion regarding the venue provisions of subsections A and B of § 2.2-3713. The Council then directed staff to prepare draft legislation that would clarify these venue provisions. Staff presented the draft at today's meeting. The draft places both venue provisions within subsection A of § 2.2-3713, using the terms "local" and "state" in separately numbered subdivisions to clarify the intended dichotomy. The draft also makes additional technical changes for purposes of clarification, but does not substantively change the existing venue provisions. The Council expressed concern that while the draft clarifies the venue provisions regarding state and local public bodies, confusion could still arise regarding the proper venue against regional public bodies. Neither the current law nor the proposed draft bill contains language specifically addressing regional public bodies. The Council directed staff to draft additional language to clarify what is the proper venue against such regional public bodies, and to present the revised draft for consideration at the next full Council meeting.

Reimbursement for travel expenses: § 2.2-3705.8 states that public access shall not be denied to "...(ii) records of the position, job classification, official salary or rate of pay of, and **records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body.**" (Emphasis added). There has been considerable debate among the media and public bodies as to precisely what records must be provided under this section of FOIA. Staff brought the issue before the Council to get the Council's sense of whether this provision requires the release of (i) credit card and hotel receipts appended to a travel voucher, (ii) the travel voucher and work sheet submitted for reimbursement, or (iii) the memorandum of the payment of the reimbursement identifying the amount paid, to whom paid, and the purpose of the travel. The Council expressed its opinion that while social security numbers and other individually-identifiable information may be redacted as exempt personnel records, all records of allowances or reimbursements should be disclosed upon request, including all receipts, vouchers, reimbursement request forms, and records of payments made.



Virginia Retirement System (VRS): This item was added to the day's agenda by request of VRS. Bob Schultze, Director, and Charles Grant, Chief Investment Officer, made a presentation to the Council regarding the need for a FOIA exemption that will allow the delayed release of certain sensitive investment information and the ability to protect confidential information provided by external entities doing business with VRS. Mr. Schultze and Mr. Grant indicated that without such an exemption, certain private investment managers would not work with VRS for fear that their private records might be disclosed under FOIA. Additionally, Mr. Schultze pointed out that certain factual situations could create conflict between VRS' fiduciary duties in managing investments and its duties as a public body under FOIA to respond to records requests. Council members expressed concern over the definitions to be used and the scope of the exemption, and how it would differ from the existing exemption for VRS records found at subdivision 12 of § 2.2-3705.7. In particular, Delegate Griffith expressed concern that such an exemption might be used improperly to hide information if VRS invested in an asset that was politically unpopular or acted against the public policy of the Commonwealth. Purely as a hypothetical example, if VRS invested in a company which in turn held assets in apartheid-era South Africa, could this proposed exemption be used to hide that fact? Mr. Grant expressed his belief that such company-level data would be withheld, but such information would still have to be released to the Joint Legislative Audit and Review Commission (JLARC). JLARC would in turn produce a report that would be subject to public disclosure, thus providing a system of checks and balances to prevent abuse of the proposed exemption. Several Council members also questioned the duration of the proposed exemption, asking at what point in the investment transaction the exempted records would be released, if ever. Council Member Wiley questioned whether the exemption would protect both investment strategy information and specific information provided by private entities. Council Member Yelich also inquired as to the number of FOIA requests VRS had received to date about investment information and how the responses to those requests had affected VRS' investments, and whether there were any national trends in this area. Mr. Grant and Mr. Schultze indicated that at least one private equity manager launching a new fund declined to work with VRS because of concern over potential FOIA disclosures. In consideration of the Council's outstanding questions and concerns, Senator Houck suggested that the Council and staff might work with VRS to create a draft for presentation at the next Council meeting. Council Members Malveaux and Spencer volunteered to help participate in this drafting process.

Access to Court Records: This item was added to today's agenda by request of Mr. John G. "Chip" Dicks. Mr. Dicks briefed the Council on ongoing work regarding records maintained by the clerks of the circuit courts, which include not only court records, but land records, marriage records, notary commissions, and other records. Specific rules for the clerks of court and records they hold are found in Title 17.1 of the Code, rather than in FOIA, although FOIA specifically provides that it applies to constitutional officers. Current law in Title 17.1 has provisions for posting land records online through a secure remote access system, and for electronic filing of land records, which allows business to be conducted without actually coming to the courthouse. The concern is that many of the land records contain individuals' social security numbers and other information that could be

misused by identity thieves. Additionally, there is concern that private information vendors will request entire databases from the clerks and then sell this data indiscriminately, without the safeguards put in place by public bodies as required under Title 17.1. Mr. Dicks presented the problems and concerns that have been raised as well as various proposed solutions, primarily concerning the redaction of social security numbers from existing records as they are converted into electronic format. He indicated that a major problem is practical in nature, as the clerks offices currently lack the personnel and technological resources to redact the millions of pages of documents they hold. Additionally, Mr. Dicks indicated that there are legal questions regarding interstate and international commerce and jurisdiction that must be addressed. Senator Houck called for volunteers from the Council to help work with Mr. Dicks and staff in developing a draft to address these issues; Council Member Fifer volunteered.

### **Of Note**

Due to time considerations, matters of note on the agenda for today's meeting were deferred for later consideration.

### **Public Comment**

Senator Houck called for public comment; there was none.

### ***December 15, 2006***

The Council held its final meeting of 2006<sup>15</sup> on December 15, 2006. This meeting included the annual legislative preview for the upcoming Session of the General Assembly. The Council heard progress reports from its four subcommittees; reviewed legislative proposals, including those from non-Council sources as part of the legislative preview; and were briefed on recent judicial decisions concerning FOIA. The Council also set its first meeting for 2007 to be held at 1:00PM, Monday, March 19, 2007.

### **Subcommittee Reports**

PPEA/PPTA Subcommittee: The PPEA/PPTA Subcommittee reported that it met on August 9, 2006, and on August 23, 2006. The main topic for consideration was SB 5011, which passed during the 2006 Special Session with a sunset provision such that it expires on July 1, 2007. The Virginia Department of Transportation (VDOT) had requested that the sunset provision of SB 5011 be removed so that its provisions will not expire. Bill Axselle, Chairman of the Subcommittee, reported that the Subcommittee had agreed on draft legislation to submit for the Council's consideration. Mr. Axselle indicated that the draft reflected a compromise position between VDOT's desired removal of the sunset provision and the opposition to that position expressed by members of the press and public-access

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<sup>15</sup> Council members Axselle, Bryan, Edwards, Fifer, Griffith, Hopkins, Houck, Miller, Spencer and Wiley were present. Council members Malveaux and Yelich were absent.

advocates. The compromise proposed would not have a sunset provision, but would be more limited in scope than SB 5011. Specifically, the draft exemption would (i) be limited in application to records prepared exclusively for use in evaluating or negotiating PPEA/PPTA proposals and only if release of the records would adversely affect the public body's negotiating position, (ii) require an affirmative statement from the public body that those specific records would be protected, and (iii) contain a corresponding meetings exemption. Mr. Axelle indicated that the Subcommittee voted 3-0 to recommend this draft, as amended, to the Council.

Senator Houck then requested any comments on the draft. Craig Merritt, representing the Virginia Press Association (VPA), indicated that the VPA was not fully persuaded that the draft legislation is the best option to pursue at this time. The VPA submitted written comments in opposition to the draft, including alternative draft language. Frosty Landon of the Virginia Coalition for Open Government (VCOG) indicated that VCOG shared VPA's concerns about the draft legislation. Rick Walton, representing VDOT, indicated that VDOT supports the draft as proposed with the technical changes to be made by staff. To address the concerns of VPA and VCOG, Mr. Axelle briefly reiterated how the limitations and conditions in the draft would affect the use of the exemption, and expressed his belief that the proposed draft strikes a balance between the opposing concerns. Mr. Axelle moved that the Council recommend the draft, with the technical amendments to be made by staff, to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

Electronic Meetings Subcommittee: The Electronic Meetings Subcommittee reported that it met on August 9, 2006, August 23, 2006, October 11, 2006, November 8, 2006, and December 15, 2006. John Edwards, Chairman of the Subcommittee, reported that after extensive deliberations the Subcommittee members had agreed to propose draft legislation that would define a "regional public body" to include bodies comprised by two or more counties or cities; would define the ability of political subdivisions to hold electronic meetings depending on whether they were state-level or local-level in character; would reduce the current requirement that notice be given seven working days in advance down to three working days; and would allow three other instances where individual members of public bodies could participate in meetings by electronic means: (1) if an emergency occurs on the day of a meeting, (2) if the member has a disability or other medical condition that prevents physical attendance, and (3) if a member of a regional public body lives 60 miles or more from the meeting place. The first and third such instances (i.e. emergencies and participation by members of regional public bodies) would require approval by the public body before the member could participate through electronic means. All three instances would still require that a quorum of the public body be physically assembled in one central location, and that the voice of the individual participating by electronic means be heard by those at the central location. Mr. Edwards indicated that the draft passed as a unanimous recommendation of the Subcommittee.

In response to questions from Senator Houck, Delegate Griffith, and Mr. Bryan, it was agreed that the draft should be changed to clarify that members of regional public bodies living more than 60 miles from the meeting location who wish to participate by electronic

means must call in and get approval on a per-meeting basis (no "standing" approval may be given). It was also acknowledged that there was the possibility that individual members might attempt to abuse the provisions allowing individual electronic participation, but that it was up to each public body to monitor for such abuse through the approval process. Mr. Edwards then moved that the draft legislation be recommended to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

"Fifth Response" Subcommittee: The Fifth Response Subcommittee reported that it met on July 27, 2006, and November 8, 2006. Craig Fifer, Chairman of the Subcommittee, reported that the Subcommittee had agreed to propose a draft that made four primary changes to existing law: (1) the draft removes the term "custodian" from the existing law; (2) the draft changes the presentation format of the responses to clarify unequivocally that if the public body is going to provide records in response to a request, it must do so within five working days of receipt of the request; (3) the draft adds a fifth response allowing public bodies to indicate that the requested records do not exist or cannot be found, and also provides that if a public body has knowledge of where the records may be found (i.e., they are held by a different public body), it shall so inform the requester; and (4) the draft allows a public body to invoke additional time to respond if the request requires an extraordinarily lengthy search for records.

Mr. Fifer indicated that the Subcommittee had met and considered two concerns expressed by the Council at its October meeting: (1) concerns regarding multiple requests to an elected official during the election period; and (2) concerns about whether the draft language could be seen as attributing knowledge to the public body itself and the consequences of such attribution. In the first instance, it was noted that requesters can currently make requests to elected officials during the election period, and the language of the draft does nothing to change that. Mr. Fifer indicated that the Subcommittee felt that the real substance of the question concerned the use of FOIA as a tool for political harassment, something that was outside the scope of the Subcommittee's charge. Therefore the Subcommittee did not recommend any changes to the draft to address such harassment. The second issue was whether the phrase in the draft "if the public body that receives the request knows that another public body has the requested records" places a responsibility on the receiving public body to poll all of its employees before making the response that it knows the records are in the possession of another public body. In response, staff pointed out that FOIA is replete with references to the public body itself and not employees of the public body. Additionally, it was noted that common sense dictates that the phrase does not require the polling of all employees. After a brief discussion, the subcommittee decided that the draft language was sufficient as drafted. There was no comment from the Council or the public regarding the proposed draft. Mr. Fifer moved that the draft legislation be recommended to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

VRS Workgroup: The VRS Workgroup, consisting of Council members Spencer and Malveaux, was created at the October 11, 2006, meeting of the Council following a presentation by VRS. VRS indicated that it intends to seek a FOIA exemption during the 2007 Session of the General Assembly to protect certain investment records. Ms. Spencer

reported that on November 29, 2006, the subcommittee met with VRS personnel and other interested persons to discuss the exemption requested by VRS. Consensus was reached to the extent that the exemption, if approved, should be placed within FOIA rather than in VRS's basic law, that the exemption should be specific to VRS and local retirement systems, and that there should also be a corresponding meetings exemption. The VRS Subcommittee did not make any policy recommendations or endorsements. The proposed draft is the exemption requested by the VRS, but in a form agreed to by all parties at the meeting. The draft was presented as a vehicle to facilitate further discussion and comment.

Robert Schultze was scheduled to present the draft exemption on behalf of VRS during the "Other Business" section of today's agenda. The Council moved his presentation up to coincide with the VRS Workgroup's report since both concern the same subject matter. Mr. Schultze stated that VRS had two concerns that would be addressed by the proposed exemption: (1) protection of investment plans and strategies going forward, and (2) protection of information regarding alternative investment programs, such as trade secrets provided by investment managers. As examples of the consequences of not having such an exemption, Mr. Schultze indicated that VRS was recently terminated from a fund that gave a tenfold return on the investment, and VRS was denied the opportunity to invest with another fund manager because of concerns over possible FOIA disclosures.

Mr. Fifer asked whether the Council was to take any action on the proposed VRS exemption today. Senator Houck indicated that no action was expected, given how recently the exemption had been presented to the Council. Mr. Edwards indicated he would not be comfortable taking action on this proposal; in particular, he agreed that short-term investment plans should be protected but expressed concerns with the breadth and duration of the proposed exemption. Mr. Bryan asked whether other states were taking the same or a similar approach. Mr. Schultze replied that many states already have or are in the process of developing similar legislation. In response to further questions from Mr. Fifer, Mr. Bryan, and Mr. Wiley, Mr. Schultze indicated that some types of protected investments would include hedge funds, private equity funds, and other funds that are generally not publicly traded and tend to be longer-term investments, around 7-8 years in duration. Furthermore, the public could get records and information from the Joint Legislative Audit and Review Committee (JLARC), because JLARC oversees VRS and publishes a semi-annual report about VRS that is publicly available. Additionally, Mr. Schultze indicated that the public could find out about asset groups or sub-groups, and could find out about the existence of a relationship with a particular manager and the amount invested with a particular manager, but that other information concerning particular managers would be protected under the proposed exemption. Senator Houck then indicated that if any Council member wanted to make a motion concerning the draft, such motion would be entertained. Mr. Miller indicated he had considered making a motion to adopt the concept of the proposed exemption, but was unsure if it would be appropriate at this time. No motion was made.

