

REPORT OF THE

**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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ADVISORY COUNCIL**

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

Senator R. Edward Houck, Chair  
Delegate H. Morgan Griffith  
Craig T. Fifer  
Eric A. Gregory  
Edward Jones  
Forrest M. "Frosty" Landon  
E. M. Miller, Jr.  
John G. Selph  
Mary Yancey Spencer  
Sandra G. Treadway  
George T. Whitehurst  
Roger C. Wiley

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Maria J.K. Everett, *Executive Director*  
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Darlene Jordan, *Sr. Operations Staff Assistant*

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# REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**To: The Honorable Robert F. McDonnell, Governor of Virginia  
and The General Assembly of Virginia**

**Richmond, Virginia  
December 2010**

## INTRODUCTION

*"Light is the only thing that can sweeten our political atmosphere-light thrown upon every detail of administration in the departments-light blazed full upon every feature of legislation-light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of government."*

Woodrow Wilson  
1884

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 the 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 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.

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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*.

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 FOIA disputes and to foster compliance and a better understanding of 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 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**

Celebrating its decennial year, the Council continues to fulfill its role to the Virginia General Assembly by serving as a clearinghouse for public access issues, examining in this ten-year period 44 bills referred by the General Assembly. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. In its ten-year history, the Council has provided more than 13,000 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials. The Council has also conducted approximately 527 FOIA training programs since its creation. In addition, it is recognized as the forum for evaluating proposed FOIA and related public access legislation. In 2002, the Council implemented an annual legislative preview as part of its regular meeting schedule to provide a forum for the discussion proposed FOIA legislation well in advance of General Assembly Session to facilitate compromise between opposing parties. For a decade, the Council has evaluated the provisions of FOIA to ensure Virginia's commitment to open government while balancing the need to protect the public's negotiating and litigation positions, privacy, and safety. The Council has grappled with myriad issues involving databases, email use and retrieval, Social Security Numbers, concealed handgun permits, secondary publication of public records, public procurement, political caucuses, terrorism prevention, and other public safety measures. The Council also has evaluated the law governing teleconferencing and other meetings by electronic communication means and recommended relaxation of the rules thus allowing state and local governmental entities to avail themselves of technology in situations involving emergencies or medical necessity to facilitate service by persons with disabilities and others on government boards and commissions. Of the 22 Council-initiated legislative recommendations since 2000, all have been enacted by the General Assembly and signed by the Governor into law.

During this reporting period, the Council conducted in-depth reviews of legislation concerning the FOIA and other public access issues referred to it by the General Assembly. The five bills referred to the Council by the General Assembly and studied by two Council-appointed subcommittees are as follows:



1. HB 449 (Ware, RL)--remedy for public bodies for requester harassment.
2. HB 641 (Armstrong)--extending the right to make FOIA requests in Virginia to U.S. citizens.
3. HB 976/SB147 (Anderson) and (Puller)--proceedings for enforcement; when notice of suit must be filed by petitioner on public body.
4. SB 711 (Edwards)--disclosure of criminal investigative records.<sup>3</sup>

The Rights and Remedies Subcommittee was responsible for the following bills: HB 449 (Ware, R.L.) (remedy for public bodies for harassment by requesters), HB 641 (Armstrong) (extending the right to make FOIA requests in Virginia to United States citizens), and HB 976 (Anderson)/SB 147 (Puller) (proceedings for enforcement; when notice of suit must be filed by the petitioner on the public body). The Council also directed the Rights and Remedies Subcommittee to develop a plan for proactive training for legislative agencies, committees and commissions, as well as studying other methods to promote access to joint committees of conference for the state budget. The Rights and Remedies Subcommittee consisted of Council members Senator Houck (Chair), Roger Wiley, Frosty Landon, Mary Yancey Spencer, Eric Gregory, George Whitehurst, and Ed Jones. The Subcommittee made the following recommendations that were adopted by the Council.

