



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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## **2007 FOIA LEGISLATIVE UPDATE**

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2007.*

### **I. Introduction**

The General Assembly passed a total of 19 bills amending the Virginia Freedom of Information Act (FOIA) in 2007. Four of the 19 bills were recommended by the Freedom of Information Advisory Council: HB 1791 (Griffith), adding 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; SB 1001 (Houck), addressing various provisions regarding electronic communication meetings; SB 1002 (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); and SB 1003 (Houck), concerning the venue for FOIA enforcement actions.

Of the 19 bills, four bills created three new record exemptions to FOIA:

- Two bills add an identical exemption regarding the identities of persons designated to conduct executions (HB 2418 and SB 1295);
- Adds an exemption for certain information contained in rabies vaccination certificates provided to local treasurers; this bill was passed with a one-year sunset clause, and was referred to the FOIA Council for study (HB 2558);
- Adds an exemption for certain records held by the Virginia Retirement System (VRS) or local retirement systems; effective March 21, 2007 (SB 1369).

Only one bill adds a new closed meeting exemption to § 2.2-3711:

- SB 1369, mentioned above, also adds a meetings exemption to correspond to the record exemption it provides for certain records held by the Virginia Retirement System (VRS) or local retirement systems.

Fifteen bills amend existing provisions of FOIA:

- Provides that FOIA does not afford any rights to persons civilly committed pursuant to the Sexually Violent Predators Act, except in exercising their constitutionally protected rights (HB 1790 amending § 2.2-3703);
- 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 (HB 1791 amending § 2.2-3704);
- Two identical bills provide that FOIA does not apply to land records available via secure remote access, in addition to making various related changes to laws outside of FOIA (HB 2062 and SB 824 amending § 2.2-3703);
- Expands the current record exemption for state or local park and recreation departments to include local and regional park authorities (HB 2259 amending § 2.2-3705.7);
- Allows state public bodies to hold electronic meetings without a physically assembled quorum under certain conditions when the Governor has declared a state of emergency (HB 2669 amending § 2.2-3708);
- Clarifies where meeting notices and minutes of state public bodies must be posted (HB 2758 amending §§ 2.2-3707 and 2.2-3707.1);
- Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services.<sup>1</sup> (HB 2858 amending §§ 2.2-3706 and 2.2-3711)
- Technical amendment to an existing records exemption for the Department of Environmental Quality and other related entities found in corresponding to the reorganization of those entities; not effective until July 1, 2008 (HB 3113 and SB 1403 amending § 2.2-3705.7);

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<sup>1</sup> Note that this bill effectively removes the exemption for closed meetings of community corrections resources boards regarding the placement of certain individuals in community diversion programs, currently subdivision A 18 of § 2.2-3711. Our understanding is that because of organizational changes outside of FOIA, these community diversion programs no longer exist, rendering the exemption moot.

- Amends an existing proprietary records exemption to include such records held by a nonprofit, nonstock corporation created by the Virginia Economic Development Partnership Authority. (HB 3171 amending § 2.2-3705.6);
- Various amendments relaxing certain requirements for electronic communications meetings and adding relevant definitions (SB 1001 amending §§ 2.2-3701 and 2.2-3708);
- Amends an existing exemption for certain records under the PPTA (Public-Private Transportation Act of 1995) and PPEA (Private Education Facilities and Infrastructure Act of 2002)(SB 1002 amending § 2.2-3705.6);
- Clarifies the venue provisions for bringing a petition to enforce FOIA (SB 1003 amending § 2.2-3713);
- Amends an existing closed meeting exemption to allow the discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure (SB 1111 amending § 2.2-3711).

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 2007 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes will become effective July 1, 2007.

