



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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May 20, 2008

2008 FOIA LEGISLATIVE UPDATE

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2008.*

I. Introduction

The General Assembly passed a total of 21 bills amending the Virginia Freedom of Information Act (FOIA) during the 2008 Regular Session. One bill amending FOIA was passed as a recommendation of the Freedom of Information Advisory Council (FOIA Council): SB 131 (Houck)/HB 854 (Ebbin), concerning emergency meetings of local public bodies. Additionally, SB 132 (Houck)/HB 634 (May), amending provisions of the Government Data Collection and Dissemination Practices Act, passed as a joint recommendation of the FOIA Council and the Joint Commission on Technology and Science (JCOTS). Similarly, SB 133 (Houck) and HB 633 (May), amending the Personal Information Privacy Act, also passed as a joint recommendation of the FOIA Council and JCOTS. SB 529 (Houck), concerning access to concealed carry handgun permits, was introduced as a recommendation of the FOIA Council and was referred to the FOIA Council for further study during the 2008 interim.

Of the 21 bills, nine bills created seven new record exemptions to FOIA as follows:

- Exempts certain records of public institutions of higher education concerning fundraising and donors. (HB 407/SB 130 amending § 2.2-3705.4);
- Exempts certain records of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing

- body; also adds a corresponding meetings exemption. (HB 520 amending § 2.2-3705.2);
- Exempts certain proprietary or confidential documents provided by an insurance carrier to the State Health Commissioner. (HB 603/SB 396 amending § 2.2-3705.6);
 - Exempts investigator notes, and other correspondence and information with respect to an active investigation conducted by or for the Board of Education related to the denial, suspension, or revocation of teacher licenses; also contains a corresponding meetings exemption. (HB 768 amending § 2.2-3705.3);
 - Exempts records maintained by the Department of the Treasury or participants in the Local Government Investment Pool, to the extent such records relate to information required to be provided by such participants to the Department to establish accounts. (HB 1367 amending § 2.2-3705.7);
 - Exempts certain records supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General's Office. (SB 210 amending § 2.2-3705.6);
 - Exempts certain records of the Office of the Attorney General acting pursuant to its enforcement authority under the Master Settlement Agreement (regarding certain tobacco product manufacturers), to the extent that such records contain reports, affidavits, correspondence, or other information submitted by a private business entity or principal thereof to the Office of the Attorney General. (SB 545 amending § 2.2-3705.3).

Three bills add new closed meeting exemptions to § 2.2-3711:

- Exempts certain meetings of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also contains a corresponding records exemption. (HB 520);
- Exempts the discussion or consideration by the Board of Education of records related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding records exemption. (HB 768);
- Exempts the discussion or consideration of confidential proprietary records provided by a private business to certain state, local, or regional industrial or economic development authorities or

organizations for business, trade and tourism development to be conducted in meetings not open to the public. (SB 593).

Eleven bills amend existing provisions of FOIA as follows:

- Establishes the Adult Fatality Review Team and adds Adult Fatality Review Team records to the existing exemption for Child Fatality Review Team records. (HB 251 amending § 2.2-3705.5);
- Removes an existing exemption for certain information contained in rabies vaccination certificates; contains provisions outside FOIA addressing the retention and destruction of such records to ensure that treasurers only retain the information required to be collected and made available for public inspection. (HB 537 amending §§ 2.2-3705.7 and 3.1-796.87:1).
- Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become effective unless reenacted by the 2009 Session of the General Assembly. (HB 760/SB 620 amending §§ 2.2-3705.3 and 2.2-3705.5);
- Allows certain local public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location under certain conditions when the Governor has declared a state of emergency. Also contains a technical amendment. (HB 854/SB 131 amending §§ 2.2-3701, 2.2-3708, and 2.2-3714);
- Broadens the current FOIA exemption to apply to any type of franchise and protects certain trade secrets and confidential proprietary information from both bidders for the franchise and the person who is ultimately awarded the franchise. (HB 1271 amending § 2.2-3705.6);
- Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. (HB 1280/SB 199 amending §§ 2.2-3705.3 and 2.2-3705.6);
- Exempts from public disclosure certain proprietary records submitted to the Innovative Technology Authority as part of a grant application by amending current provisions applicable to the Commonwealth

Health Research Board (CHRB); also contains a corresponding amendment to the existing CHRB meetings exemption. (HB 1458/SB 726 amending §§ 2.2-3705.6 and 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 2008 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, 2008.

II. Amendments to the Freedom of Information Act

§ 2.2-3701. Definitions.

Amends the definition of "meeting" to include a reference to § 2.2-3808.1. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

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

Adds an exemption for certain records of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also adds a corresponding meetings exemption. HB 520 (2008 Acts of Assembly, c. 721).