**House Bill 449--** This was not a new issue before the Council. In 2002, the Council studied HB 900, introduced by Delegate Purkey, on the issue of harassment of public bodies by FOIA requesters. At that time, the Council found that harassment was difficult to define and required a determination of the intent behind the request. Because of this, the Council in 2002 took another direction and recommended SB 738 (Houck), which provided that before processing a request for records, a public body may require a requester to pay any

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<sup>3</sup> **HB449 (Ware, R.L.); Freedom of Information Act; injunctive relief for public bodies under certain circumstances.** Provides that any public body may petition a court for injunctive relief to restrain a requester from harassment or other abuse of the rights or privileges granted under FOIA.

**HB 641 (Armstrong); Freedom of Information Act; requests for records may be made by any citizen of United States.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth and extends the same privilege to representatives of newspapers and magazines. The bill provides that this privilege is limited to those states which give reciprocal rights to make FOIA requests to Virginia citizens. The bill also allows a public body to require prepayment before providing requested records when the amount for so producing is likely to exceed \$100.

**HB 976 (Anderson)/SB 147 (Puller); FOIA; party whom writ is served must be served a copy of petition prior to filing.** Clarifies that before a FOIA petition is filed, the party against whom the writ is brought must receive a copy of the petition within a reasonable time prior to the petitioner filing the petition with the court. The bill contains a technical amendment and incorporates HB 689.

**SB 711 (Edwards); FOIA; disclosure of criminal investigative records.** Limits the exemption for criminal investigative or prosecution records to those investigations or prosecutions that are ongoing. As a result, criminal investigative and prosecution records would be open to the public after the ongoing criminal investigation or prosecution has become final or has been otherwise terminated, unless there is jeopardy to any other criminal investigation or prosecution.

amounts owed to the public body for previous FOIA requests that remain unpaid 30 days or more after billing.<sup>4</sup> With regard to HB 449, it was noted that intentional harassment by FOIA requesters is a much broader problem, albeit infrequent, than just in Powhatan County, which was the basis for the bill. The Subcommittee attempted to find a balanced solution that could not be used by public bodies as a weapon against citizens, but that would account for the substantial expenditure of resources, personnel, and time to respond to requests intended to harass a public body. The Subcommittee also considered novel approaches--like utilizing FOIA charges--as was done in 2002 as a possible solution. Some believed the courts are in the best position to evaluate a given situation. Public comment on this issue by Megan Rhyne of the Virginia Coalition for Open Government (VCOG) revealed an awareness that harassment happens, albeit infrequently, and suggested that the remedy may lie in allowing a public body to petition for more time to respond to the FOIA request. Ginger Stanley of the Virginia Press Association (VPA) noted that the situation in Powhatan County that gave rise to HB 449 was a result of the county not availing itself of the remedies afforded under current FOIA law. She suggested that this one case was based on bad facts and changing the law as a result was a position the VPA could not support. Several state agencies reported that they handle a huge number of FOIA requests with "persistent requesters." In these instances, agencies have gone to court for relief with success. It was noted, however, that this took significant resources and effort to get the desired relief. Nonetheless, there was agreement that one should be concerned about giving the government too much power to enjoin citizens from making FOIA requests. Senator Houck stated that he, like other legislators, was empathetic to public bodies in these instances given the volume of records and the costs to produce them. Virginia's FOIA is silent regarding the number and frequency of requests a single requester may make, and contains no provision addressing harassment. There do not appear to be any reported cases or published opinions specifically addressing this issue in Virginia. As a general rule, a requester cannot violate FOIA by making requests. Other states' FOIA laws were reviewed to ascertain what if any remedies are granted to public bodies when faced with this dilemma. The laws of Colorado, Connecticut, Illinois, Kansas, Kentucky, Tennessee, Texas, and Utah, which have relevant provisions, were examined.<sup>5</sup> The approaches taken by Kansas and Kentucky--a request may be refused if it places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency--were favored by the Subcommittee. Further inquiry into the success of these laws in addressing the issue was undertaken. Representatives of both states reported that the relevant provisions in their law were not utilized because ultimately an agreement was worked out between the parties.

Further deliberations to fashion a remedy for intended harassment stalled because, while there was stipulation by all parties that harassment did occur, there was no agreement that harassing requests are a problem requiring a legislative fix. Megan Rhyne, VCOG, advised that her concern was the chilling effect on the "good citizen" who doesn't know whether his legitimate request for documents and subsequent requests may be perceived as harassing, when there is no intent to harass. Craig Merritt, representing the VPA, stated that the

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<sup>4</sup> SB 738 was enacted into law by the 2003 Session of the General Assembly (c.275 of the 2003 Acts of Assembly).