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

### **§ 2.2-3701. Definitions.**

Adds definition of "electronic communications" and "regional public body" to § 2.2-3701, in addition to changes to the procedural requirements for electronic communication meetings made in § 2.2-3708. SB 1001 (2007 Acts of Assembly, c. 945)

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

Provides that FOIA does not afford any rights to persons civilly committed pursuant to the Sexually Violent Predators Act, except in exercising their constitutionally protected rights. HB 1790 (2007 Acts of Assembly, c. 438)

In addition to changes outside of FOIA regarding certain records held by clerks of court, provides that FOIA does not apply to land records available via secure remote access. HB 2062 (2007 Acts of Assembly, c. 626), SB 824 (2007 Acts of Assembly, c. 548)

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

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. HB 1791 (2007 Acts of Assembly, c. 439)

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

Amends an existing proprietary records exemption to include such records held by a nonprofit, nonstock corporation created by the Virginia Economic Development Partnership Authority pursuant to § 2.2-2240.1. HB 3171 (2007 Acts of Assembly, c. 693)

Amends existing subdivision 11 of § 2.2-3705.6 to allow 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 and PPEA 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. Also provides a meeting exemption in § 2.2-3711 and contains technical amendments. SB 1002 (2007 Acts of Assembly, c. 374)

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

Amends the current record exemption for state or local park and recreation departments to include local and regional park authorities. HB 2259 (2007 Acts of Assembly, c. 406)

Adds an exemption that provides that the identities of persons designated by the Director to conduct an execution shall be exempt from FOIA, and shall not be subject to discovery or introduction as evidence in any civil proceeding, unless good cause is shown. HB 2418 (2007 Acts of Assembly, c. 652), SB 1295 (2007 Acts of Assembly, c. 737)

Adds an exemption for the identification of the breed of a vaccinated animal and any personal identifying information relating to the animal owner that is not made a part of an animal license application. This bill was passed with a one-year sunset provision such that it expires July 1, 2008, and was referred to the FOIA Council for a one-year study. HB 2558 (2007 Acts of Assembly, c. 660)

Consolidates the State Air Pollution Control Board, the State Water Control Board, and the Waste Management Board into one eleven-member citizen board--the Virginia Board of Environmental Quality--with the authority to adopt regulations, including general permit regulations. All other responsibilities of the existing boards, including the authority to issue licenses and permits, shall be transferred to the Department of Environmental Quality. Contains a technical amendment to the existing exemption in subdivision 16 of § 2.2-3705.7 to correspond to these changes. The bill includes a "re-enactment clause" that requires the General Assembly of 2008 to reaffirm the legislation and delays the effective date until July 1, 2008. HB 3113 (2007 Acts of Assembly, c. 838), SB 1403 (2007 Acts of Assembly, c. 841)

Adds an exemption for the Virginia Retirement System (VRS) and a local retirement system for trade secrets provided by a private entity to the extent that the disclosure of such records would have an adverse impact on the financial interest of the VRS or local retirement system. Also adds a corresponding closed meeting exemption to § 2.2-3711. Passed with an

emergency enactment clause effective March 21, 2007. SB 1369 (2007 Acts of Assembly, c. 739)

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

Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services, including changes in §§ 2.2-3706 and 2.2-3711 of FOIA. HB 2858 (2007 Acts of Assembly, c. 133)

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

Clarifies that meeting notices of state public bodies must be posted on the Commonwealth Calendar website. HB 2758 (2007 Acts of Assembly, c. 300)

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

Clarifies that the minutes of certain state public bodies must be posted on the Commonwealth Calendar website. HB 2758 (2007 Acts of Assembly, c. 300)

**§ 2.2-3708. Electronic communication meetings.**

Allows state public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location when (i) the Governor has declared a state of emergency in accordance with § 44-146.17, (ii) the meeting is necessary to take action to address the emergency, and (iii) the public body otherwise complies with the electronic communication meetings law. HB 2669 (2007 Acts of Assembly, c. 512)

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. Also adds definitions to § 2.2-3701 and contains technical amendments. SB 1001 (2007 Acts of Assembly, c. 374)

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

Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services, including changes in §§ 2.2-3706 and 2.2-3711 of FOIA. HB 2858 (2007 Acts of Assembly, c. 133)