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

Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become effective unless reenacted by the 2009 Session of the General Assembly.

HB 760 (2008 Acts of Assembly, c. 821), SB 620 (2008 Acts of Assembly, c. 832).

Adds an exemption for investigator notes, and other correspondence and information with respect to an active investigation conducted by or for the Board of Education related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding meetings exemption. HB 768 (2008 Acts of Assembly, c. 668).

Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. HB 1280 (2008 Acts of Assembly, c. 387), SB 199 (2008 Acts of Assembly, c. 689).

Adds an exemption for certain records of the Office of the Attorney General acting pursuant to its enforcement authority under the Master Settlement Agreement (regarding certain tobacco product manufacturers), to the extent that such records contain reports, affidavits, correspondence, or other information submitted by a private business entity or principal thereof to the Office of the Attorney General. SB 545 (2008 Acts of Assembly, c. 758).

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

Adds an exemption for certain records of public institutions of higher education concerning fundraising and donors. HB 407 (2008 Acts of Assembly, c. 665), SB 130 (2008 Acts of Assembly, c. 561).

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

Establishes the Adult Fatality Review Team and adds Adult Fatality Review Team records to existing exemption for Child Fatality Review Team records. HB 251 (2008 Acts of Assembly, c. 539).

Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become

effective unless reenacted by the 2009 Session of the General Assembly. HB 760 (2008 Acts of Assembly, c. 821), SB 620 (2008 Acts of Assembly, c. 832).

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

Adds an exemption for certain proprietary or confidential documents provided by an insurance carrier to the State Health Commissioner. HB 603 (2008 Acts of Assembly, c. 71), SB 396 (2008 Acts of Assembly, c. 102).

Broadens the current FOIA exemption to apply to any type of franchise and protects certain trade secrets and confidential proprietary information from both bidders for the franchise and the person who is ultimately awarded the franchise. HB 1271 (2008 Acts of Assembly, c. 736).

Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. HB 1280 (2008 Acts of Assembly, c. 387), SB 199 (2008 Acts of Assembly, c. 689).

Exempts from public disclosure certain proprietary records submitted to the Innovative Technology Authority as part of a grant application by amending current provisions applicable to the Commonwealth Health Research Board (CHRB); also contains a corresponding amendment to the existing CHRB meetings exemption. HB 1458 (2008 Acts of Assembly, c. 743), SB 726 (2008 Acts of Assembly, c. 633).

Adds an exemption for certain records supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General's Office. SB 210 (2008 Acts of Assembly, c. 266).

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

Repeals an existing exemption for certain information contained in rabies vaccination certificates; contains provisions outside FOIA addressing the

retention and destruction of such records to ensure that treasurers only retain the information required to be collected and made available for public inspection. HB 537 (2008 Acts of Assembly, c. 16).

Adds a FOIA exemption for the records maintained by the Department of the Treasury or participants in the Local Government Investment Pool, to the extent such records relate to information required to be provided by such participants to the Department to establish accounts. HB 1367 (2008 Acts of Assembly, c. 739)

§ 2.2-3708. Electronic communication meetings.

Allows certain local public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location under certain conditions when the Governor has declared a state of emergency. Also contains a technical amendment. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

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

Adds an exemption for certain meetings of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also adds a corresponding records exemption. HB 520 (2008 Acts of Assembly, c. 721).

Adds an exemption for the discussion or consideration by the Board of Education of records related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding records exemption. HB 768 (2008 Acts of Assembly, c. 668).

Adds an exemption for the discussion or consideration of confidential proprietary records provided by a private business to certain state, local, or regional industrial or economic development authorities or organizations for business, trade and tourism development to be conducted in meetings not open to the public. SB 593 (2008 Acts of Assembly, c. 626).

Amends a current meeting exemption to allow the discussion or consideration of certain proprietary records submitted to the Innovative Technology Authority as part of a grant application; also contains a

corresponding records exemption. HB 1458 (2008 Acts of Assembly, c. 743), SB 726 (2008 Acts of Assembly, c. 633).

§ 2.2-3714. Violations and penalties.

Adds a reference to § 2.2-3708.1 in regard to violations willfully and knowingly made. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

III. Other Access-Related Legislation

Title 2.2 Administration of Government

Government Data Collection and Dissemination Practices Act (GDCDPA); personal information; definition; collection of same; penalty for violation; jurisdiction of district courts. Provides that no agency shall require an individual to furnish or disclose his social security number (SSN) or driver's license number unless the furnishing or disclosure of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. The bill also strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and grants general district courts the authority to hear GDCDPA cases. Additionally, the bill has enactment clauses giving it a delayed effective date of July 1, 2009, and requires state agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. The bill also contains a fourth enactment clause providing for the gathering of similar information about the use and collection of SSNs by cities, counties and towns with a population greater than 15,000. The bill is a recommendation of the Freedom of Information Advisory Council and JCOTS. HB 634 (2008 Acts of Assembly, c. 840), SB 132 (2008 Acts of Assembly, c. 843).