<sup>5</sup> A more thorough review of other states' laws appears on the Council website.

correct question is not whether people overuse FOIA, acknowledging that they do. Instead the question is whether FOIA is inadequate to address the situation. There was agreement, however, that the threat of being hauled into court by a public body is a bad approach. Because of the lack of consensus, no legislation was proposed.

**HB 641--** In 2006 in Delaware, citizenship as a basis for FOIA requests was the subject of a decision of the Third Circuit Court of Appeals<sup>6</sup> upholding a decision of the federal District Court for the District of Delaware,<sup>7</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 Third Circuit did not consider the "common calling" ground. Instead, in a three-step analysis the Third Circuit (1) found that (i) participation in the national political process was a fundamental right protected by the Privileges and Immunities Clause, (ii) Delaware's stated interest in defining its political community and strengthening the bond between its citizens and government was a substantial interest, and (iii) 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 Third Circuit held that limitation to be unconstitutional.<sup>8</sup>

While this decision may be influential, it is not binding in Virginia. The Council reviewed a Virginia case on point. In the spring of 2009, the United States District Court for the Eastern District of Virginia heard the case of *McBurney v. McDonnell* (Case No. 3:2009cv44). In this consolidated case, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.<sup>9</sup> However, on appeal, the United States Court of Appeals for the Fourth Circuit ruled for two of the three plaintiffs, saying they can proceed with their challenge on the merits to the citizens-only provision of FOIA. Oral arguments are scheduled for December 20, 2010.

In discussing HB 641, Council member Wiley stated that he advises his local government clients not to control on the citizenship issue given the ease with which a Virginia requester can be found to make the request. This has been the same advice given by the Council since 2000. Because FOIA does not apply to out-of-state requesters, a public body may take a reasonable time to provide the requested records and require prepayment of any charges assessed in producing the requested records. Council member Spencer agreed and stated that she handles numerous out-of-state FOIA requests on behalf of the Virginia State Bar daily. She stated that most of these requests are from data aggregators and she successfully negotiates a deal with them on their requests. The State Bar usually honors out-of-state

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<sup>6</sup> *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>7</sup> *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

<sup>8</sup> It was noted that the Delaware case, although it received one level of appellate review, was not appealed to the United States Supreme Court.

<sup>9</sup> The Court held that the three-out-of-state plaintiff's lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

requests, but if the records requested are voluminous, they charge for their production. Other state agencies also commented on their experience with out-of-state requests.<sup>10</sup> A representative of the Department of Medical Assistance Services (DMAS) indicated that DMAS never denied a FOIA request based on citizenship. However, because the number of requests became overwhelming, DMAS began charging for the production of the requested records. A representative of the Department of Motor Vehicles (DMV) states that DMV usually honors out-of-state requests and it is not a big problem for them. VDOT indicated that they also honor out-of-state requests unless the requested records are voluminous. The VPA stated that it opposed the current form of HB 641. VCOG advised that FOIA currently provides tools for public bodies to use; but noted that as drafted, VCOG opposed the reciprocity piece in HB 641 and did not favor any approach that looked at the underlying purpose for the request. Forty-four states do not restrict who may make FOIA requests and there has been no clamoring for changing the law in those states. It was noted that state agencies do better with out-of-state requests than local agencies. Mr. Wiley stated that states may limit access without it being unconstitutional in all instances. He suggested that the solution may be to link out-of-state requests to the prepayment of charges and/or time lines for responding to a FOIA request. The Council agreed that it would be prudent to await the outcome of the *McBurney* case before considering any legislation. In the meantime, the law can be successfully dealt with following the advice of the Council. By consensus, it was agreed that HB641 as referred to the Council not go forward.