Amends existing subdivision A 29 of § 2.2-3711 to allow any independent review panel appointed to review PPTA proposals and advise the responsible public entity concerning such records to meet in a closed meeting. Also amends a record exemption in § 2.2-3705.6 and contains technical amendments. SB 1002 (2007 Acts of Assembly, c. 945)

Amends existing subdivision A 20 of § 2.2-3711 to add a closed meeting exemption for the discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure. SB 1111 (2007 Acts of Assembly, c. 566)

Adds a closed meeting exemption for the Board of Trustees of VRS, the Investment Advisory Committee, and local retirement systems corresponding to the records exemption added to § 2.2-3705.6 (see above). Effective March 21, 2007. SB 1369 (2007 Acts of Assembly, c. 739)

**§ 2.2-3713. Proceedings for enforcement of chapter.**

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. SB 1003 (2007 Acts of Assembly, c. 560)

**III. Other Access-Related Legislation**

## **Title 2.2 Administration of Government**

**Government Data Collection and Dissemination Practices Act; rights of data subjects.** Requires agencies covered by the Government Data Collection and Dissemination Practices Act to respond to a data subject for inspection of his record in five working days after receiving the request or within a time period as may be mutually agreed upon by the agency and the data subject. The bill references the pertinent section of the Virginia Freedom of Information Act (FOIA) so as to treat requests made under the Government Data Collection and Dissemination Practices Act in the same manner as requests under FOIA, in terms of response time and invoking applicable exemptions, etc. The bill also clarifies that charges for document production shall be in accordance with FOIA provisions.<sup>1</sup> HB 2527 (2007 Acts of Assembly, c. 232)

**Security of confidential state data.** Requires the Chief Information Officer of the Commonwealth to develop policies, procedures, and standards relating to the security data maintained and used by state agencies.<sup>2</sup> SB 845 (2007 Acts of Assembly, c. 769)

**Address Confidentiality Program; victims of domestic violence.** Requires the Statewide Facilitator for Victims of Domestic Violence in the Office of the Attorney General to establish the "Address Confidentiality Program" to protect victims of domestic violence by authorizing the use of designated addresses for such victims. The bill limits its application to Arlington County with a report from the Office of the Attorney General on evaluation of the program by December 31, 2007.<sup>3</sup> SB 938 (2007 Acts of Assembly, c. 599)

**State and Local Government Conflict of Interests Act.** Provides that if the disqualification of a state or local government officer or employee who has a personal interest in a transaction leaves fewer than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote.<sup>4</sup> SB 1400 (2007 Acts of Assembly, c. 613)

## **Title 8.01 Civil Remedies and Procedure.**

**Privileged communications; physician peer review and physician accreditation entities.** Clarifies that privilege attaches to the proceedings,

minutes, records, and reports of a quality assurance, quality of care, or peer review committee of a national or state physician peer review entity or physician accreditation entity.<sup>5</sup> HB 3090 (2007 Acts of Assembly, c. 530)

### **Title 15.2 Counties, Cities, and Towns.**

**Traffic signal enforcement programs; civil penalty.** Grants localities the authority to operate traffic signal enforcement systems. Among other provisions, limits the use and retention of images recorded and provides other parameters and limitations for localities.<sup>6</sup> SB 829 (2007 Acts of Assembly, c. 903)

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

**Public records; protection of law-enforcement officers; penalty.** Includes identification of the person's primary residence address in the statute prohibiting the publishing of a person's name or photograph as well as their identifying information. Also states that if any person violates the statute (§ 18.2-186.3), and he knew or had reason to know that the person he was identifying was a law-enforcement officer, then he is guilty of a Class 6 felony instead of a Class 1 misdemeanor.<sup>7</sup> SB 1282 (2007 Acts of Assembly, c. 736)