## Other Council Legislative Proposals

Venue: At the June meeting of the Council, staff briefed the case of Shaw v. Casteen, which highlighted confusion regarding the venue provisions of subsections A and B of § 2.2-3713. The Council then directed staff to prepare draft legislation that would clarify these venue provisions. Staff presented an initial draft that clarified the venue provisions applicable to state and local public bodies at the October 11, 2006, meeting of the Council. At that meeting the Council directed staff to incorporate additional language to address venue against regional public bodies. Staff presented the amended draft today, which contains three separate provisions to address venue against local public bodies, regional public bodies, and state public bodies. The draft also makes technical changes to clarify the existing law. At the suggestion of Mr. Wiley, the term "institution" used in the draft was changed without objection to read "public institution of higher education," so that there could be no confusion as to which provision would apply to the University of Virginia. Mr. Shaw spoke to express his support for the draft legislation when Senator Houck asked for any public comment. Mr. Shaw also suggested that an emergency enactment clause be added to the draft because the underlying request for records was still unanswered and the substance of that request is still a controversial topic.<sup>16</sup> After explaining that adding an emergency enactment clause would make the legislation more difficult to pass by requiring a supermajority vote of the General Assembly, the Council voted unanimously to recommend the draft legislation to the General Assembly for its 2007 Session, with the change in language from "institution" to "public institution of higher education," but without an emergency enactment clause.

## Annual Legislative Preview

Access to Court Records: Mr. John G. "Chip" Dicks presented a draft bill that would exempt from FOIA land records available online through the circuit courts' secure remote access system, as provided under other laws. Mr. Dicks indicated that the General Assembly had passed laws concerning secure remote access to land records held by the circuit courts that enabled access to these records via the Internet, but protected the records by limiting access to paid subscribers who signed a confidentiality agreement. Additionally, FOIA and another law<sup>17</sup> specifically make these and other court records open to the public. In the past, these laws ensured that people could access necessary records (deeds and other land records, marriage and divorce records, etc.) by physically going to the courthouse; Mr. Dicks indicated that such traditional, physical access has not posed any problems. However, Mr. Dicks indicated that a problem arose as the records were made available online because certain offshore companies would request entire databases of information through FOIA, including records containing social security numbers and other personal

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<sup>16</sup> If the draft legislation is introduced, passes both houses of the General Assembly, and is signed by the Governor in 2007, then without such an emergency enactment clause it would take effect on July 1, 2007, whereas with such an emergency enactment clause it would take effect immediately upon signature by the Governor.

<sup>17</sup> § 17.1-208, which states in part: *Except as otherwise provided by law, the records and papers of every circuit court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided.*

information about individual citizens. These offshore companies would then use the information for commercial purposes, including posting the information online, without any of the safeguards the General Assembly had put into place through the secure remote access laws. Mr. Dicks indicated that the proposed exemption would protect these online databases from such misuse.

Mr. Fifer inquired as to the penalties if a company violated the secure remote access agreement. Mr. Dicks indicated that that was a problem, and that interested parties were currently seeking legislation to provide an enforcement mechanism. Mr. Dicks further stated that a federal court case has established that there cannot be criminal penalties imposed for dissemination of public records, as such penalties would violate the Constitution of the United States. Mr. Fifer then asked whether the proposed FOIA exemption would have an actual effect on the offshore companies, and indicated that he agreed with the idea behind the proposal but was unsure whether it would work in practice. Mr. Dicks indicated that the proposed legislation would discourage attempts to get entire databases and force companies to actually pay for the subscription rather than making their requests through FOIA, which would further discourage abuse of the secure remote access system. Mr. Dicks stated that the proposed exemption strikes a balance between necessary access to public records and abusive access to large volumes of public records that could then be misused. Mr. Fifer then suggested having a means by which individuals could access their own records without having to purchase expensive subscriptions, perhaps on a per-record or per-day basis. Mr. Dicks stated that the difficulty with such a proposal lies in judging a requester's motive and purpose for a request, but that some similar provisions had been made, such as § 2.2-3808.2, which provides that any litigant has a right to his own records. Mr. Dicks also stated that the Technology Trust Fund was being used to help keep the subscription costs low. Mr. Edwards asked about the availability of software to redact social security numbers from existing records. Mr. Dicks stated that such software does exist now, but still has problems with false positive results when searching for number strings, so manual checking is still required. Mr. Edwards then expressed concern that this exemption might lead to less availability of court records than has been the case ever before, and suggested including a sunset provision on any proposed exemption. Mr. Dicks indicated that there would be no opposition to including a sunset provision, and that the exemption should be repealed if the problem is solved in the future. Senator Houck then moved the discussion to the next topic, as today's presentations are intended as legislative previews rather than work sessions to refine drafts of particular legislation. The Council took no action regarding this matter at this time.

Wireless Service Franchise Agreements: Mr. Fifer was scheduled to present this proposal for legislation, but indicated that in the interest of saving time, and because he was unsure whether the idea was developed fully enough for presentation, that the Council should move on to the next agenda item. The Council took no action regarding this matter at this time.

Security of Public Buildings: Kathleen Dooley, City Attorney for the City of Fredericksburg, proposed that a closed meeting exemption be added for discussions concerning vulnerability assessments and other matters concerning the security of public

buildings. Ms. Dooley pointed out that there currently exist records exemptions concerning various building security topics, but that the only current meetings exemption is limited to matters involving terrorist activity. Ms. Dooley indicated that most security threats are criminal in nature rather than related to terrorist activity, and that these concerns drive budget decisions. Mr. Wiley indicated his support for such an exemption, noting that it was a real problem for jail authorities and others. The Council took no action regarding this matter at this time.

Citizenship Requirement: Frosty Landon, Executive Director of VCOG, proposed removal of the requirement in Virginia's FOIA that a requester be a citizen of the Commonwealth or representative of the news media. He indicated that a similar limitation in Delaware law had been found unconstitutional by a federal district court, and that decision was upheld by the Third Circuit Court of Appeals. Additionally, Mr. Landon indicated that as a matter of pragmatism, VCOG had been informed that an effort is under way to find similar litigants in the Fourth Circuit, including Virginia. Mr. Landon stated that another practical consideration is that it is easy for an out-of-state requester to find an in-state proxy to make a request on his or her behalf. Mr. Landon also stated that the language regarding the news media is out of date as it fails to address technological advancements such as the Internet, podcasts, and "blogs." In conclusion, Mr. Landon indicated he believes any litigation on this matter would be unnecessary, because the result is a foregone conclusion, and therefore the Council should act to remove the citizenship requirement before a federal court finds it unconstitutional. The Council took no action on the matter.

Financial Reports of Taxicab Companies: Dennis P. Gallagher, representing the Virginia Taxi Cab Association, and Ms. Judy Swiston, President of the Black and White Cab Company, presented access-related legislation that would appear in Title 46.2 rather than in FOIA. Currently localities regulate the rates charged by taxicab companies, and get financial information from the companies in order to do so. There is no current exemption for such financial information, and in a recent case, a newspaper made a request to the City of Norfolk and received information about the Black and White Cab Company. This legislation is being proposed in order to protect such private financial data in the future. Mr. Gallagher and Ms. Swiston indicated that they had met with representatives of the press and other interested parties, and that the proposed legislation had been agreed to by all concerned. Senator Houck indicated that engaging in such a dialogue with other concerned parties was the preferred way to handle such matters. The Council took no action on the matter.

Virginia Office of Protection and Advocacy: Sherry Confer, Policy Director of VOPA, presented a proposal to add a closed meeting exemption that would allow VOPA's Governing Board or a committee of the Board to hear appeals of individual cases in closed meetings. Ms. Confer explained that VOPA works with clients with disabilities, is federally funded, and must meet certain federal requirements that limit the number and type of clients VOPA may serve. As a result VOPA tries to take on cases that will have a systemic impact rather than cases that will only be of limited consequence. Sometimes clients do not want their cases to be closed, or VOPA simply cannot take a type of case, and the persons involved will file an appeal with the Director of VOPA. If the Director upholds the staff



decision not to take a case, the person may then appeal to the Board. The Board and its committees do meet in public, and currently there is no exemption allowing the Board to hear such an appeal in closed meeting. As a practical consequence, the Board does not hear such appeals as a body but instead assigns them to individual members who may hear each case privately. Senator Houck and Mr. Fifer presented questions about the complaint and appeals process. Ms. Confer indicated that the complainant in each case is the person who was denied services by VOPA, and the appeal concerns only that decision, not any other underlying dispute with another agency or person. For example, if a disabled child was denied assistive technology by his or her school system, he or she might seek aid from VOPA. If VOPA denied that request, the appeal would concern VOPA's denial, not the underlying decision by the school system; the school system would not be involved in the VOPA appeals process at all. In response to a question from Mr. Bryan, Ms. Confer indicated that VOPA has approximately 500 clients or people seeking aid, and about 50 appeals per year, many from the Department of Corrections. Staff indicated that VOPA currently has a records exemption, but no corresponding meetings exemption. Mr. Wiley expressed his support for such a meetings exemption, finding it analogous to the current exemption allowing matters involving students to be discussed in closed meeting. The Council took no action.

### **Other Business**

Annual Report: Staff briefly presented the draft of the 2006 Annual Report, noting that it had not yet been reviewed by editorial staff and was incomplete as presented because it did not include appendices or minutes for the meetings held today. Staff requested that Council members review the draft and present any comments, suggestions, or revisions as soon as possible.

### **Of Note**

White Dog Publishing v. Culpeper County Board of Supervisors: Staff briefed the Council regarding this recent decision of the Supreme Court of Virginia.<sup>18</sup> The Court held that the closed meeting exemption for contract negotiations may only be used for the discussion of the formation or modification of procurement contracts vis-à-vis a vendor. Staff has prepared an Issue Brief published by the Division of Legislative Services that examines the Court's decision in detail. The Court's decision leaves several questions regarding the application of this exemption unresolved, such as whether the Court used the term "procurement" as a limitation or as a description, and if used as a limitation, what practical effects that limitation has; whether the use of "vis-à-vis" means that a vendor must be present for the exemption to apply; and whether the exemption may be used if the contract under negotiation is between two public bodies rather than between a public body and a private vendor. The Council took no action regarding this matter at this time.

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<sup>18</sup> *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 634 S.E.2d 334, 2006 Va. LEXIS 81 (2006).

Citizenship Requirement: Staff briefed the Council about a recent decision of the Third Circuit Court of Appeals<sup>19</sup> that upheld a decision of the federal District Court for the District of Delaware,<sup>20</sup> holding that the limitation of rights under Delaware's FOIA law to Delaware citizens violates the Privileges and Immunities Clause of the Constitution of the United States. The District Court found that the law violated two rights of the requester under the Privileges and Immunities Clause: (1) his right to pursue a "common calling" as a journalist, and (2) his right to participate in the political process. The Circuit Court did not consider the "common calling" ground. Instead, in a three-step analysis the Circuit Court (1) found that participation in the national political process was a fundamental right protected by the Privileges and Immunities Clause, (2) found that Delaware's stated interest in defining its political community and strengthening the bond between its citizens and government was a substantial interest, and (3) found that Delaware's stated interest was not furthered by limiting access to public records to Delaware citizens. Finding that the citizenship limitation did not further a substantial interest and did impair a fundamental right, the Circuit Court held that limitation to be unconstitutional. Staff noted that this decision may be influential but is not binding in Virginia, and that no Virginia court (state or federal) has yet addressed this issue. Additionally, staff noted that the Code of Virginia used to have provisions concerning "citizenship" that were repealed in 2005 (and not replaced), and that several inquiries have been received regarding whether corporations and other entities are "citizens" with rights under Virginia's FOIA. Mr. Fifer, Mr. Edwards, and Senator Houck all indicated interest in this topic as one that should be addressed by the Council next year.

Annual Statistics: Staff presented a year-by-year comparison of the statistics of services rendered by the Council since its inception in 2000. The comparison indicated that requests for formal opinions had been tapering off in the past couple of years. Meanwhile, requests for opinions by e-mail or telephone were increasing dramatically. Staff attributed this shift to the reputation enjoyed by the Council as a credible, neutral arbiter. Staff averred that people no longer felt that they had to have a written opinion to feel that the advice they received was official; but instead could rely on the oral opinions given by Council staff via e-mail or telephone.

Latest Statistics: Staff presented the latest statistics of the services rendered by the Council for the past year.<sup>21</sup> For the period June 1, 2005 through November 30, 2006, Council staff responded to 827 informal requests for assistance-- 402 by government officials, 327 from citizens, and 98 from media representatives. Additionally, the Council issued four formal written opinions--two to citizens and two to government officials.

## **Public Comment**

Mr. Phillip Abraham, Vectre Corporation, expressed concern that the current PPTA exemption and the proposed draft recommended at today's meeting do not address the

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<sup>19</sup> *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>20</sup> *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

<sup>21</sup> Due to time constraints, service statistics were not presented at the October 11, 2006, meeting of the Council, and so the statistics presented herein cover the time period since the last presentation, which was at the June 12, 2006, meeting of the Council.

treatment of records submitted by a private entity after the execution of an interim agreement but before the execution of a comprehensive agreement. Mr. Abraham indicated that this concern had arisen from a transaction involving Transurban Development, which is involved in development in and around the District of Columbia and Northern Virginia. In response to a question from Senator Houck, Mr. Abraham indicated this concern was a new one raised by recent events involving his client. Senator Houck observed that the legislative preview and the use of subcommittees are utility features of the FOIA Council, because it is nearly impossible to perform due diligence regarding such legislative issues during the legislative session due to time constraints. The Council took no action regarding this matter at this time.