**HB 976/SB 147--** This issue was brought before the Council in 2009 by Prince William County Public Schools in response to a specific issue there. The Council had recommended language to resolve the issue of when notice is to be given. However, during the General Assembly Session, Prince William County Public Schools objected to the language. As a result, both bills were again sent to the Council. The difference between the two bills was that in SB 147 notice was to be *served* on a public body, while in HB 976 notice was to be *received* by the public body. Mr. Wiley noted that the use of the word "served" means by the sheriff or other process server and that unnecessarily delays the process. Mr. Wiley suggested that notice be given to the public body, but that the length of time before the FOIA suit may be filed be specified. By consensus the Council agreed to recommend the following language to resolve the differences in the bills. "Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made—provided the party against whom the writ is brought has received a copy of the petition at least three working days prior to filing."

The Criminal Investigative Records Subcommittee studied SB 711 (Edwards). The bill would limit the exemption for criminal investigative or prosecution records to those investigations or prosecutions that are ongoing. As a result, criminal investigative and prosecution records would be open to the public after the ongoing criminal investigation or prosecution has become final or has been otherwise terminated, unless jeopardy to any other criminal investigation or prosecution would result. This Subcommittee consisted of Council

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<sup>10</sup> By letter, the State Board of Elections submitted comment on the citizenship issue. Specifically, concern was expressed on the effect of HB 641 on the administration of elections in Virginia. The volume of requests (both in-state and out-of-state) can be very time consuming and divert attention away from election preparations at critical times. This is especially the case because many local electoral boards are understaffed.

members Craig Fifer (Chair), Delegate Griffith, E.M. Miller, John Selph, and Sandra Treadway. The Criminal Investigative Records Subcommittee met three times and considered the policy issues raised by SB 711, but could not find common ground for substantive changes. Instead, the subcommittee recommended a redraft of § 2.2-3706 (access to criminal records) intended to make the section easier to read and understand without introducing any substantive changes. The redraft of § 2.2-3706 reorganized the section into separate subsections addressing definitions, discretionary releases, required releases, prohibited release, noncriminal records, and conflict resolution. The redraft also contained a second enactment clause stating that it was declaratory of existing law to make it clear that this was not a substantive change in the law. The Council voted 8-2 in favor of recommending the draft. However, after the vote, there was concern expressed by several members that introducing the draft might open up the entire topic to re-examination and unwanted mischief. Given that 2011 was an election year in the House of Delegates, it was suggested that introduction of the redraft of § 2.2-3706 be delayed until the 2012 Session of the General Assembly.

The Council continued to monitor Virginia court decisions relating to FOIA. In another U.S. District Court case in the Eastern District of Virginia, *Ostergren v. McDonnell*, the Court considered the prohibition on dissemination of social security numbers (SSNs) obtained from public records contained in the Personal Information Privacy Act (PIPA).<sup>11</sup> Ms. Ostergren advocates for the removal of SSNs from public records, especially court records that are published online. She publishes the Virginia Watchdog website to further those efforts. Among other content on the website, Ms. Ostergren republishes public records that contain SSNs in order to emphasize her advocacy and illustrate the problem. In July 1, 2008, PIPA was amended to prohibit the republication of public records containing SSNs, including fines up to \$2500 per violation, investigative demands, and injunctions. In its analysis the court reviewed prior Supreme Court decisions and observed that SSNs are generally entitled to privacy as personal identifiers that may be misused. However, the court found that based on the record, the General Assembly did not provide funding for the redaction by court clerks of SSNs from court records, and therefore protection of SSNs is not a state interest of the highest order. The court also found that this matter - the protection of SSNs - is a matter of public significance and that Ms. Ostergren's speech is political in nature and entitled to protection under the First Amendment. The court decided that PIPA is unconstitutional as applied to Ms. Ostergren's website as it presently exists, but further briefing would be required "on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."<sup>12</sup> In August, a three judge panel of the U.S. Fourth Circuit Court of Appeals unanimously ruled that Ms. Ostergren could not be punished under PIPA where the public records containing SSNs were legally obtained. The case has been remanded to the U.S. District Court to fashion appropriate injunctive relief.

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<sup>11</sup> Code § 59.1-443.2.

<sup>12</sup> In full, the Court concluded "that Virginia Code §59.1-443.2 is unconstitutional as applied to Ostergren's website as it presently exists. However, given the significant public interest issues presented by the spreading of SSNs on the Internet, the Court will require further briefing on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."