Address confidentiality for victims of domestic violence; program expanded; penalty. Expands the address confidentiality for victims of domestic violence program currently implemented in the County of Arlington to the Counties of Albemarle, Augusta, Dickenson, Fairfax, Henry, Lee, Rockbridge, Russell, Scott, Washington, and Wise as well as the Cities of Buena Vista, Charlottesville, Lexington, Martinsville, Norfolk, and

Roanoke. The bill also provides that an applicant to the program may apply in person at a domestic violence program, which is defined as a public and not-for-profit agency the primary mission of which is to provide services to victims of sexual or domestic violence. Currently, such applications are made directly to the Office of the Attorney General. SB 764 (2008 Acts of Assembly, c. 649).

Title 6.1 Banking and Finance

Payday Loan Act. Requires the State Corporation Commission, by January 1, 2009, to certify and contract with one or more third parties to develop, implement, and maintain an Internet-accessible database, and requires payday lenders to query the database prior to making any loan to determine whether the loan is permissible. Provides that the information in the database is confidential and exempt from FOIA. HB 12 (2008 Acts of Assembly, c. 849), SB 588 (2008 Acts of Assembly, c. 876).

Title 8.01 Civil Remedies and Procedure

Circuit Court clerks; electronic filing and recording; digital reproduction; recordation of judgments; secure remote access; deed cover sheets; fees collected by clerks. Clarifies a number of issues for circuit court clerks including: use of the last four digits of a social security number on judgments (filer is responsible); that the clerk may provide information from a locality to remote access users; filer is responsible for cover sheet accuracy; allowing the clerk to rely on the cover sheet to index; the difference between e-filing of court records and e-recording of land records. The bill also provides standard definitions of subscriber, secure remote access, public access, and electronic recording of land records. The bill also establishes a \$5 per document fee for e-recording of a land record and provides for a \$50 per month subscription rate for remote access to land, civil, and criminal records. HB 1106 (2008 Acts of Assembly, c. 823), SB 622 (2008 Acts of Assembly, c. 833).

Title 10.1 Conservation

Air and Water Boards permit issuance process. Establishes a uniform permit issuance process for the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board). Among other changes,

provides that if either Board conducts a meeting by electronic communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. HB 1332 (2008 Acts of Assembly, c. 557), SB 423 (2008 Acts of Assembly, c. 276).

Title 16.1 Courts Not of Record

Expungement of juvenile records. Requires that when a clerk destroys records pursuant to a juvenile record expungement, he shall destroy all records, including electronic records. HB 1258 (2008 Acts of Assembly, c. 519).

Title 17.1 Courts of Record

Circuit Court clerks; electronic filing and recording; digital reproduction; recordation of judgments; secure remote access; deed cover sheets; fees collected by clerks. Clarifies a number of issues for circuit court clerks including: use of the last four digits of a social security number on judgments (filer is responsible); that the clerk may provide information from a locality to remote access users; filer is responsible for cover sheet accuracy; allowing the clerk to rely on the cover sheet to index; the difference between e-filing of court records and e-recording of land records. The bill also provides standard definitions of subscriber, secure remote access, public access, and electronic recording of land records. The bill also establishes a \$5 per document fee for e-recording of a land record and provides for a \$50 per month subscription rate for remote access to land, civil, and criminal records. HB 1106 (2008 Acts of Assembly, c. 823), SB 622 (2008 Acts of Assembly, c. 833).

Title 18.2 Crimes and Offenses Generally

Database breach notification. Requires an individual or entity that owns or licenses computerized data that includes personal information to disclose any breach of the security of the system following discovery or notification of the breach to the Office of the Attorney General and any affected resident of the Commonwealth whose unencrypted and unredacted personal information was, or is reasonably believed to have been accessed and acquired by an unauthorized person. A breach is defined as the unauthorized access and acquisition of unencrypted and unredacted computerized data that

compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth. Violations by a state-chartered or licensed financial institution shall be enforceable exclusively by the financial institution's primary state regulator. Violations by an entity regulated by the State Corporation Commission shall be enforceable exclusively by the Commission. All other violations shall be enforced by the Office of the Attorney General, which may impose a civil penalty not to exceed \$150,000 per breach or series of breaches of a similar nature that are discovered in a single investigation. The bill specifies that its provisions do not limit an individual from recovering direct economic damages. HB 1469 (2008 Acts of Assembly, c. 801), SB 307 (2008 Acts of Assembly, c. 566).