## **SERVICES RENDERED BY THE COUNCIL**

As part of its statutory duties, the Council is charged with providing opinions about the application and interpretation of FOIA, conducting FOIA training seminars, and publishing educational materials. In addition, the Council maintains a website designed to provide on-line access to many of the Council's resources. The Council offers advice and guidance over the phone, via e-mail, and in formal written opinions to the public, representatives of state and local government, and members of the news media. The Council also offers training seminars on the application of FOIA. In addition to the statewide FOIA Workshops offered in odd-numbered years, Council staff is available to conduct FOIA training throughout Virginia, upon request, for governmental entities, media groups and others interested in receiving a FOIA program that is tailored to meet the needs of the requesting organization. This service is provided free of charge. The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. During this reporting period, the Council, with its staff of two, responded to more than 1,700 inquiries and conducted 55 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 2005 to December 2006, the Council, with a staff of two attorneys, fielded more than 1,700 inquiries. Of these inquiries, 10 resulted in formal,

written opinions. By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, written opinions are posted on the Council's website in chronological order and in a searchable database. The Council issues written opinions upon request, and requires that all facts and questions be put in writing by the requester. Requests for written opinions are handled on a "first come, first served" basis. Response for a written opinion is generally about four weeks, depending on the number of pending requests for written opinions, the complexity of the issues, and the other workload of the staff. 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 2005 through December 2006:

Written Advisory Opinions: 10

State Government	3
Local Government	1
Law Enforcement	0
Citizens of the Commonwealth	6
Members of the News Media	0
Out-of-state	0

Typically, the Council provides advice over the phone and via e-mail. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses are recorded in a database for the Council's own use, but are not published on the website as are written advisory opinions. Questions are often answered on the day of receipt, although response time may be longer depending on the complexity of the question and the research required. The table below profiles who requested informal opinions between December 2005 and December 2006:

Telephone and E-mail Responses: 1,741

State Government	408
Local Government	381
Federal Government	3
Law Enforcement	53
Citizens of the Commonwealth	611
Members of the News Media	232
Out-of-state	53

During this reporting period, the Council has answered a broad spectrum of questions about FOIA. Appendix F 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 approximately 238,000 times. About 62,000 visitors viewed the written advisory opinions and reference materials of the Council. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms and letters, (iv) the Council's annual reports, (v) information about Council subcommittees and legislative proposals, and (vi) links to other Virginia resources, including the Virginia Public Records Act. To facilitate compliance with FOIA, sample response letters for each of the four mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

## FOIA Training

2006 was the first year where statewide FOIA training workshops were not offered. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the previous two years as a sign that its basic training mission had been successfully accomplished. Statewide workshops will continue to be offered, however, in odd-numbered years to provide FOIA training to recently-appointed public officials and employees. As is customary, the workshops are approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys. They are also approved for in-service credit for law-enforcement personnel by the Department of Criminal Justice Services and for three academy points for school board officials by the Virginia School Board Association.

The Council also provides training, upon request, to interested groups. These groups include the staff of state agencies, members of local governing bodies, media organizations, and any other group that wishes to learn more about FOIA. Council staff travels extensively throughout the Commonwealth to provide this training. The training is individualized to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group. These specialized programs provided free of charge. For the second year, all of the Council's training programs have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. From December 2005 to December 2006, the Council conducted 55 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
- Taking the Shock Out of FOIA Charges
- 2006 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 seventh 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 1,700 inquiries. It formed subcommittees to examine FOIA and related access issues, and encouraged the participation of many individuals and groups in Council studies. Through its website, the Council provides increased public awareness of and participation in its work, and publishes a variety of educational materials on the application of FOIA. Its commitment to facilitating compliance with FOIA through training continued in the form of specialized training sessions throughout the Commonwealth. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication. Lastly, the Council extends its congratulations to the Virginia Coalition for Open Government, Forrest M. "Frosty" Landon, and Megan Rhyne, on the occasion of

VCOG's 10th Anniversary in 2006. VCOG was instrumental in advocating for the creation of the Council in 2000.

Respectfully submitted,

R. Edward Houck, Chair  
H. Morgan Griffith  
Ralph L. "Bill" Axselle  
John Stewart Bryan, III  
John B. Edwards  
Craig T. Fifer  
W. Wat Hopkins  
Courtney M. Malveaux  
E. M. Miller, Jr.  
Mary Yancey Spencer  
Roger C. Wiley  
Nolan T. Yelich

## APPENDIX A

### 2007 LEGISLATIVE RECOMMENDATIONS

1. **BILL SUMMARY: Freedom of Information Act; responses to requests for public records.** Adds an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist. The bill also clarifies the other responses to requests for public records under FOIA. The bill also contains technical amendments.

#### **BILL TEXT:**

A BILL to amend and reenact § 2.2-3704 of the Code of Virginia, relating to the Virginia Freedom of Information Act; responses to requests for public records.

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

#### **1. That § 2.2-3704 of the Code of Virginia is amended and reenacted as follows:**

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

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body ~~that is~~ subject to this chapter ~~and that is the custodian of the requested records~~ shall promptly, but in all



cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

~~1. The requested records will be provided to the requester.~~

~~2~~1. The requested records ~~will be~~ are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall ~~(i) be in writing,~~ ~~(ii)~~ identify with reasonable particularity the volume and subject matter of withheld records, and ~~(iii)~~ cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

~~3~~2. The requested records ~~will be~~ are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall ~~(i) be in writing,~~ ~~(ii)~~ identify with reasonable particularity the subject matter of withheld portions, and ~~(iii)~~ cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall ~~be in writing and~~ specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the ~~three-four~~ preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this

chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsections G and J, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the 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. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the

public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

J. Every public body of state government shall compile, and annually update, an index of computer databases that contains at a minimum those databases created by them on or after July 1, 1997. "Computer database" means a structured collection of data or records residing in a computer. Such index shall be a public record and shall include, at a minimum, the following

information with respect to each database listed therein: a list of data fields, a description of the format or record layout, the date last updated, a list of any data fields to which public access is restricted, a description of each format in which the database can be copied or reproduced using the public body's computer facilities, and a schedule of fees for the production of copies in each available form. The form, context, language, and guidelines for the indices and the databases to be indexed shall be developed by the Virginia Information Technologies Agency in consultation with the Librarian of Virginia and the State Archivist. The public body shall not be required to disclose its software security, including passwords.

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2. **BILL SUMMARY: Freedom of Information Act; electronic communication meetings.** Reduces the notice requirement for electronic communication meetings from seven to three working days and clarifies that political subdivisions, other than units of local government, may conduct electronic communication meetings. The bill also allows an individual member of a public body to participate in a meeting through electronic communication means from a remote location that is not open to the public in the event of an emergency, temporary or permanent disability or other medical condition, or when a member of a regional public body's principal residence is more than 60 miles from the primary meeting location. For a member to participate in the above described manner, the bill requires that a quorum of the public body be physically assembled at the primary or central meeting location and that the public body make arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location. The bill defines "regional public body." The bill also contains technical amendments and is a recommendation of the Virginia Freedom of Information Advisory Council.

**BILL TEXT:**

A BILL to amend and reenact §§ 2.2-3701, 2.2-3708, 23.38.95, and 23-50.16:32 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-3708.1, relating to the Virginia Freedom of Information Act; electronic communication meetings; participation in meetings in event of emergency; certain disabilities; regional public bodies.

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

**1. That reenact §§ 2.2-3701, 2.2-3708, 23.38.95, and 23-50.16:32 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-3708.1 as follows:**

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

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

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. The gathering of employees of a public body shall not be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private

sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, whose members are appointed by the participating local governing bodies, and such unit includes two or more counties or cities.

"Scholastic records" means those records containing information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

§ 2.2-3708. Electronic communication meetings; applicability; physical quorum required; notice; report.

A. ~~It Except as expressly provided in § 2.2-3708.1, shall be a violation of this chapter for any political subdivision or any no local~~ governing body, school board, or any authority, board, bureau, commission, district or agency of local government ~~or, any committee thereof to, or any~~ entity created by a local governing body, school board, or any local authority, board, or commission shall 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:~~

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

~~"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.~~

B. Except as provided in subsection D of § 2.2-3707.01, state public bodies may conduct any meeting wherein the public business is discussed or transacted through electronic communication means. ~~Where~~, provided (i) a quorum of ~~a the~~ public body ~~of the Commonwealth~~ is physically assembled at one primary or central meeting location ~~for the purpose of conducting a meeting authorized under this section, additional members of such public body may participate in the meeting through electronic communication means provided such participation is available to the public,~~ (ii) notice of the meeting has been given in accordance with subsection C, and (iii) the remote locations, from which additional members of the public body participate through electronic communication means, are open 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.

~~If an authorized public body holds an electronic meeting pursuant to this section, the public body it 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 ~~seven~~ three working days in advance of the date scheduled for the meeting. The notice shall include the date, time, place, and purpose for the meeting; 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.

~~Seven working days' notice shall not be required for meetings authorized under this section continued to address an emergency as provided in subsection F or to conclude the agenda of a meeting 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.~~

D. ~~An agenda and materials~~ Agenda packets and, unless exempt, all 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 electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through electronic communication means shall be recorded by name in roll-call fashion and included in the minutes.

~~E. Any public body that meets by electronic communication means shall make a written report of the following to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science by December 15 of each year:~~

- ~~1. The total number of electronic communication meetings held during the preceding year;~~
- ~~2. The dates and purposes of the meetings;~~
- ~~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. A public body may meet by electronic communication means as often as needed if an emergency exists and the public body is unable to meet in regular session. E. Three working days' notice shall not be required for meetings authorized under this section that are continued to address an emergency or to conclude the agenda of the meeting for which proper notice has been given, when the date, time, place, and purpose of the continued meeting are set during the meeting prior to adjournment. Public bodies conducting emergency meetings through electronic communication means shall comply with the provisions of subsection D requiring minutes of the meeting. The nature of the emergency shall be stated in the minutes.~~

~~F. Any authorized public body that meets by electronic communication means shall make a written report of the following to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science by December 15 of each year:~~

~~1. The total number of electronic communication meetings held that year;~~

~~2. The dates and purposes of the meetings;~~

~~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.

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

A. A member of a public body may participate in a meeting governed by this chapter through electronic communication means from a remote location that is not open to the public only as follows and subject to the requirements of subsection B:

1. If, on the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that such member is unable to attend the meeting due to an emergency and identifies with specificity the nature of the emergency, and the public body holding the meeting (a) approves such member's participation by a majority vote of the members present and (b) records in its minutes the specific nature of the emergency and the remote location from which the member participated.

Such participation by the member shall be limited each calendar year to two meetings or 25 percent of the meetings of the public body, whichever is fewer;

2. If a member of a public body notifies the chair of the public body that such member is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance and the public body records this fact and the remote location from which the member participated in its minutes; or

3. If, on the day of a meeting, a member of a regional public body notifies the chair of the public body that such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting and the public body holding the meeting (a) approves such member's participation by a majority vote of the members present and (b) records in its minutes the remote location from which the member participated.

B. Participation by a member of a public body as authorized under subsection A shall be only under the following conditions:

1. A quorum of the public body is physically assembled at the primary or central meeting location; and

2. The public body makes arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

§ 23-38.95. Public access to information.

A covered institution shall continue to be subject to § 2.2-4342 and to the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), but shall be entitled to conduct business pursuant to § 2.2-3709, in the case of a public institution of higher education to which that section applies, and, in all cases, may conduct business as a "state public body" for purposes of ~~subsection B of~~ § 2.2-3708.

§ 23-50.16:32. Confidential and public information.

A. The Authority shall be subject to the provisions of the Freedom of Information Act (§ 2.2-3700 et seq.), which shall include the exclusions set forth in subdivision 15 of § 2.2-3705.7 and subdivision 24 of subsection A of § 2.2-3711.

B. For purposes of the Freedom of Information Act (§ 2.2-3700 et seq.), meetings of the Board shall not be considered meetings of the Board of Visitors of the University. Meetings of the Board may be conducted through telephonic or video means as provided in ~~subsections C through F of~~ § 2.2-3708 or similar provisions of any successor law.

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**3. BILL SUMMARY: Freedom of Information Act; exemptions for PPTA and PPEA projects.** Allows memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the PPTA (Public-Private Transportation Act of 1995) and PPEA (Private Education Facilities and Infrastructure Act of 2002) to be withheld from public disclosure, where if such records were made public prior to or after the execution an interim or a comprehensive agreement, the financial interest or bargaining position of the public entity would be adversely affected. The bill allows any independent review panel appointed to review PPTA proposals and advise the responsible public entity concerning such records to meet in a closed meeting. The bill also contains technical amendments and is a recommendation of the Virginia Freedom of Information Advisory Council.

**BILL TEXT:**

A BILL to amend and reenact §§ 2.2-3705.6, 2.2-3711, and 56-573.1:1 of the Code of Virginia, relating to public access to procurement records and certain discussions thereof under the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities and Infrastructure Act of 2002.

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

**1. That §§ 2.2-3705.6, 2.2-3711, and 56-573.1:1 of the Code of Virginia are amended and reenacted as follows:**

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

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

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

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

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

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

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

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

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

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

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

10. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an

application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. ~~(Effective July 1, 2007) Records~~ a. Memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 ~~(§ 56-556 et seq.)~~ or the Public-Private Education Facilities and Infrastructure Act of 2002 ~~(§ 56-575.1 et seq.)~~, to the extent that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the records specified in clauses (i), (ii) and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

2. Identifying with specificity the data or other materials for which protection is sought;

and

3. Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. To protect other records submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public ~~body~~ entity, the records afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction ~~to which such records are provided by the responsible public entity~~.