The Council continued its commitment to providing FOIA training. The Council views its training mission as its most important duty and welcomes every opportunity to provide FOIA training programs. During 2010, Council staff conducted 53 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and citizens. 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. In addition to Virginia State Bar continuing legal education credit, the training programs are also pre-approved by the Department of Criminal Justice Services for law-enforcement in-service credit and the Virginia School Board Association for academy points.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,690 inquiries. Of these inquiries, six resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: two by government officials, one by a media representative, and three by citizens. The remaining requests were for informal opinions, received via telephone and e-mail. Of these requests, 899 were made by government officials, 620 by citizens, and 165 by media. Over the past several years, the Council has seen an increase in the number of informal opinion requests as compared to requests for formal written opinions. This continuing trend appears to stem from the Council's reputation as a creditable source for FOIA guidance before disputes arise and the reliability of its informal opinions.

FOIA was again the subject of significant legislative activity in the 2010 Session. The General Assembly passed a total of 12 bills amending FOIA during the 2010 Session. Two bills amending FOIA passed as recommendations of the Council: House Bill 434 (Griffith), which allows the redaction of financial account numbers and routing information, passed as a recommendation of the Council; and House Bill 433 (Griffith), which sets out the original date (January 1, 1975) when social security numbers were authorized to be collected or required by state and local agencies under federal law, and makes other changes to the Government Data Collection and Dissemination Practices Act (GDGDDPA). A more detailed report of the bills discussed above and those FOIA and other public access bills passed during the 2010 Session appear on the Council's website and are attached as Appendix E to this report.

In 2010, the Council said goodbye to Council members Ralph L. "Bill" Axselle and Courtney M. Malveaux. Mr. Axselle served on the Council since 2002 and his two four-year terms have expired. Mr. Malveaux was appointed by Governor McDonnell as the director of the Virginia Department of Labor and Industry. Messrs. Axselle and Malveaux were replaced by Ed Jones, Editor of the Free Lance Star, and Eric Gregory of the Office of the Attorney General, respectively. The Council also bid farewell to Delegate H. Morgan Griffith, who won his bid for the U.S. Congress in November 2010. Delegate Griffith was appointed to the Council in 2004, and served as vice chair from June 2004 until August 2008 and as chair from August 2008 until July 2010.

## WORK OF THE COUNCIL

### July 26, 2010

The Council held its first meeting of 2010.<sup>13</sup> The Council welcomed its newest members Ed Jones, Editor of the Free Lance-Star and Eric Gregory, designee of the Attorney General. The Council also thanked outgoing member Courtney Malveaux for his service to the Council. The Council next held elections for chair and vice chair. Upon properly seconded motions, Senator Houck was elected chair and Delegate Griffith was elected vice chair. Both elections were unanimous.

#### *2010 Legislative Update*

Staff presented the 2010 legislative update to the Council. The General Assembly passed a total of 12 bills amending FOIA during the 2010 Session. Of note, House Bill 434 (Griffith), which allows the redaction of financial account numbers and routing information, passed as a recommendation of the Council. This bill was passed with an emergency clause and became law effective April 11, 2010. The General Assembly also passed House Bill 433 (Griffith), which sets out the original date (January 1, 1975) when social security numbers were authorized to be collected or required by state and local agencies under federal law, and makes other changes to the Government Data Collection and Dissemination Practices Act (GDGCPA), also a recommendation of the Council. The complete legislative update was distributed to Council members and to the public. A copy of the 2010 legislative update is also posted on the Council's website.

Staff explained the five bills referred to the Council for further study by the 2010 General Assembly:<sup>14</sup>

5. HB 449 (Ware, RL)--remedy for public bodies for requester harassment.
6. HB 641 (Armstrong)--extending the right to make FOIA requests in VA to U.S. citizens.
7. HB 976/SB147 (Anderson) and (Puller)--proceedings for enforcement; when notice of suit must be filed by petitioner on public body.
8. SB 711 (Edwards)--disclosure of criminal investigative records.