### **Title 22.1 Education.**

**School crisis, emergency management, and medical emergency response plans.** Requires that local school boards annually review the written school crisis, emergency management, and medical emergency response plans and that the local division certify that review in writing to the Virginia Center on School Safety no later than August 31 of each year. Provides that local school boards have the authority to withhold or limit the review of any security plans and specific vulnerability assessment components as provided in subdivision 7 of § 2.2-3705.2.<sup>8</sup> HB 2271 (2007 Acts of Assembly, c. 44)

**Standards of Quality; changes in provisions.** Among other changes, requires local school divisions to post a current copy of the school division policies, including the Student Conduct Policy, on the local division's website while ensuring that printed copies of such policies are available, as needed, to citizens who do not have Internet access.<sup>9</sup> SB 795 (2007 Acts of Assembly, c. 234)

## **Title 24.2 Elections.**

**Elections; voter registration records.** Clarifies the duties of local electoral boards, general registrars, and the State Board of Elections regarding voter registration records and exceptions from public inspection. Requires State Board to provide general registrars with lists of registered voters and persons denied registration for public inspection.<sup>10</sup> HB 1642 (2007 Acts of Assembly, c.311)

**Elections; voter registration records; authorize matching with lists of other states; State Board of Elections to develop security policies and make annual report.** Authorizes the State Board of Elections to furnish voter lists to other states with protections for privacy of voter social security numbers. Authorizes cancellation of voter registration based on information from registration officials of other states. Makes conforming changes to sections referring to social security numbers to prohibit disclosure of parts of numbers. Requires State Board of Elections to (i) approve security procedures for transmitting voter lists to other states' Chief Election Officers, and (ii) monitor implementation with annual statistical reporting to the General Assembly starting July 1, 2008.<sup>11</sup> HB 2141 (2007 Acts of Assembly, c. 318)

## **Title 30 General Assembly.**

**Public-Private Partnership Advisory Commission.** Establishes the Public-Private Partnership Advisory Commission to review and advise responsible public entities that are agencies or institutions of the Commonwealth on detailed proposals for qualifying projects under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.). Adds section stating that records and information afforded the protection under subdivision 11 of § 2.2-3705.6 that are provided by a responsible public entity to the Commission shall continue to be protected from disclosure when in the possession of the Commission.<sup>12</sup> SB 756 (2007 Acts of Assembly, c. 764)

## **Title 32.1 Health.**

**Medical Examiner's reports and findings.** Requires that all Medical Examiner's reports shall be confidential and not available for discovery

except as provided and creates additional exceptions for reports concerning the death of a prisoner committed to the custody of any local correctional facility. The bill also eliminates allowance for any form of disclosure other than aggregate or statistical form of disclosure.<sup>13</sup> HB 2393 (2007 Acts of Assembly, c. 868)

**Child Fatality Review Team to obtain presentence reports.** Authorizes the Chief Medical Examiner to obtain and review presentence reports of any person convicted of a crime that led to the death of a child investigated by the Child Fatality Review Team.<sup>14</sup> HB 2523 (2007 Acts of Assembly, c. 411)

**Human research review committees; publication of results.** Provides that each human research review committee of an institution or agency shall ensure that the approved human research projects and the results of such projects are made public on the institution's or agency's website unless otherwise exempt from disclosure under the Virginia Freedom of Information Act.<sup>15</sup> HB 2567 (2007 Acts of Assembly, c. 413)

## **Title 37.2 Mental Health, Mental Retardation and Substance Abuse Services.**

**Sexually violent predators; civil commitment.** Among numerous other provisions, grants access to a variety of records to the Department of Mental Health, the CRC, and the Department of Corrections and provides that the existence of prior convictions or charges may be shown with affidavits or documentary evidence at the probable cause hearing.<sup>16</sup> HB 2671 (2007 Acts of Assembly, c. 876)

## **Title 42.1 Libraries.**

**Technology protection measures; public libraries.** Contains provisions regarding limitations on access to child pornography, obscenity, and materials deemed harmful to minors through library computers.<sup>17</sup> SB 1393 (2007 Acts of Assembly, c. 583)