~~Nothing~~ Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § 56-573.1:1 or 56-575.17; (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002.

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in

connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.

13. Confidential proprietary records that are provided by a franchisee under Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2 to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.

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

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

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

17. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to



the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

18. Confidential proprietary records and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to the extent that disclosure of such records would be harmful to the competitive position of the locality. In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (i) invoke the protections of this subdivision, (ii) identify with specificity the records or portions thereof for which protection is sought, and (iii) state the reasons why protection is necessary.

19. Confidential proprietary records and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that records required to be maintained in accordance with § 15.2-2160 shall be released.

20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Minority Business Enterprise as part of an application for (i) certification as a small, women- or minority-owned business in accordance with Chapter 14 (§ 2.2-1400 et seq.) of this title or (ii) a claim made by a disadvantaged business or an economically disadvantaged individual against the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial records to be excluded from the provisions

of this chapter, the business shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reasons why protection is necessary.

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

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

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

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

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

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

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

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

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

8. In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such

entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

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

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

11. Discussion or consideration of tests, examinations, or other records excluded from this chapter pursuant to subdivision 4 of § 2.2-3705.1.

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

13. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

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

15. Discussion or consideration of medical and mental records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5.

16. Deliberations of the State Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of State Lottery Department matters

related to proprietary lottery game information and studies or investigations exempted from disclosure under subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

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

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

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

20. Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety.

21. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23-76.1, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system or provided to the retirement system under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system or the

Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment.

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

23. Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

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

Authority; marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority; members of its medical and teaching staffs and qualifications for appointments thereto; and qualifications or evaluations of other employees.

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

26. Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23 is discussed.

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

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

29. Discussion or consideration [of records excluded from this chapter pursuant to subdivision 11 of § 2.2-3705.6](#) by a responsible public entity or an affected local jurisdiction, as those terms are defined in § 56-557, ~~of confidential proprietary records excluded from this chapter pursuant to subdivision 11 of § 2.2-3705.6 or any independent review panel appointed to review information and advise the responsible public entity concerning such records.~~

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

31. Discussion or consideration by the Commonwealth Health Research Board of grant application records excluded from this chapter pursuant to subdivision 17 of § 2.2-3705.6.

32. Discussion or consideration by the Commitment Review Committee of records excluded from this chapter pursuant to subdivision 9 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

33. [Expired.]

34. Discussion or consideration of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 18 of § 2.2-3705.6.

35. Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 19 of § 2.2-3705.6.

36. Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-625.1.

37. Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of records excluded from this chapter pursuant to subdivision F 1 of § 2.2-3706.

38. Discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of records or confidential matters excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.



39. Discussion or consideration by the Virginia Port Authority of records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6.

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

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

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

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

§ 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement records.

A. Conceptual proposals submitted in accordance with subsection A or B of § 56-560 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities that are state agencies, departments, and institutions, posting shall be on the Department of General Service's web-based electronic procurement program commonly known as "eVA;" and

2. For responsible public entities that are local public bodies, posting shall be on the responsible public entity's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. Posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the local responsible public entity.

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.

B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public comment on the proposals. The public comment period required by this subsection may include a public hearing in the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and a decision to award has been made by a responsible public entity, the responsible public entity shall present the major business points of the interim or comprehensive

agreement, including the use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open to the public.

D. ~~(Effective July 1, 2007)~~ Once an interim agreement or a comprehensive agreement has been entered into, a responsible public entity shall make procurement records available for public inspection, ~~upon request in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.)~~. For the purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.

E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

F. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

G. The provisions of this section shall apply to accepted proposals regardless of whether the process of bargaining will result in an interim or a comprehensive agreement.

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4. **BILL SUMMARY: Freedom of Information Act; venue for enforcement actions.** Clarifies that venue for the enforcement of FOIA rights and privileges against state public bodies, including state institutions, may be brought in general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond. The bill addresses the decision in a recent Supreme Court of Virginia case of *William F. Shaw v. John T. Casteen, et al.*, where the Supreme Court declined to hear the appeal finding no error in the trial court's decision that a FOIA action against the University of Virginia could not be brought where the aggrieved party lived. The bill contains technical amendments and is a recommendation of the Virginia Freedom of Information Advisory Council.

**BILL TEXT:**

A BILL to amend and reenact § 2.2-3713 of the Code of Virginia, relating to the Freedom of Information Act; venue for enforcement actions.

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

**1. That § 2.2-3713 of the Code of Virginia is amended and reenacted as follows:**

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause, ~~addressed to the general district court or the court of record of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his or her rights and privileges conferred by this chapter. Venue for the petition shall be addressed as follows:~~

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

~~B. Any petition alleging denial of rights and privileges conferred by this chapter by a board, bureau, commission, authority, district or agency of the state government or by a standing or other committee of the General Assembly, shall be addressed~~

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing

[or other committee of the General Assembly,](#) to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. The petition for mandamus or injunction shall be heard within seven days of the date when the same is made. However, any petition made outside of the regular terms of the circuit court of a county that is included in a judicial circuit with another county or counties, the hearing on the petition shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

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## APPENDIX B

### TRAINING/EDUCATIONAL PRESENTATIONS

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

From December 1, 2005 through December 1, 2006, Council staff conducted 55 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 7, 2006	New Officer Training Compensation Board Richmond, Virginia
December 20, 2005	Indigent Defense Commission Richmond, Virginia
January 6, 2006	New Committee Chair Training General Assembly Richmond, Virginia
	New Member Training General Assembly Richmond, Virginia
January 17, 2006	State Independent Living Council Richmond, Virginia
January 20, 2006	Virginia Association of Community Development Officials Winter Conference Richmond, Virginia
February 10, 2006	Office of the Attorney General Richmond, Virginia
February 15, 2006	Management Team Forum James City County James City County, Virginia
February 16, 2006	Department of Medical Assistance Services Richmond, Virginia

February 17, 2006	Dinwiddie County Public Schools Dinwiddie County, Virginia
March 15, 2006	Department of Criminal Justice Services Richmond, Virginia
March 16, 2006	International Public Management Association Virginia Chapter Spring Conference Charlottesville, Virginia
March 22, 2006	New Kent County New Kent County, Virginia
April 8, 2006	Associated Press Richmond, Virginia
April 12, 2006	Virginia Information Technologies Agency Richmond, Virginia
April 24, 2006	Stafford County Stafford County, Virginia
April 27, 2006	Commonwealth Management Institute Hampton, Virginia
	Commonwealth Managers Association Richmond, Virginia
May 3, 2006	Northern Virginia Public Information Officers Fairfax, Virginia
May 5, 2006	State Mental Health Mental Retardation Substance and Abuse Services Board Williamsburg, Virginia
May 10, 2006	Division of Building and Fire Regulation Virginia Department of Housing and Community Development Norfolk, Virginia
May 12, 2006	City of Chesapeake Chesapeake, Virginia
May 17, 2006	Virginia Water and Waste Authorities Association Charlottesville, Virginia

May 18, 2006	Commonwealth Management Institute Williamsburg, Virginia
May 25, 2006	Chesterfield County Human Resource Management Staff Chesterfield County, Virginia
June 1, 2006	Office of the Attorney General Richmond, Virginia
June 13, 2006	Office of the Attorney General Richmond, Virginia
June 15, 2006	Tidewater Area Reference Librarians Newport News, Virginia
June 22, 2006	International Legislative Drafting Institute Washington, D.C.
July 19, 2006	Virginia Office for Protection and Advocacy Richmond, Virginia
July 26, 2006	Town Councils, Boards, and Commissions in Loudoun County Leesburg, Virginia
August 2, 2006	Stafford County Public Schools Stafford County, Virginia
August 12, 2006	Virginia Electoral Board Association Southern District Bedford, Virginia
August 21, 2006	Virginia Port Authority Norfolk, Virginia
August 25, 2006	Office of the Attorney General Richmond, Virginia
September 6, 2006	Hampton Roads Sanitation District Commission Virginia Beach, Virginia  Hampton Roads Sanitation District Commission Newport News, Virginia



September 14, 2006	Commonwealth Management Institute Charlottesville, Virginia
September 27, 2006	Virginia Department of Agriculture and Consumer Services Richmond, Virginia
October 4, 2006	Department of General Services Richmond, Virginia
October 7, 2006	Local Government Attorneys Association, Inc. Fall Conference Roanoke, Virginia
October 17, 2006	Town of Glade Spring Glade Spring, Virginia
October 19, 2006	Commonwealth Management Institute Williamsburg, Virginia
October 24, 2006	New Board Member Training Department of Health Professions Richmond, Virginia
	Managing Jail Risk Conference Compensation Board Williamsburg, Virginia
October 26, 2006	City of Emporia Emporia, Virginia
October 27, 2006	Office of the Attorney General Richmond, Virginia
October 31, 2006	E-911 Dispatchers and Emergency Responders Roanoke, Virginia
	Managing Jail Risk Conference Compensation Board Roanoke, Virginia
November 1, 2006	E-911 Dispatchers and Emergency Responders Abingdon, Virginia
November 2, 2006	Richmond First Club Richmond, Virginia

November 15, 2006	Commodity Boards Administrators Virginia Department of Agriculture and Consumer Affairs
November 16, 2006	Commonwealth Management Institute Charlottesville, Virginia
November 17, 2006	Virginia Coalition for Open Government Access 2006 Conference Richmond, Virginia
November 20, 2006	City of Richmond Richmond, Virginia

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## APPENDIX C

### INDEX OF WRITTEN ADVISORY OPINIONS December 1, 2005 through December 1, 2006<sup>22</sup>

#### Opinion No.

#### Issue(s)

#### February

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[AO-01-06](#)

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

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#### March

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[AO-02-06](#)

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

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[AO-03-06](#)

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

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[AO-04-06](#)

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

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#### May

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[AO-05-06](#)

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

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<sup>22</sup> No opinions were issued in December 2005 or January 2006

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[AO-06-06](#)

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

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**July**

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[AO-07-06](#)

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

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**August**

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[AO-08-06](#)

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

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**October**

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[AO-09-06](#)

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

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[AO-10-06](#)

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

## APPENDIX D

### *2006 Meetings of the Freedom of Information Advisory Council*

#### **Monday, June 12, 2005**

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

Recap of FOIA and Related Access Bills from 2006 Regular and Special Sessions of General Assembly. Creation/continuation of subcommittees to study access to Public-Private Education Facilities and Infrastructure Act (PPEA) records, electronic meetings by local regional bodies, and appropriateness of adding a fifth response--the requested records do not exist. Report on Sunshine Week-- Barrett Hardiman, Virginia Association of Broadcasters; Ginger Stanley, Virginia Press Association; Frosty Landon, Virginia Coalition for Open Government. Commending Virginia Coalition for Open Government on the occasion of its 10th anniversary (SJR 173/HJR 206). Review of recent Supreme Court of Virginia decision in *Shaw v. John T. Casteen, et al.*, concerning proper venue for FOIA actions. Designation by General Assembly of March 16, 2006 and in each succeeding year as Freedom of Information Day in Virginia (SJR 170). Update on number of inquiries to Council for advisory opinions (oral and written).

#### **Wednesday, October 11, 2006**

##### **Senate Room A, General Assembly Building, Richmond**

Progress reports from PPEA Subcommittee, Electronic Meeting Subcommittee, and Mandated Fifth Response Subcommittee. Review of draft legislation clarifying venue in FOIA actions. Discussion of public access to travel reimbursement records of public officials and employees. Update on number of inquiries to Council for advisory opinions (oral and written).

#### **Friday, December 15, 2006**

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

Final reports from from PPEA Subcommittee, Electronic Meeting Subcommittee, VRS Subcommittee, and Fifth Response Subcommittee. Review and adoption of subcommittee-recommended legislative draft proposals. Review and adoption of other draft legislation clarifying venue in FOIA actions. Annual legislative preview: Robert Schultze, Virginia Retirement System--VRS FOIA exemptions; John G. "Chip" Dicks, Esquire-- FOIA and requests for court records; Kathleen Dooley, City of Fredericksburg/Virginia Municipal League-- closed meeting for discussion of security of public buildings; Frosty Landon, Virginia Coalition for Open Government-- eliminating citizenship requirement in VA FOIA; Dennis P. Gallagher, Virginia Taxi Cab Association--confidentiality of financial statements provided to local government bodies by taxi cab companies; Colleen Miller, Virginia Office of Protection and Advocacy (VOPA)-- closed meeting exemption for appeals committee of VOPA Board concerning discussions of records exempted under § 2.2-3705.3 (8). Review of recent Supreme Court of Virginia decision in *White Dog Publishing v.*

Culpeper County Board of Supervisors, concerning closed meetings for contract negotiations. Review of the U.S Court of Appeals for the Third Circuit decision concerning Delaware's Freedom of Information Act limiting access to Delaware residents only. Presentation of year by year statistics of services provided by the Council. Update on number of inquiries to Council for advisory opinions (oral and written).

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## APPENDIX E

### *Status of Freedom of Information and Other Related Access Bills Considered by the 2006 General Assembly*

#### **I. Introduction**

The General Assembly passed a total of 16 bills amending the Virginia Freedom of Information Act (FOIA) in 2006. Fifteen of those bills were passed during the 2006 Regular Session; one was passed during the 2006 Special Session I. One bill was recommended by the Freedom of Information Advisory Council: SB 76 (Houck), concerning the release of certain records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA). SB 5011, passed during the 2006 Special Session I, also concerned the release of certain records and corresponding closed meetings under the PPTA and PPEA.