Two subcommittees had previously been appointed to study the above bills. First, the Rights and Remedies Subcommittee will study the following bills: HB 449 (Ware, R.L.) (remedy for public bodies for harassment by requesters), HB 641 (Armstrong) (extending the right to make FOIA requests in Virginia to United States citizens), and HB 976 (Anderson)/SB 147 (Puller) (proceedings for enforcement; when notice of suit must be filed

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<sup>13</sup> Delegate Griffith, Senator Houck and Messrs. Fifer, Whitehurst, Selph, Landon, Gregory, and Jones, and Ms. Treadway were present. Messrs. Wiley and Miller, and Ms. Spencer were absent.

<sup>14</sup> Summaries of each of the bills referenced above appear as Appendix A to this summary.

by the petitioner on the public body). At this meeting, the Council also directed the Rights and Remedies Subcommittee to develop a plan for proactive training for legislators, aides, and legislative agencies, committees and commissions, as well as studying other possibilities to promote FOIA education (see discussion under Other Business). The Rights and Remedies Subcommittee consists of Council members Senator Houck (Chair), Roger Wiley, Frosty Landon, Mary Yancey Spencer, Eric Gregory, George Whitehurst, and Ed Jones.

The Criminal Investigative Records Subcommittee was appointed to study SB 711 (Edwards), which was referred to the Council by the 2010 Session of the General Assembly for study. The bill would limit the exemption for criminal investigative or prosecution records to those investigations or prosecutions that are ongoing. As a result, criminal investigative and prosecution records would be open to the public after the ongoing criminal investigation or prosecution has become final or has been otherwise terminated, unless there is jeopardy to any other criminal investigation or prosecution. This Subcommittee consists of Council members Craig Fifer (Chair), Delegate Griffith, E.M. Miller, John Selph, and Sandra Treadway.

#### *Rights and Remedies Subcommittee Report*

Staff advised the Council that the Rights and Remedies Subcommittee met on July 22, 2010 to review the bills assigned to it and took the following actions:

With regard to HB449 (Ware, R.L.), the Subcommittee was generally empathetic to the plight of public bodies faced with FOIA requests intended to harass because of the volume and frequency of these requests as well as the associated increase in allocation of resources to respond to them. The Subcommittee noted that while this issue occurs infrequently it does cause problems. The Subcommittee will look at what, if anything, other states do in these instances. The Subcommittee will also investigate other approaches, including the payment of charges similar to the charges provision that was added in response to the 2002 bill on same issue.

With regard to HB 641 (Armstrong), the Subcommittee recommended no action on the bill as presented. Virginia is one of only six states that limit FOIA requests based citizenship.<sup>15</sup> The Subcommittee is aware of the recent decision of the Third Circuit Court of Appeals<sup>16</sup> that upheld a decision of the federal District Court for the District of Delaware,<sup>17</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 Subcommittee will also continue to monitor a similar suit in Virginia. In the *McBurney v. McDonnell*, the United States District Court for the Eastern District of Virginia, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the

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<sup>15</sup> Arkansas, Georgia, New Hampshire, and Tennessee are the other states that limit FOIA requests based citizenship.

<sup>16</sup> *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>17</sup> *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).



Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.<sup>18</sup> However, on appeal, the United States Court of Appeals for the Fourth Circuit ruled for two of the three plaintiffs, saying they can proceed with their challenge on the merits to the citizens-only provision of FOIA. It is the recommendation of the Subcommittee to await the outcome of the McBurney case. In the meantime, however, the law can be successfully dealt with following the advice of the Council to work it out with out-of-state requesters to provide records, including prepayment and supplying records within a reasonable time. Virginia public bodies should not control on the in-state or out-of-state status of the requester. By consensus, the Subcommittee agreed that the bill should not go forward as drafted.

With regard to HB 976 (Anderson)/SB 147 (Puller), the Subcommittee recommended revision of the language to specify a time period when a public body against whom a FOIA petition is brought must receive a copy of the petition before the petition is filed with the court. The Subcommittee recommends the following:

1. After "petition" on Line 29 of the House Substitute:  
Strike "within a reasonable time" and insert "at least three working days;" and
2. Recommend language "has received a copy" (HB 976) instead of "has been served with a copy (SB 147).

The Council directed staff to redraft the bills according to its recommendation and to notify the patrons and Prince William County Public Schools of the recommendation. The draft will be posted on the Council's website.