## **Title 45.1 Mines and Mining.**

**Coal miner certification and mine safety.** Provides for the confidentiality of certain records and meetings regarding substance abuse test results of

certified persons.<sup>18</sup> HB 3190 (2007 Acts of Assembly, c. 894), SB 1091 (2007 Acts of Assembly, c. 914)

## **Title 46.2 Motor Vehicles.**

**Regulation of taxicab service by localities; public access to financial records.** Provides that financial data collected by local governing bodies shall be used only for consideration of rates or charges, or to determine financial responsibility, and shall be kept confidential by the governing body. The bill provides, however, that any certificate of insurance, bond, letter of credit, or other certification that the owner or operator has met the requirements of this chapter or of any local ordinance with regard to financial responsibility is not confidential.<sup>19</sup> SB 1000 (2007 Acts of Assembly, c. 238)

## **Title 51.5 Persons with Disabilities.**

**Brain and spinal cord injury registry.** Specifies that the registry shall include all brain and spinal cord injuries, regardless of severity, and updates the language relating to research on human subjects to be consistent with state and federal law. The bill also exempts physicians from the reporting requirement, and changes the timeline for reporting to within 30 days of identification for spinal cord injuries, to be consistent with the requirement for brain injuries.<sup>20</sup> HB 2732 (2007 Acts of Assembly, c. 666)

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

**Board of Medicine; disciplinary procedure.** Among other related provisions, requires the Board of Medicine to make available via any department website information regarding any final orders together with any associated notices which impose disciplinary action against a licensee of the Board.<sup>21</sup> HB 2157 (2007 Acts of Assembly, c. 861)

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<sup>1</sup> Amends § 2.2-3806.

<sup>2</sup> Amends §§ 2.2-2006 and 2.2-2009.

<sup>3</sup> Amends § 2.2-515.1; adds new § 2.2-515.2.

<sup>4</sup> Amends §§ 2.2-3112 and 15.2-1415.

<sup>5</sup> Amends § 8.01-581.17.

<sup>6</sup> Adds new § 15.2-968.1.

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- <sup>7</sup> Amends § 18.2-186.4.
- <sup>8</sup> Amends § 22.1-279.8.
- <sup>9</sup> Amends §§ 22.1-253.13:1 and 22.1-253.13:3 through 22.1-253.13:7.
- <sup>10</sup> Amends §§ 24.2-101, 24.2-107, 24.2-442, 24.2-443.3, and 24.2-444.
- <sup>11</sup> Amends §§ 24.2-107, 24.2-405, 24.2-406, 24.2-407.1, 24.2-411.1, 24.2-411.2, 24.2-416.5, 24.2-427, 24.2-444, 24.2-533, 24.2-706, and 24.2-1002.1.
- <sup>12</sup> Amends §§ 56-575.1, 56-575.3:1, 56-575.4, and 56-575.16; adds new §§ 30-278 through 30-281 and 56-575.18.
- <sup>13</sup> Amends §§ 32.1-283 and 32.1-283.4.
- <sup>14</sup> Amends § 32.1-283.1.
- <sup>15</sup> Amends § 32.1-162.19.
- <sup>16</sup> Amends §§ 19.2-169.3, 37.2-900, 37.2-901 through 37.2-905, 37.2-906, 37.2-907, 37.2-908, 37.2-910, and 37.2-912 ; adds new §§ 37.2-905.1 and 37.2-905.2.
- <sup>17</sup> Amends § 42.1-36.1.
- <sup>18</sup> Amends §§ 45.1-161.31, 45.1-161.32, 45.1-161.35, 45.1-161.37, 45.1-161.39, 45.1-161.64, 45.1-161.76, 45.1-161.78, 45.1-161.87, and 45.1-161.257.
- <sup>19</sup> Amends § 46.2-2062.
- <sup>20</sup> Amends § 51.5-11.
- <sup>21</sup> Amends §§ 54.1-2900, 54.1-2910.1, and 54.1-2912.3; adds new § 54.1-2910.2.