Of the 16 bills, seven bills created five new record exemptions to FOIA:

- HB 348 and SB 39 add an identical exemption for certain records furnished to the state Board of Education;
- SB 443 adds an exemption for certain records of the Brown v. Board of Education Scholarship Awards Committee;
- HB 122 adds an exemption for certain records submitted to the Department of Minority Business Enterprise;
- HB 1458 adds an exemption for certain records of the Tobacco Indemnification and Community Revitalization Commission;
- HB 984 and SB 559 add an identical exemption for certain records of the Sex Offenders and Crimes Against Minors Registry maintained by the Department of State Police.

Four of the 16 bills add three new closed meeting exemptions to § 2.2-3711:

- HB 845 and SB 557 add an identical exemption for certain closed meetings of the Forensic Science Board or the Scientific Advisory Committee;
- HB 1467 adds an exemption for certain closed meetings of the Virginia Port Authority;
- SB 443, in addition to the records exemption already mentioned, also adds a corresponding exemption for certain closed meetings of the Brown v. Board of Education Scholarship Program Awards Committee.

In addition to SB 76 and SB 5011, described above, four other bills amend existing provisions of FOIA:

- HB 1404 and SB 706 amend the records exemption for certain proprietary records of cable television franchisees found in § 2.2-3705.6;

- SB 21 corrects references to the Internet throughout the Code, including § 2.2-3707.1 of FOIA;
- HB 564 amends § 2.2-3707.1 to clarify the requirements for posting minutes by state public bodies in the executive branch.<sup>23</sup>

Section II of this update presents a brief overview of amendments to FOIA section by section in order to provide context and organization to the numerous bills. Section III presents a brief overview of other access-related legislation passed during the 2006 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes became effective July 1, 2006.

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

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

Adds an exemption for certain records furnished to the state Board of Education in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. HB 348 (2006 Acts of Assembly, c. 95), SB 39 (2006 Acts of Assembly, c. 25)

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

Adds an exemption for certain records pertaining to applicants and recipients of scholarships awarded by the Brown v. Board of Education Scholarship Awards Committee. SB 443 (2006 Acts of Assembly, c. 518)

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

Adds an exemption for certain trade secrets and financial records submitted to the Department of Minority Business Enterprise. HB 122 (2006 Acts of Assembly, c.831)

Amends subdivision 13 of § 2.2-3705.6, concerning certain proprietary records of cable television system franchisees, to refer to Article 1.2 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2 of the Code of Virginia, and the current reference to § 15.2-2100 is stricken. HB 1404 (2006 Acts of Assembly, c. 76), SB 706 (2006 Acts of Assembly, c. 73)

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<sup>23</sup> SB 21 strikes certain language from § 2.2-3707.1. HB 564 strikes the same and other language from the same section, and replaces it with new language. For practical purposes, once both bills go into effect, the language of § 2.2-3707.1 will be that contained in HB 564.



Adds an exemption for certain proprietary records of the Tobacco Indemnification and Community Revitalization Commission. HB 1458 (2006 Acts of Assembly, c. 467)

Amends the current exemption for certain procurement records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA). SB 76 (2006 Acts of Assembly, c. 936)

Amends certain provisions of the current exemption for certain procurement records under the PPTA and PPEA. The provisions of this bill expire July 1, 2007. SB 5011 (2006 Acts of Assembly Special Session I, c. 1)

**§ 2.2-3706. Disclosure of criminal records; limitations.**

Adds an exemption for certain records of the Sex Offenders and Crimes Against Minors Registry maintained by the Department of State Police. HB 984 (2006 Acts of Assembly, c. 857), SB 559 (2006 Acts of Assembly, c. 914)

**§ 2.2-3707.1. Posting of minutes for state boards and commissions.**

Amends the existing section to clarify that all boards, commissions, councils, and other public bodies created in the executive branch of state government shall post minutes of their meetings on such body's website, if any, and on the Virginia Regulatory Town Hall. HB 564 (2006 Acts of Assembly, c. 595)

Amends the existing section as part of simplifying and updating all references to the Internet in the Code of Virginia. SB 21 (2006 Acts of Assembly, c. 474)

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

Adds an exemption for closed meetings of the Forensic Science Board or the Scientific Advisory Committee when discussing or considering certain records relating to a criminal investigation or prosecution, records that are excluded from disclosure pursuant to subdivision F 1 of § 2.2-3706. HB 845 (2006 Acts of Assembly, c. 430), SB 557 (2006 Acts of Assembly, c. 430)

Adds an exemption for closed meetings of the Virginia Port Authority for discussion or consideration of certain records excluded from disclosure pursuant to subdivision 1 of § 2.2-3705.6. HB 1467 (2006 Acts of Assembly, c. 560)

Adds an exemption for certain closed meetings of the Brown v. Board of Education Scholarship Program Awards Committee. SB 443 (2006 Acts of Assembly, c. 518)

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

**[Uncodified Act; see HB 1502, SB 675.] Higher educational institutions; management agreements, report.**

Provides management agreements between the Commonwealth and Virginia Polytechnic Institute and State University, The College of William and Mary in Virginia, and the University of Virginia, respectively, pursuant to the Restructured Higher Education Financial and Administrative Operations Act. Contains various provisions regarding FOIA as applied to these particular institutions. HB 1502 (2006 Acts of Assembly, c. 933), SB 675 (2006 Acts of Assembly, c. 943)

#### **§ 2.2-609. Copies of state publications furnished to Librarian of Virginia.**

Amends § 2.2-609 and adds in Title 42.1 a chapter numbered 8, consisting of sections numbered 42.1-92 through 42.1-97. Amends the State Publications Depository Program to include electronic publications, and clarifies that the requirements of the Program apply to all state agencies in any branch of government. Among other new provisions, explicitly states that the new chapter does not alter or diminish the responsibilities of public bodies with respect to public records under FOIA or the Virginia Public Records Act. HB 210 (2006 Acts of Assembly, c. 59)

#### **§ 2.2-3808.2. Posting and availability of certain information on the Internet; prohibitions.**

Removes sunset provision from § 2.2-3808.2, which prohibits the posting of certain personal information on court-controlled websites. Amends various other provisions in § 17.1-279 concerning online access to land records held by the court. HB 563 (2006 Acts of Assembly, c. 647)

#### **§ 2.2-4343. Exemption from operation of chapter for certain transactions.**

Amends § 2.2-4343 and adds two new sections in Title 37.2, §§ 37.2-512 and 37.2-615. Permits community services boards and behavioral health authorities to enter into joint agreements for certain purposes. Permits the parties to such an agreement to create an administrator or management body to provide treatment, habilitation, or support services, subject to certain conditions. One such condition is that the administrator or management body is subject to all statutory and regulatory requirements that apply to community services boards, including FOIA. HB 774 (2006 Acts of Assembly, c. 656)

#### **§ 9.1-177.1. Confidentiality of records of and reports on adult persons under investigation by or placed on probation supervision with a local community-based probation program.**

Provides that presentencing investigation reports compiled by local probation officers for general district courts are to remain confidential and are exempt from FOIA. HB 1417 (2006 Acts of Assembly, c. 289)

**§ 33.1-56.4. Release of personal information; penalty.**

Adds subsections in § 33.1-56.4 and § 46.2-819.1 exempting from public disclosure certain records collected by photo-enforcement systems of toll facilities, in addition to other changes in provisions concerning toll facilities made to other Code sections. HB 1000 (2006 Acts of Assembly, c. 859)

**§ 55-248.9:1. Confidentiality of tenant records.**

Among amendments to other sections, adds two exceptions to a landlord's holding a tenant's records confidential under § 55-248.9:1, which exceptions are for information requested (i) pursuant to a subpoena in a civil case and (ii) by a contract purchaser of the landlord's property, provided the contract purchaser agrees in writing to maintain the confidentiality of such records. HB 907 (2006 Acts of Assembly, c. 667)

**§ 58.1-344.3. Voluntary contributions of refunds requirements.**

Amends § 58.1-344.3 and adds new § 44-102.2. Establishes the Virginia Military Relief Fund, which requires submission of an annual report to the Governor and certain members of the General Assembly. Provides that certain information in the report concerning recipients and others shall not be subject to public disclosure. HB 628 (2006 Acts of Assembly, c. 103)

**§ 63.2-1251. Furnishing information; confidentiality; penalty.**

Among other changes, creates a Putative Father Registry in the Department of Social Services. New § 63.2-1251 restricts the dissemination of information from the registry to certain parties and exempts information contained in the registry from disclosure under FOIA. SB 534 (2006 Acts of Assembly, c. 825).

**IV. Resolutions**

**HJ 206/SJ 173:** Commend the Virginia Coalition for Open Government (VCOG), founded in 1996, on the occasion of its 10th anniversary.

**SJ 170:** Designates March 16, in 2006 and every succeeding year, as Freedom of Information Day in Virginia.

## APPENDIX F

### Breakdown of Inquiries to Council December 2005 to December 2006

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.

Time period: December 1, 2005 through November 30, 2006

Total number of inquiries: 1751

#### 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	2	0	0	0	1	0	0	0	0	3
Local Government	0	0	0	0	0	0	0	0	1	0	0	0	1
Law Enforcement	0	0	0	0	0	0	0	0	0	0	0	0	0
Citizens of the Commonwealth	0	0	1	1	0	2	0	0	0	0	2	0	6
Members of the News Media	0	0	0	0	0	0	0	0	0	0	0	0	0
Out-of State	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>3</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>10</b>

**B. TELEPHONE & EMAIL INQUIRIES:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Federal Government	0	0	1	0	0	0	0	0	2	0	0	0	3
State Government	62	28	22	38	25	37	32	26	47	27	38	26	408
Local Government	28	41	32	38	28	33	22	27	41	25	40	26	381
Law Enforcement	2	5	6	9	6	2	2	0	2	3	7	9	53
Citizens of the Commonwealth	41	49	50	63	51	58	47	55	51	50	54	42	611
Members of the News Media	13	14	8	24	24	21	17	19	21	19	30	22	232
Out-of State	2	5	8	2	2	6	6	5	8	1	7	1	53
<b>TOTAL</b>	<b>148</b>	<b>142</b>	<b>127</b>	<b>174</b>	<b>136</b>	<b>157</b>	<b>126</b>	<b>132</b>	<b>172</b>	<b>125</b>	<b>176</b>	<b>126</b>	<b>1741</b>

**II. Types of Inquiries Received**

**A. RECORDS INQUIRIES:**

**1. 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.)	5	14	20	24	23	14	11	15	12	8	15	11	172
Responding to a request (i.e. response time, appropriate response, FOIA applies to existing records, etc.)	48	21	22	35	26	23	11	12	17	10	25	18	268
Charges for records	8	5	3	10	4	9	4	7	12	3	13	4	82
Definition of "public records"	7	2	2	8	7	5	4	3	4	5	6	7	60
Format of records	2	1	0	1	2	0	1	1	2	0	1	3	14
Other inquiries regarding FOIA procedure for records requests	4	1	2	0	3	5	4	5	1	0	2	1	28
<b>SUBTOTAL</b>	<b>74</b>	<b>44</b>	<b>49</b>	<b>78</b>	<b>65</b>	<b>56</b>	<b>35</b>	<b>43</b>	<b>48</b>	<b>26</b>	<b>62</b>	<b>44</b>	<b>624</b>

**2. Inquiries regarding specific types of records or exemptions:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Draft records	1	0	0	0	0	0	0	0	0	1	0	0	2
E-mail as a public record	0	0	1	1	2	1	3	0	0	0	1	1	10
Court records	1	3	2	2	2	1	2	5	4	2	3	2	29
Personnel records (including access to salary & job position of public employees)	4	15	12	15	12	19	14	16	20	14	14	15	170
Licensing records exemption	0	0	0	1	0	3	1	1	1	0	0	1	8
Law enforcement records	3	10	9	10	9	11	8	6	7	11	15	11	110
Tax records exemption	0	0	1	3	3	2	1	4	5	2	3	2	26
Scholastic records exemption	1	3	2	2	1	1	3	0	1	1	4	3	22
Medical records exemption	2	0	2	1	1	3	1	0	1	1	1	2	15
Working papers exemption	4	2	0	2	1	4	6	3	1	0	1	3	27
Attorney/client privilege & work product exemptions	1	2	1	2	0	0	1	0	3	0	1	1	12
Terrorism & public safety	1	0	2	5	1	0	0	1	0	0	0	1	11
Procurement & contracts	2	2	2	3	3	1	4	0	2	6	2	4	31
Other inquiries regarding specific types of records or exemptions	13	13	12	13	11	13	12	12	15	11	14	15	154
<b>SUBTOTAL</b>	<b>33</b>	<b>50</b>	<b>46</b>	<b>60</b>	<b>46</b>	<b>59</b>	<b>56</b>	<b>48</b>	<b>60</b>	<b>49</b>	<b>59</b>	<b>61</b>	<b>627</b>

**3. Total number of records-related inquiries:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
<b>TOTAL</b>	<b>107</b>	<b>94</b>	<b>95</b>	<b>138</b>	<b>111</b>	<b>115</b>	<b>91</b>	<b>91</b>	<b>108</b>	<b>75</b>	<b>121</b>	<b>105</b>	<b>1251</b>