#### *Access to Budget Conferences*

Helen Tansey, a citizen who attempted to follow the budget conferences at the end of the 2010 General Assembly Session and wrote live blogs concerning the same addressed the Council about her experience. Ms. Tansey has 10 years of experience lobbying the General Assembly on water and land conservation issues. In her new role as a blogger remarking on the budget process in Virginia, Ms. Tansey stated that she was told she was not welcome as a lobbyist or a citizen to the budget conferences. In preparation for her work, she indicated that she had contacted the staff directors of the Senate Finance Committee and the House Appropriations Committees, and each budget conferee to advise them of her activities. She described the budget conference process as old, antiquated and dysfunctional, and noted that there were many closed door meetings. Ms. Tansey advised that she tried to file a criminal complaint with law-enforcement officials and was told that it was a civil matter. She advised that Council that she was aware that she could sue for a violation of FOIA, but did not want to pursue this course of action. Instead, she requested the Council to provide annual FOIA training to the budget conferees, noting that the conferees were doing the public's business.

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<sup>18</sup> The Court held that the three-out-of-state plaintiffs lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

### *Other Business*

Senator Houck advised the Council that given the issue raised by Ms. Tansey and some FOIA issues related to the appointment of a new director by the Joint Legislative Audit and Review Commission (JLARC) at a meeting earlier this summer, he believed the Council should become more proactive in training legislators and their aides, and all legislative commissions, councils, and agencies. It was his intent that the matter be added to the study charge of the Rights and Remedies Subcommittee. Senator Houck noted that he is a budget conferee and that budget conference process has moved dramatically in the right direction over the years. He stated that it is not yet perfect. That any citizen feels aggrieved by the actions of the budget conferees is of concern and the issue should be examined. With regard to the JLARC action, he noted that while unintentional, the law was not followed. Delegate Griffith indicated that he agreed with Senator Houck but believes that the law as conceived in 1968 was not intended to cover the General Assembly. He noted there has been confusion on this issue and that is the reason he introduced HB 1357 in the 2004 to clarify the application of FOIA's open meeting rules to the General Assembly. He stated that there needs to be a balance between access and getting the budget work done within the tight time constraints imposed on the General Assembly. Senator Houck added that there is a practical dynamic for budget conferees; however practicality should not overshadow a citizen's right of access. He described a closed door gathering between the two money committee chairs and their respective staffs; which is not a "meeting" under FOIA. However, other conferees came in to listen to the discussion and the result was possibly a violation of FOIA because the door was closed. He noted that this is a perfect example of the logistics involved. Ms. Treadway agreed and indicated as Librarian of Virginia, the same problem exists with respect to the Virginia Public Records Act (VPRA). She stated that without constant training on the law the institutional memory is lost. Mr. Fifer added that while he was in agreement, citizens do have the responsibility to knock on a closed door. He stated that he would like local government officials included in the training as the issues are the same. Mr. Landon suggested that there should be mandatory FOIA training for the staff of the public bodies.

### *Public Comment*

Megan Rhyne, Virginia Coalition for Open Government, advised the Council of the upcoming FOIA and VPRA seminar that was being held in September with the assistance of the Council, the Virginia Association of Counties, the Virginia Municipal League, and VDOT.

Ginger Stanley, Virginia Press Association, complimented both Senator Houck and Delegate Griffith on their legislative activity relating to public access during the 2010 Session. She advised the Council of the many articles written and the activities that took place during Sunshine Week in March, 2010.

Mark Flynn, Virginia Municipal League (VML), praised Council staff Alan Gernhardt for his great job providing FOIA training to new members of city and town councils at a recent

VML conference. In addition, Mr. Flynn suggested, with regard to HB 976/SB147, that using the phrase "service of process" is more effective because it allows a FOIA petition to proceed on the merits of the case in a timely manner instead of the first hearing relating only to the procedural requirements for notice of a FOIA suit.

James Lawrence, a Fredericksburg citizen, chronicled he difficulties when trying to exercise his FOIA rights with local officials. He indicated that some of these issues have been resolved.