Title 19.2 Criminal Procedure

Juror information confidential. Provides that a court may in a criminal trial, upon the motion of either party or its own motion, and for good cause shown, issue an order regulating the disclosure of personal information of a juror to any person other than the counsel for either party. Good cause shown includes, but is not limited to, a likelihood of bribery, tampering, or physical injury to or harassment of a juror. The order may be modified as deemed appropriate by the court. "Personal information" is defined as any information collected by the court, clerk, or jury commissioner including, but not limited to, a juror's name, age, occupation, home and business addresses, telephone numbers, email addresses, and any other identifying information that would assist another in locating or contacting the juror. The bill also directs the Supreme Court to prescribe and publish rules that provide for the protection of a juror's personal information. HB 181 (2008 Acts of Assembly, c. 538).

Title 23 Educational Institutions

Management agreement with Virginia Commonwealth University. Provides a management agreement between the Commonwealth of Virginia and Virginia Commonwealth University pursuant to the Restructured Higher Education Financial and Administrative Operations Act. Contains various provisions regarding access to records, particularly procurement records.

HB 1124 (2008 Acts of Assembly, c. 594), SB 358 (2008 Acts of Assembly, c. 616).

Public institutions of higher education; operational authority. Provides operational authority for public institutions of higher education in the areas of information technology, procurement, and capital outlay pursuant to the Restructuring Act of 2005. Contains various provisions regarding access to records, particularly procurement records. HB 1390 (2008 Acts of Assembly, c. 824), SB 442 (2008 Acts of Assembly, c. 829).

Title 37.2 Mental Health, Mental Retardation and Substance Abuse Services

Involuntary commitment; outpatient treatment; etc. Makes numerous changes to this and other titles regarding emergency custody orders, temporary detention orders, and involuntary commitment proceedings. Among other changes, modifies the existing provision of § 37.2-818 stating that records of involuntary commitment hearings are exempt from FOIA by providing that the subject of the hearing may waive confidentiality, and by allowing the court to disclose dispositional orders under certain conditions. HB 499 (2008 Acts of Assembly, c. 850), SB 246 (2008 Acts of Assembly, c. 870).

Title 52 Police (State)

Virginia Fusion Intelligence Center; confidentiality; immunity. Provides that papers, records, documents, reports, materials, databases or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center within the Department of State Police is confidential and not subject to the Virginia Freedom of Information Act or the Government Data Collection and Dissemination Practices Act. The Department must conduct an annual review of such information and remove any which is determined to not have a nexus to terroristic activity. The bill also provides that people who have access to information maintained by the Fusion Center are not subject to subpoena in any civil action concerning criminal intelligence information maintained by the Fusion Center. The bill restricts the release or dissemination of information without prior authorization from the Fusion Center and punishes any person who knowingly disseminates information with a Class 1 misdemeanor. If such unauthorized release or dissemination

results in death or serious bodily injury the penalty is a Class 4 felony. There is an immunity provision for people who furnish information on criminal violations to a governmental entity established for the purposes of detecting and preventing acts of terrorism. HB 1007 (2008 Acts of Assembly, c. 792).

Title 54.1 Professions and Occupations

Advance Health Care Directive Registry; creation. Requires the Department of Health to make available a secure online central registry for advance health care directives. The registry shall be accessible to health care providers licensed by the Board, through a site maintained by the Department of Health. Provides that data in the registry shall be confidential and exempt from FOIA. HB 805 (2008 Acts of Assembly, c. 301), SB 290 (2008 Acts of Assembly, c. 696).

Title 58.1 Taxation

Confidentiality of taxpayer information. Includes as a confidential tax document any document that is required to be filed with the Department of Conservation and Recreation under the land preservation tax credit program. HB 662 (2008 Acts of Assembly, c. 785).

Title 59.1 Trade and Commerce

Personal Information Privacy Act; social security numbers. Prohibits the dissemination of another person's social security number, regardless of whether such number is obtained from a public or private record. Currently, the prohibition against dissemination only applies to social security numbers obtained from private sources. This bill is a recommendation of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science. HB 633 (2008 Acts of Assembly, c. 820), SB 133 (2008 Acts of Assembly, c. 562).

Title 62.1 Waters of the State, Ports and Harbors

Air and Water Boards permit issuance process. Establishes a uniform permit issuance process for the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board). Among other changes, provides that if either Board conducts a meeting by electronic

communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. HB 1332 (2008 Acts of Assembly, c. 557), SB 423 (2008 Acts of Assembly, c. 276).

IV. Resolutions

Commending Nolan T. Yelich. Mr. Yelich served on the FOIA Council from its inception in 2000 until his retirement from state service in 2007. **SJ 238.**

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