**B. MEETING INQUIRIES:**

**1. Inquiries regarding FOIA meetings procedures:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Definition of a "meeting"	7	13	12	8	9	5	8	4	11	6	5	4	92
Closed meeting procedure	1	1	4	8	3	8	4	1	5	2	12	5	54
Electronic meetings	5	3	2	5	3	6	5	4	1	3	4	2	43
Voting	2	1	2	3	1	2	3	0	1	1	1	4	21
Minutes	4	2	1	5	3	3	2	0	2	1	6	5	34
Chance meetings	0	1	0	1	1	0	1	0	1	2	3	0	10
Agenda	2	0	1	1	1	1	2	2	3	0	1	0	14
Notice	2	4	7	19	9	4	1	3	6	1	3	2	61
Public Comment	0	0	2	1	3	0	0	0	0	0	1	0	7
Polling	2	0	0	0	0	0	1	0	0	0	0	0	3
Special & emergency meetings	0	0	1	0	1	0	1	4	2	1	1	1	12
Public forum	0	2	0	0	2	0	0	0	2	0	1	0	7
Agenda packets	2	1	0	1	5	0	0	1	0	0	1	0	11
Other inquiries regarding procedural matters	2	4	4	2	2	2	2	1	0	4	4	5	32
<b>SUBTOTAL</b>	<b>29</b>	<b>32</b>	<b>36</b>	<b>54</b>	<b>43</b>	<b>31</b>	<b>30</b>	<b>20</b>	<b>34</b>	<b>21</b>	<b>43</b>	<b>28</b>	<b>401</b>

**2. 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	2	3	4	0	1	4	1	3	1	6	1	30
Real Estate	1	0	0	2	0	0	0	0	3	0	2	1	9
Consultation with legal counsel	1	2	0	3	1	4	0	1	3	2	8	0	25
Scholastic	0	0	0	0	0	1	0	0	0	0	4	1	6
Terrorism & public safety	0	0	0	1	1	0	1	0	0	0	0	0	3
Other inquiries regarding subject-matter	3	1	1	1	1	5	1	0	1	1	0	4	19
<b>SUBTOTAL</b>	<b>9</b>	<b>5</b>	<b>4</b>	<b>11</b>	<b>3</b>	<b>11</b>	<b>6</b>	<b>2</b>	<b>10</b>	<b>4</b>	<b>20</b>	<b>7</b>	<b>92</b>

**3. Total number of meetings-related inquiries:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
<b>TOTAL</b>	<b>38</b>	<b>37</b>	<b>40</b>	<b>65</b>	<b>46</b>	<b>42</b>	<b>36</b>	<b>22</b>	<b>44</b>	<b>25</b>	<b>63</b>	<b>35</b>	<b>493</b>

**C. GENERAL INQUIRIES:**

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Remedies	13	6	6	12	6	8	7	4	10	7	6	6	91
Definition of a public body	11	8	6	10	9	9	12	10	8	6	13	7	109
Role of FOIA Council	6	3	3	7	4	2	6	5	4	3	2	4	49
Privacy issues (GDCDPA)	0	1	0	5	1	0	0	1	0	0	1	0	9
Request for document review	2	1	0	1	1	1	1	0	4	0	0	1	12
Suggestions/FYI	4	4	1	3	3	2	1	2	4	1	6	1	32
Request for FOIA Materials	17	3	6	7	9	2	4	8	3	5	7	5	76
Request for FOIA Training	1	1	1	4	1	1	2	5	8	5	3	1	33
Public Records Act	1	2	0	3	1	2	1	5	5	1	3	3	27
Outside scope of FOIA	19	13	13	11	9	10	11	12	14	12	15	14	153
Specific request for records held by other public bodies	4	6	2	5	2	2	5	4	4	2	7	1	44
FOIA Legislation	2	4	0	3	5	3	1	3	2	1	8	1	33
Other general inquiries	10	14	5	12	8	12	8	11	17	9	20	5	131
<b>TOTAL</b>	<b>90</b>	<b>66</b>	<b>43</b>	<b>83</b>	<b>59</b>	<b>54</b>	<b>59</b>	<b>70</b>	<b>83</b>	<b>52</b>	<b>91</b>	<b>49</b>	<b>799</b>

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**APPENDIX G**

**OPINIONS ISSUED BY THE FOIA COUNCIL  
JULY 2000 THROUGH SEPTEMBER 2006**

**RAW DATA (NUMBER OF OPINIONS)**

Written Advisory Opinions:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
State Government	1	20	0	1	1	1	3
Local Government	3		6	7	6	0	1
Law Enforcement	0	0	0	0	1	3	0
Citizens of the Commonwealth	3	41	11	13	15	11	4
Members of the News Media	1	10	2	3	3	1	0
Out-of-state	0	0	0	0	0	0	0
<b>TOTAL</b>	<b>8</b>	<b>71</b>	<b>19</b>	<b>24</b>	<b>26</b>	<b>16</b>	<b>8</b>

Written Opinions Aggregated Categories:

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

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Telephone and E-mail Responses:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
State Government	20	275	161	200	230	360	339
Local Government	25		266	224	328	325	312
Federal Government	0	0	0	0	2	2	3
Law Enforcement	0	0	38	48	56	69	37
Citizens of the Commonwealth	43	324	339	313	397	627	510
Members of the News Media	21	169	165	198	145	209	176
Out-of-state	0	0	21	18	32	60	45
<b>TOTAL</b>	<b>109</b>	<b>768</b>	<b>990</b>	<b>1001</b>	<b>1190</b>	<b>1652</b>	<b>1422</b>

Informal Opinions Aggregated Categories:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
Government	45	275	465	472	616	756	691
Public	43	324	360	331	429	687	555
News Media	21	169	165	198	145	209	176

**NOTES:**

- The 2000 and 2001 Annual Reports did not use the same categories as later years, and so those numbers may not correspond exactly to the numbers for later years (see the excerpts from the Annual Reports, below, for details.) In particular, these years did not list separate totals for federal government, law enforcement, and out-of-state inquiries.
- The 2000 reporting period was July 1, 2000 through November 30, 2000.
- The 2006 reporting period to date includes December 1, 2005 through September 30, 2006.

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**2006 Judicial Decisions  
Supreme Court of Virginia  
U.S. Court of Appeals for the Third Circuit**

**In 2006, two FOIA cases were decided by the Supreme Court of Virginia. The issues before the Court were the proper venue for filing a FOIA petition against a public institution of higher education and the parameters of the closed meeting exemption for contract negotiations. In addition, the U.S. Court of Appeals for the Third Circuit decided a case on the issue of who had access rights under the Delaware Freedom of Information Act. Each case is discussed below in more detail.**

***I. Decisions of the Supreme Court of Virginia***

Shaw v. Casteen

*The Supreme Court of Virginia denies a petition for appeal in a case involving FOIA venue issues, finding no reversible error in the trial court's decision.*

**I. Introduction and Synopsis**

The Virginia Freedom of Information Act (FOIA) provides that any person whose rights and privileges under FOIA are denied may bring a petition for mandamus or injunction against the public body that denied his rights. FOIA contains two venue provisions: (1) subsection A of § 2.2-3713, which requires a petition against a local public body to be filed in the county or city from which the public body has been elected or appointed to serve, and (2) subsection B of § 2.2-3713, which requires a petition against a state entity to be filed in the county where the petitioner resides or in the City of Richmond.

William Shaw, a citizen of Louisa County, brought a petition for mandamus against the University of Virginia (the University) after the University denied his request for public records. The petition was filed in the Circuit Court of Louisa County, where he resides, pursuant to subsection B of § 2.2-3713 (venue against state entities). The Circuit Court dismissed the petition on grounds that venue was improper. Mr. Shaw moved for a rehearing, which the court denied. It appears that the Court determined that the University is not a state agency in initially dismissing the petition. In denying the motion to rehear, it appears that the Court found that because boards of visitors of public institutions of higher education are specifically mentioned in the definition of *public body* in § 2.2-3701, the University could only be sued under subsection A of § 2.2-3713 (venue against local public

bodies), as that subsection uses the term *public body* whereas subsection B does not use the term *public body*. Mr. Shaw appealed to the Supreme Court of Virginia; the Supreme Court refused his petition for appeal, finding no reversible error in the trial court's judgment.

Prior to this case, it has appeared that the University of Virginia is a state entity for FOIA purposes, and venue against the University is therefore found under subsection B of § 2.2-3713. Subsection A of § 2.2-3713 provides a venue for petitions against local public bodies; it seems clear that the University is not a local public body, and that subsection A of § 2.2-3713 is inapplicable to it. However, the trial court ruled otherwise and the Supreme Court, in refusing Mr. Shaw's petition for appeal, found no reversible error in that judgment. Staff brings this matter to the attention of the FOIA Council as it appears there may be a need to revise the definition of *public body* and/or the venue provisions of FOIA in order to prevent such a situation from arising in the future. Section II of this memorandum presents a more detailed account of the factual and procedural background of this matter. Section III presents the FOIA issues to be addressed in greater depth.

## II. Background

William F. Shaw is a resident of Louisa County, Virginia, who works as a departmental manager for the University of Virginia. Mr. Shaw was concerned about the disparity of compensation between public and private employees. He found out that the University had commissioned a study on this issue, and requested a copy of the study from the University. The University denied his request, stating that the information was purchased from third party consulting firms and was therefore proprietary and not subject to the Virginia Freedom of Information Act (FOIA). Mr. Shaw felt that the denial of his request was improper and in violation of his rights under the Virginia Freedom of Information Act (FOIA). After several repeated attempts to obtain the study, and repeated denials, Mr. Shaw filed a petition for mandamus against John T. Casteen, III, President of the University, and Carol S. Wood, Assistant Vice President for University Relations.<sup>24</sup>

By counsel, Mr. Shaw filed his petition in the Circuit Court of Louisa County pursuant to subsection B of § 2.2-3713, which reads as follows:

*Any petition alleging denial of rights and privileges conferred by this chapter by a board, bureau, commission, authority, district or agency of the state government or by a standing or other committee of the General Assembly, shall be addressed to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.*

It appears that the parties and the Court agreed that Mr. Casteen and Ms. Wood were sued in their representative capacities, and the real party defendant was in fact the University of

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<sup>24</sup> Whether the requested study is exempt from disclosure is not at issue for purposes of this memorandum.

Virginia.<sup>25</sup> The Court dismissed Mr. Shaw's petition without prejudice by Order dated October 5, 2005, stating that

*the proper venue in this case for a FOIA challenge to the University of Virginia is established by Va. Code § 2.2-3713(A), which requires filing in "the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied." This section would also require "an affidavit showing good cause." Petitioner's filing in this Court pursuant to § 2.2-3713(B) is therefore improper.*

In this Order, the Court did not elaborate further upon the reasoning for its decision that venue was improper. Mr. Shaw subsequently indicated to staff that counsel for the University at that time argued orally that the University was not a state agency.

After the Court's dismissal of his petition, Mr. Shaw then filed a Motion to Rehear, arguing that the University is a state agency, and therefore venue is proper under subsection B of § 2.2-3713 as the petition was originally filed.<sup>26</sup> Mr. Shaw also cited a prior case wherein the University had been sued in the City of Richmond pursuant to subsection B of § 2.2-3713,<sup>27</sup> but the Court did not find this case persuasive as venue was not raised as an issue in that matter. The Court denied the Motion to Rehear by Order dated October 26, 2005. In this second Order, the Court opined as follows:

*To resolve the important issue of where jurisdiction rests, the Court finds it necessary to consider the statutory intent of the General Assembly. If there were no other specific legislative intention expressed regarding how boards of visitors are to be defined for purposes of the Freedom of Information Act, then the Court could perhaps determine that the Board of Visitors of the University of Virginia could be characterized as simply another state agency; however, the General Assembly, in Virginia Code § 2.2-3701 specifically determined to include boards of visitors of public institutions of higher education, which would include the University of Virginia, in its definition of "public body" as that term is to be used within the chapter governing the Freedom of Information Act. Presuming for sake of argument that the University of Virginia is a state agency and that a conflict in interpretation of how the Board of Visitors of the University of Virginia is to be characterized exists, the Court would be required to apply fundamental principals of statutory interpretation. In that regard,*

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<sup>25</sup> In its initial Order, the Court addressed the matter as being against the University rather than as against the individually named defendants without explicitly stating that Mr. Casteen and Ms. Wood were sued in their representative capacities or that the University was the real party in interest.

<sup>26</sup> In this second Order, the Court did state that *at the time of the original hearing, the parties agreed that the Respondents were being sued in a representative capacity, and that the true Respondent was the Board of Visitors of the University of Virginia.*

<sup>27</sup> *Redinger v. Casteen*, 35 Va. Cir. 380 (1995).

*when two statutes appear to conflict, they should be construed, if reasonably possible, to give force and effect to each one. To the extent that the statutes conflict, however, the specific statute prevails over the more general one. [Citation omitted.] Because the General Assembly specifically included boards of visitors of public institutions of higher education within the definition of public body, the Court can only conclude that this Freedom of Information writ of mandamus must be filed in the General District Court or the Court of Record of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied, which would presumably be the City of Charlottesville or the County of Albemarle.*

Believing that the circuit court had erred in this decision, Mr. Shaw appealed to the Supreme Court of Virginia. By decision dated April 13, 2006, the Supreme Court refused Mr. Shaw's petition for appeal, opining that there is no reversible error in the judgment of the trial court.

### **III. FOIA Issues**

As previously discussed, FOIA has two venue provisions, subsection A of § 2.2-3713 and subsection B of § 2.2-3713. In full, the two subsections read as follows:

*A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause, addressed to the general district court or the court of record of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his or her rights and privileges conferred by this chapter.*

*B. Any petition alleging denial of rights and privileges conferred by this chapter by a board, bureau, commission, authority, district or agency of the state government or by a standing or other committee of the General Assembly, shall be addressed to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.*

Subsection A of § 2.2-3713 refers to *the county or city from which the public body has been elected or appointed*, thus strongly inferring that this subsection is meant to apply to **local** public bodies (i.e., those elected or appointed from counties or cities), rather than **state** public bodies. However, while the phrase *local public body* is used elsewhere in FOIA,<sup>28</sup> it is not used in this subsection. By contrast, subsection B of § 2.2-3713 refers to entities *of the state government or...of the General Assembly*, meaning that this subsection is meant to apply to **state** public bodies. However, between the two subsections, only subsection A of § 2.2-3713 actually uses the term *public body*. It has generally been understood that subsection B of § 2.2-3713 also refers to *public bodies*, both because the entities it lists closely match those listed in the definition of *public body* in 2.2-3701,<sup>29</sup> and because generally an entity which is not a *public body* is not subject to FOIA. While it is generally understood in context to refer to *public bodies*, subsection B of § 2.2-3713 does not explicitly use the term *public body*.

Following the denial of his petition for appeal, Mr. Shaw has indicated to staff that he intends to continue to pursue this matter, but now is left with the question of where he is to file a petition for relief. In its second Order, the Circuit Court indicated that Mr. Shaw should file his petition in the City of Charlottesville or the County of Albemarle, where the University is located, pursuant to subsection A of § 2.2-3713. However, the language of that subsection does not appear to be applicable to the University. The University, as an entity, is not elected or appointed to serve from any county or city.<sup>30</sup> The members of the Board of Visitors of the University are appointed by the Governor either from *the Commonwealth at large* or are *nonresident alumni*, rather than being elected or appointed to serve from any county or city.<sup>31</sup> It appears that the trial court in this matter focused on the use of the term *public body* within subsection A of § 2.2-3713, rather than on the language requiring that the *public body* have been elected or appointed from a county or city, thus leading to confusion in the application of the venue provisions of FOIA.

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<sup>28</sup> See subdivision 2 of § 2.2-3705.1, subdivision 3 of § 2.2-3705.3, subdivision 18 of § 2.2-3705.5, subdivision 18 of § 2.2-3705.6, and subsection B of § 2.2-3705.8 (all using the phrase *local public body* or *local public bodies*).

<sup>29</sup> The definition of *public body* in § 2.2-3701 includes, among others, *any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth*; subsection B of § 2.2-3713 includes *a board, bureau, commission, authority, district or agency of the state government or...a standing or other committee of the General Assembly*.

<sup>30</sup> See § 23-14 (wherein, along with other public institutions of higher education, *the rector and visitors of the University of Virginia...are classified as educational institutions and are declared to be public bodies and constituted as governmental instrumentalities for the dissemination of education*); § 23-69 (*The board of visitors of the University of Virginia shall be and remain a corporation, under the style of "the Rector and Visitors of the University of Virginia," ....The rector and visitors of the University of Virginia shall be at all times subject to the control of the General Assembly.*); § 23-62 (continuing the University of Virginia); Code 1919, § 806, and Code 1887, § 1541 (both continuing the rector and visitors of the University of Virginia as a corporation subject to the control of the General Assembly); Code 1819, c. 34 (by which the General Assembly established the University of Virginia).

<sup>31</sup> Subsection A of § 23-70 states that *[t]he board of visitors is to consist of sixteen visitors appointed by the Governor, of whom at least thirteen shall be appointed from the Commonwealth at large and not more than three shall be appointed from the nonresident alumni of the University of Virginia.*

This case thus brings up broader concerns over the definition of *public body* and the venue provisions of FOIA, aside from the question of the status of the University as a state or local public body and the question of where Mr. Shaw is to seek relief. In its second Order, the Circuit Court opined that even if the University is a state agency, a petition against it must still be brought under subsection A of § 2.2-3711 because the Board of Visitors of the University is a *public body* as defined in § 2.2-3701. Expanding upon the Circuit Court's reasoning in its Order of October 26, 2005, as quoted above, it would appear that any entity specifically included in the definition of *public body* in § 2.2-3701 must therefore be subject to the venue provisions of subsection A of § 2.2-3713, even if that entity is listed in subsection B of § 2.2-3713. While this conclusion appears contradictory to the language of the statute itself, the Supreme Court of Virginia stated in its refusal of Mr. Shaw's petition for appeal that it found no reversible error in the Circuit Court's judgment.

Research by staff has not revealed any other Virginia cases or opinions of the Attorney General specifically addressing the venue provisions of FOIA.<sup>32</sup> The FOIA Council may wish to examine the definition of *public body* in § 2.2-3701, the venue provisions of § 2.2-3713, or take other action in order to resolve any confusion regarding the definition of *public body* and the venue provisions of FOIA and to prevent a situation such as that facing Mr. Shaw from arising in the future. A possible solution may be to include the term *public body* in both venue provisions, to clarify that all entities potentially subject to a FOIA petition as defendants are *public bodies*. Additionally, a specific reference to the local nature of the public bodies under consideration in subsection A of § 2.2-2713 may help to clarify the law's intent. Another possible solution may be to clarify the definition of *public body* in § 2.2-3701 to differentiate between those which are local in character and those at the state level, and then make corresponding changes in the venue provisions.

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<sup>32</sup> Research did show that the University has been sued several times under FOIA, and all reported cases found were filed in the Circuit Court of the City of Richmond, although none directly addressed the issue of venue. See *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505 (1997); *Redinger v. Casteen*, 39 Va. Cir. 176 (1996); *Redinger v. Casteen*, 36 Va. 479 (1995); *Redinger v. Casteen*, 35 Va. 380 (1995); *Students for Animals v. The Rector and Bd. of Visitors of the Univ. of Virginia*, 12 Va. Cir. 247 (1988).



White Dog v. Culpeper County Board of Supervisors:  
*The Virginia Supreme Court examines the closed meeting exemption for contract negotiations under the Virginia Freedom of Information Act.*<sup>33</sup>

Alan Gernhardt, Staff Attorney  
Maria J.K. Everett, Senior Attorney

## **Introduction**

On September 15, 2006, the Supreme Court of Virginia published its unanimous decision in the case of *White Dog Publishing v. Culpeper County Board of Supervisors*, Record No. 052333, 634 S.E.2d 334 (2006). The Supreme Court found that in closing a meeting to the public, the Culpeper County Board of Supervisors ("the Board") had improperly invoked the contract negotiations exemption, in violation of the Virginia Freedom of Information Act ("FOIA")<sup>34</sup>. This closed meeting exemption was added to FOIA in 2003 as an exemption to protect a public body's bargaining position and negotiating strategy in contractual matters, in order to ensure good stewardship and the best use of the public money.<sup>35</sup> The Court's decision is the first interpreting this closed meeting exemption and sets precedent regarding the scope of the exemption and the type of contract negotiation discussions allowed to be held in closed meetings. While this decision will likely impact all public bodies in the Commonwealth, it will be especially relevant in the context of local school construction projects.

## **Background and Procedural History**

There was a great deal of public interest and concern regarding the construction of a new public high school in Culpeper County. Both the Board and the Culpeper County School Board ("the School Board") had held public meetings on the subject. In June, 2004, the School Board entered into a contract with SHW Group, an architectural firm, regarding the plan, design, and construction of a new high school. The Board was not a party to this contract originally, but became a party by subsequent amendment to the contract. After becoming a party to the contract, the Board sought a second amendment to the contract directing the architect to consider other construction options besides those in the original contract. It appears that the School Board favored one option, while the Board wished to consider several other options before reaching a final decision regarding the project. During its open meeting on October 5, 2004, the Board approved the second amendment to the contract, directing the architect to consider multiple options for the project.

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<sup>33</sup> Virginia Legislative Issue Brief No. 44, October 2006, published by the Division of Legislative Services

<sup>34</sup> Code of Virginia § 2.2-3711(A)(30).

<sup>35</sup> Note that the contract negotiations exemption was drafted originally as an exemption of general application, as opposed to the majority of FOIA exemptions which are both agency and conduct specific.

The Board also convened a closed meeting on the same date. Among other stated purposes, the Board's motion to convene a closed meeting cited the contract negotiations exemption for a discussion "with the County Attorney and staff [about] changes to a specific public contract where public discussion would adversely affect the bargaining and negotiating position of the County." A reporter for the The Culpeper Citizen newspaper attended the October 5, 2006 meeting of the Board, but left when the Board closed the meeting. The reporter later testified that she left when the Board closed the meeting because it was not apparent that any matters relevant to the high school were to be discussed during the closed meeting. However, during the closed portion of the meeting, the Board actually did meet with an architect from SHW Group involved in the high school construction project. The Board later expressed a belief that it needed to speak with the architect privately, outside the presence of School Board members, in order to have a frank and candid discussion regarding options not favored by the School Board. It was felt that the architect was more guarded in discussing other options when School Board members were present. After returning to open meeting and certifying the closed meeting, the Board adopted a motion to have the architect examine several specific options regarding the construction of a new high school.

White Dog Publishing, Inc. ("White Dog"), which publishes The Culpeper Citizen, subsequently filed a petition for mandamus against the Board in general district court alleging that the Board had violated the Virginia Freedom of Information Act (FOIA) at its October 5, 2006, meeting. White Dog alleged that the motion to convene the closed meeting did not meet the procedural requirements of FOIA, and that the exemption for contract negotiations did not apply to the topics discussed during the closed meeting. White Dog sought records of the closed meeting, and attorney's fees and costs. After an evidentiary hearing, the general district court ruled in favor of the Board on all counts, finding that the Board had not violated FOIA.

White Dog then appealed to the circuit court, where two other newspaper publishers (collectively, "the publishers") were granted leave to intervene in the suit. The circuit court held that the Board's motion failed to meet the procedural requirements for a motion to convene a closed meeting under FOIA,<sup>36</sup> but that the closed meeting was not held in violation of FOIA because the purpose of the discussion was properly exempt under the contract negotiations exemption. Recognizing that the publishers had prevailed on one count, but not wholly, the circuit court also held that special circumstances made an award of attorney's fees and costs unjust. The publishers then appealed the circuit court's decision to the Supreme Court of Virginia, alleging that the circuit court erred in its interpretation of the closed meeting exemption, that the facts showed that the Board's discussion in closed meeting did not fall under the allowed purpose of the exemption, and that the circuit court should have awarded attorney's fees and costs to the publishers.

### **The Supreme Court Decision**

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<sup>36</sup> Code of Virginia § 2.2-3712(A); note that this issue was not raised on appeal. The circuit court's ruling in favor of the publishers stands.

The Supreme Court found that in the closed meeting the Board discussed "its strategy in relation to the School Board due to the policy dispute between those two public bodies about the new high school facility." The Court held that this was not an allowed purpose under the exemption. The exemption permits a public body to convene a closed meeting for the "[d]iscussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body." Stating that it was bound to apply FOIA's narrow construction policy,<sup>37</sup> the Court stated as follows:

The unambiguous language in Code § 2.2-3711(A)(30), viewed in its entirety, demonstrates that the purpose of the exemption is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body's bargaining position or negotiating strategy regarding the contract....the exemption does not allow a public body to close a meeting in order to discuss the application or enforcement of the scope or terms of a previously awarded public contract.

There were no disputed facts in this case. The Court accepted the Board's assertion that the Board held the closed meeting in order to discuss the scope of the contract in relation to the School Board's position, and that the Board felt that it needed a candid analysis from the architect to do so. Because such purpose "was not for forming or modifying a procurement contract" the Court found that the Board violated FOIA by closing this meeting on the basis of the contract negotiations exemption. The Court also reversed the decision of the circuit court regarding costs and attorney's fees. The circuit court had found that "special circumstances" made the award of such costs and fees unjust. The Court found, based upon the record and in light of the Court's holding on the merits in favor of the publishers, that none of the circumstances described by the circuit court made such an award unjust, and therefore remanded the case to the circuit court for a determination of the award to the publishers.

In this decision the Court has set the boundaries of the contract negotiations exemption in three ways. First, the Court clarified that the exemption may be used for discussions relating to both the formation and the modification of public contracts, but not for discussions regarding the enforcement or application of existing contracts. Second, the decision interprets the exemption such that it may be used only in the context of procurement contracts. Third, the decision indicates that the exemption only applies to discussions that might jeopardize a public body's bargaining position or negotiating strategy

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<sup>37</sup> Code of Virginia § 2.2-3700(B)("Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.").

in relation to a vendor. Each of these three aspects of the Court's decision is discussed in greater detail below.

**A. Closed meeting discussions regarding contractual amendments are permitted under the contract negotiations exemption.**

At issue in this case was whether the contract negotiations exemption allows for the discussion of the terms and scope of a covered contract once the contract has been awarded. In other words, could the exemption be used to discuss the amendment of an existing contract? The Board argued, based on the language of the exemption, that it covered two types of discussions: (1) discussion of the award of a public contract, and (2) discussion of the terms and scope of a public contract. The discussion of contractual amendments would appear to fall under the second category as argued by the Board. However, the Court appears to have taken a somewhat different approach in interpreting this exemption. The Court held that closed meeting discussions could be held only in the context of awarding, forming, or modifying a public contract. Thus a discussion concerning the terms and scope of a public contract may not be held outside of one of these contexts. For example, under this exemption as interpreted by the Court, a public body could not hold a closed meeting to discuss the terms and scope of a contract that has already been awarded, unless the discussion is in the context of a modification to the existing contract. The Court specifically held that discussions of the enforcement or application of a public contract that has already been awarded are not covered by this exemption. Note that the Board argued that it was in fact discussing a potential amendment to the contract, but the Court appears to have rejected this characterization of the facts of the case. The Court found that the Board was discussing its strategy in relation to a policy dispute with the School Board, rather than discussing an amendment of the terms or scope of the contract with the architect. Thus the Court found that "the purpose of the Board's closed meeting was not for forming or modifying a procurement contract" and did not properly fall under the allowed purpose of the exemption.

**B. The contract negotiations exemption only applies in the context of procurement contracts.**

As quoted above, the Court found that the exemption's purpose "is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process." In rejecting the Board's interpretation of the exemption, the Court further stated as follows:

The Board's view of the exemption would allow any discussion about the scope or terms of an awarded contract to occur during a closed session if the discussion would adversely affect some aspect of the Board's bargaining position or negotiating strategy. The Board does not limit the exemption to discussions involving procurement. Such an expansive interpretation of Code § 2.2-3711(A)(30) would be inconsistent with the General Assembly's directive that an exemption to FOIA's requirement of open meetings be narrowly construed.

(Emphasis in original.) Thus the Court's decision limits the application of this exemption to negotiations of procurement contracts. Discussions regarding other types of contracts may not be held during closed meetings under this exemption.<sup>38</sup>

**C. The contract negotiations exemption only applies in the context of a public body's bargaining position or negotiating strategy in relation to a vendor.**

The Court explicitly agreed with the Board that the Board's purpose in holding the closed meeting was to discuss options with the architect in order to position the Board to negotiate the scope of the contract with the School Board. The Court accepted the Board's testimony that it sought the architect's "candid analysis of the options that might be included in the scope of his contract and his assistance in convincing the School Board to agree to a scope of work." In this case the architect was actually present during the Board's closed meeting, but in fact "no negotiations with SHW occurred during the closed session." Because the Board was discussing its strategy in relation to the School Board, the Court found that it was "not discussing changes in the terms or scope of the SHW contract vis-à-vis the vendor." The court held that this is not a purpose allowed under the exemption, because the purpose "was not for forming or modifying a procurement contract." Thus the Court has held under these facts that where § 2.2-3711(A)(30) refers to "the bargaining position or negotiating strategy of the public body," it specifically refers to the position or strategy relative to a vendor in a procurement transaction.

**Conclusion**

The specific factual posture of this case, particularly the relationship between the parties to the contract at issue, may affect the value of this decision as precedent for other situations. School boards are political subdivisions in their own right, and are empowered to negotiate contracts for things such as the construction of new school facilities that are a part of its capital improvement plan. However, the responsibility for funding such projects is vested with the governing body (in this case, the Board). There is only one source of public funds in this situation. In most cases, only the school board and the selected contractor are parties to a school construction contract. The governing body approves or disapproves the funding for the project based on a budget projection, but does not typically become a party to the contract. When a public body is not a party to the contract, it cannot invoke the contract negotiations exemption to hold a closed meeting to discuss the contract (i.e. it is not negotiating the contract, so cannot use the exemption).

The instant case is atypical because the Board did become a party to the contract between the School Board and the architect. However, keep in mind that there is still only a single source of public funds involved. In this case, the two public bodies involved share an interest in receiving the best possible deal for the least expenditure of public funds, and thus their bargaining positions and negotiating strategies are not "adverse" to each other. By

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<sup>38</sup> Note that while the Court has interpreted this exemption to apply only to procurement contracts, other exemptions might apply to discussions regarding other types of contracts, depending on the specific context.

contrast, of course, the vendor in such a situation seeks to maximize profit, and so does have an adverse bargaining position or negotiating strategy in relation to the public bodies. This is not to say that the School Board and the Board in this case did not disagree, but their differences were in regard to a "policy dispute," as characterized by the Court.<sup>39</sup> Regarding the public funds used to pay for the contract, their bargaining positions were not adverse to each other. The exemption by its own terms cannot apply to a discussion where such financial adversity is not present; discussions of policy or political differences are not covered. At the heart of this contract negotiations exemption is recognition of the importance of good stewardship of public funds. Without such an exemption, public bodies would have to discuss their bargaining positions and negotiating strategies during open meetings, meetings which any adverse party would surely attend to gain advantage over the public body, resulting in higher costs to the citizenry. Protecting a public body's bargaining position and negotiating strategy by allowing closed meetings thus facilitates the ability of a public body to fulfill its obligation to be a good steward of the public money.

While the Court did not explicitly address this aspect of the facts, it is an important consideration regarding the use of the Court's decision as precedent for other situations. Consider an instance where two public bodies representing different localities, such as a neighboring county and city, with separate sources of public funds, are jointly entering a procurement contract with a third party vendor. For example, if a county and city jointly agreed to build a regional landfill to be operated by a private enterprise, the county and city may have legitimately adverse bargaining positions or negotiating strategies in relation to each other, as each seeks to obtain the best deal for its constituents. The city may negotiate to have the county pay for the majority of the goods provided or services rendered by the vendor, and vice versa. Each public body would also hold an adverse position to the third party vendor, as the vendor will of course seek to maximize its profits, while both public bodies seek to minimize the amounts they pay. While such a case may be differentiated from this decision on the facts, the Courts decision stated unconditionally that the use of the exemption is limited to a public body's bargaining position vis-à-vis a vendor. Thus it is unclear whether public bodies with financially adverse bargaining positions in relation to each other may use this closed meeting exemption for discussing those positions.

Additionally, the Court's decision limits the use of the exemption to procurement transactions, but it does not define those transactions or refer to a specific procurement law. In common usage, to "procure" means "to obtain; acquire,"<sup>40</sup> and "procurement" is defined as the "act of getting or obtaining something."<sup>41</sup> Similarly, a "procurement contract" is defined as a "contract in which a government receives goods or services."<sup>42</sup> Legally, in order to have a contract, there must an offer, acceptance, and consideration given. The language of the exemption limits its application to discussions of the award of public contracts "involving the expenditure of public funds." Those public funds are the consideration

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<sup>39</sup> The facts of this case underscore the political tension extant between school boards and governing bodies inherent by design.

<sup>40</sup> The American Heritage Dictionary at 988 (2nd College ed. 1982)(the word "procurement" is not separately defined therein).

<sup>41</sup> Black's Law Dictionary (8th ed. 2004) at 1244.

<sup>42</sup> *Id.* at 347.

(although not necessarily the sole consideration) given by the public body. The public body must receive something in return for its consideration for a contract to exist at all. In this context of this exemption, therefore, all contracts covered by the exemption are contracts in which the government receives goods or services, i.e. procurement contracts under this general definition. Additionally, note that the language of the exemption explicitly includes "interviews of bidders or offerors," terms typically used in procurement laws. By contrast, a more specific usage of "procurement contract" may refer to a contract formed as part of a transaction under a specific procurement statute.<sup>43</sup> However, the Court did not specify that the exemption was only to apply to contracts formed according to statutory procurement laws, and the language of the closed meeting exemption does not refer to any procurement laws, or in fact use the word "procurement" at all.

Thus it appears that the general usage of the term "procurement" is too broad to add meaning in this context, while a narrow usage limiting the exemption to transactions under specific procurement laws is not supported by the Court's decision or the language of the statute. It is uncertain whether the Court's holding that the exemption is limited to discussions regarding "procurement contracts" is merely descriptive under the general usage of "procurement," or whether it is meant as a further limitation upon the use of the exemption. The Court did state that "[t]he Board does not limit the exemption to discussions involving procurement. Such an expansive interpretation of Code § 2.2-3711(A)(30) would be inconsistent with the General Assembly's directive that an exemption to FOIA's requirement of open meetings be narrowly construed." This statement implies that the Court was using "procurement" as a word of limitation, not merely a descriptor. It is possible that the Court only intended to differentiate between what the exemption allows and what the Board actually discussed under the facts of this case (characterized by the Court as a "policy dispute" rather than a discussion of the formation, award, or modification of a procurement contract). However, without further clarification it is not clear precisely what the limitation is or how the limitation of the exemption to "procurement contracts" will actually work in practice.

Finally, consider what legislative history is available to shed light on the General Assembly's intent in enacting this exemption. The interaction of FOIA and the Virginia Public Procurement Act (VPPA) was the subject of study by a subcommittee of the Virginia Freedom of Information Advisory Council ("FOIA Council") in 2002, which ultimately led to the introduction of Senate Bill 737 as a recommendation of the FOIA Council.<sup>44</sup> Senate Bill 737 was passed by the General Assembly in 2003,<sup>45</sup> and contained both a records exemption<sup>46</sup> and the closed meeting exemption that was the subject of the Court's decision in this case. This background is important in context of the Court's interpretation of the meeting exemption as being limited solely to discussions regarding procurement contracts. The language used in the records exemption is informative:

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<sup>43</sup> See, e.g., the Virginia Public Procurement Act (Code §§ 2.2-4300 through 2.2-4377), the Public-Private Transportation Act of 1995 (Code §§ 56-556 through 56-575), and The Public-Private Education Facilities and Infrastructure Act of 2002 (Code §§ 56-575.1 through 56-575.17).

<sup>44</sup> Annual Report of the Virginia Freedom of Information Advisory Council, House Doc. No. 20 (2003).

<sup>45</sup> Va. Acts Ch. 274 (2003).

<sup>46</sup> Code of Virginia § 2.2-3705.1(12).

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

This language demonstrates that the General Assembly gave specific consideration to both procurement and other types of contracts when it passed Senate Bill 737. Similarly, there are other exemptions specific to particular procurement laws found in other sections of FOIA, demonstrating further that the General Assembly has given special consideration to the interaction of FOIA with the various procurement laws.<sup>47</sup> Looking to other closed meeting exemptions for additional context, note that discussions regarding many specific types of contracts could be held in closed meetings pursuant to other exemptions. For example, the personnel exemption<sup>48</sup> could be used to hold a closed meeting for the discussion an employment contract, the exemption regarding the acquisition or disposition of real property<sup>49</sup> could be used to hold a closed meeting for the discussion of a real estate contract, and the exemption for consultation with legal counsel<sup>50</sup> might apply to a wide variety of contractual discussions.<sup>51</sup> Given this context in relation to other closed meeting exemptions, it appears that the contract negotiations exemption at issue is to some degree a "catch-all" provision that could be used for contract negotiations not covered by other exemptions. In its report, the FOIA Council subcommittee stated that "[p]articipants in the meeting noted that in addition to procurement situations, there is no clear exemption allowing for a closed meeting for contract negotiations generally."<sup>52</sup> Thus it appears that the subcommittee studying the issue sought to create a more general exemption that would allow for closed meeting discussions concerning both procurement and other types of contracts, because no such exemption existed at the time. This background suggests that the legislative intent was to create a contract negotiations exemption of more general application. It therefore appears that the Court's interpretation of this exemption may be at odds with the original legislative intent, perhaps due to the wording of the exemption, wording that may be corrected by legislative amendment.

In light of the preceding considerations, the General Assembly may wish to consider further legislation clarifying its intent regarding this exemption, particularly as to whether

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<sup>47</sup> See §§ 2.2-3705.6(10) and (11); § 2.2-3711(A)(29).

<sup>48</sup> Code of Virginia § 2.2-3711(A)(1).

<sup>49</sup> Code of Virginia § 2.2-3711(A)(3).

<sup>50</sup> Code of Virginia § 2.2-3711(A)(7).

<sup>51</sup> Note that these three examples are not exclusive, as there are several other closed meeting exemptions that may allow closed meetings for the purpose of discussing particular types of contracts.

<sup>52</sup> *Supra* n.9.



the exemption is intended to be limited in application solely to procurement contracts and whether the "bargaining position or negotiating strategy" must be that in relation to a vendor. Until such time, the Court has set the boundaries of the contract negotiations exemption: the exemption may only be used in the context of formation or modification of procurement contracts when an open meeting would adversely affect the public body's bargaining position or negotiating strategy vis-à-vis a vendor.

## ***II. Decision of the U.S. Court of Appeals for the Third Circuit***

*Lee v. Minner*, 369 F.Supp.2d 527 (D.Del. 2005), *aff'd*, 458 F.3d 194 (3d Cir. 2006).

Matthew Lee, a citizen of New York, requested from Delaware's Attorney General records concerning Delaware's decision to join in a nationwide settlement resolving an investigation into deceptive lending practices by a business. Delaware's Freedom of Information Act (Delaware FOIA) granted rights of access to Delaware public records only to citizens of Delaware, not to citizens of other states. Mr. Lee's request was refused on the basis that Mr. Lee was not a citizen of Delaware. Mr. Lee reiterated his request and was again refused. After the second refusal he filed a complaint in the United States District Court for the District of Delaware, asserting that by limiting access to public records solely to Delaware citizens, Delaware FOIA violates the Privileges and Immunities Clause of the Constitution of the United States. Ruling in favor of Mr. Lee, the District Court found that Delaware FOIA violated two rights under the Privileges and Immunities Clause: (1) Mr. Lee's right to pursue a "common calling" as a journalist, and (2) his right to participate in the national political process.

The case was appealed to the Court of Appeals for the Third Circuit, which upheld the decision of the District Court. The Circuit Court found it unnecessary to consider the "common calling" argument, as it decided in Mr. Lee's favor on the grounds that Delaware FOIA's citizenship limitation violated Mr. Lee's right to participate in the national political process. Applying a three-step analysis the Circuit Court (1) found that participation in the national political process was a fundamental right protected by the Privileges and Immunities Clause, (2) found that Delaware's stated interest in defining its political community and strengthening the bond between its citizens and government was a substantial interest, and (3) found that Delaware's stated interest was not furthered by limiting access to public records to Delaware citizens. Because the citizenship limitation did not further a substantial interest and did impair a fundamental right under the Privileges and Immunities Clause, the Circuit Court held that limitation to be unconstitutional.

This decision may be influential but is not binding in Virginia, as Virginia is part of the Fourth Circuit rather than the Third Circuit. The case is considered to be precedent-setting, according to legal experts, because there is little case law on the issue. At this time neither the federal nor the state courts in Virginia have issued any opinions regarding the citizenship requirement in Virginia's FOIA. Virginia's FOIA by its terms is limited to Virginia citizens; but unlike Delaware, also includes access rights to media representatives with circulation in or out of Virginia and who broadcast in or out of Virginia. It will be

interesting to follow what if any impact this case will have on other states' FOIA law and in Virginia in particular.

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