## **September 13, 2010**

The Council held its second meeting of 2010.<sup>19</sup> The meeting was held to hear subcommittee reports, to vote on subcommittee recommendations, and to begin the annual legislative preview.

### *Subcommittee Reports*

#### *Rights and Remedies Subcommittee*

Staff reported that the Rights and Remedies Subcommittee met on August 30, 2010 to continue its deliberations. The subcommittee first discussed HB 449 (Ware), which would have provided a remedy for public bodies to use against requesters who use FOIA as a tool for harassment. The subcommittee was sensitive to the issue, recognizing that it was infrequent but does happen, that requesters sometimes may use FOIA with the intent to slow down government. The subcommittee looked at what other states have done, and also is considering other novel approaches, such as the charges provisions added in 2002 to address similar issues. The subcommittee will continue its deliberations on this matter at its next meeting.

The next bill addressed was HB 641 (Armstrong), which would have granted FOIA access rights to all United States citizens. The subcommittee recommended no action be taken on this matter at this time. The subcommittee was made aware that Virginia is one of six states with citizenship limitations on access, that there was a federal case in the 3rd Circuit<sup>20</sup> that found a citizens-only FOIA limitation to be unconstitutional, and that a similar case is currently on remand to the federal District Court for the Eastern District of Virginia. The subcommittee recommended no action while waiting for the federal court decision, and that staff continue to provide advice to work with out-of-state requesters to provide records, including advice on prepayment and supplying records in a reasonable time, rather than letting the requesters' status as a citizen (or not) control.

The last bills to be considered were HB 976 (Anderson) and SB 147 (Puller), identical bills regarding the provision of notice of the filing of a petition for mandamus or injunction. The subcommittee voted unanimously (5-0) to recommend a draft to the Council that revises the current language to specify that the defendant must receive a copy of the FOIA petition

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<sup>19</sup> The following members were present: Senator Houck, Delegate Griffith, Fifer, Gregory, Jones, Landon, Selph, Spencer, Treadway, Whitehurst, and Wiley. Mr. Miller was absent.

<sup>20</sup> That case would be persuasive but not controlling, as Virginia is in the 4th federal Circuit, not the 3rd.

three working days before the petition is filed. Delegate Anderson and Senator Puller have both indicated they would be willing to carry the bill in the 2011 Session.

Finally, regarding the suggestion to provide FOIA training to legislative agencies, Senator Houck reported that leadership in the House and Senate, as well as both Clerks' offices, was receptive to the idea. Staff will work on logistics and contacting legislative commission and agency heads, as well as continuing to work on related issues.

#### *Criminal Investigative Records Subcommittee*

Chairman Fifer reported that the Criminal Investigative Records Subcommittee met on August 19, 2010 to consider SB 711 (Edwards), which would have provided greater access to criminal investigative files after criminal cases were closed. There was a great deal of interest in the subcommittee's work, with over 50 people attending, including many sheriffs, police chiefs and officers, and Commonwealth's Attorneys. The subcommittee found it difficult to reach any agreement on any wholesale change in policy, but instead looked for common ground. An idea was proposed to put in a mechanism for a requester to go to court to get records if he could demonstrate harm that would occur if the records were not released. The subcommittee will consider draft language at its next meeting, after which it may have a recommendation for the full Council to consider.

#### *Action on Subcommittee Recommendation*

The Rights and Remedies Subcommittee recommended draft language to address the notice requirements for filing a petition for mandamus or injunction, as stated above. Staff presented the draft bill. Jim Council spoke on behalf of Prince William County Schools (PWCS), who had requested the original bills under consideration. He indicated that he had spoken with the patrons, Delegate Anderson and Senator Puller, and the School Board of PWCS, and all were in favor of the new draft. Senator Houck stated that the bill has been before the legislature for two years now, that a compromise could not be reached previously during the rush of the General Assembly Session, and that he hoped that those involved would resist any temptation to tinker with the bill in the future, as it might unravel all the good work done so far. Roger Wiley suggested two technical amendments to the draft to clarify the language without changing its substance. The amendments were adopted by unanimous voice vote. The Council then voted to recommend the draft, as amended, to the 2011 Session of the General Assembly, also by unanimous voice vote.

#### *Annual Legislative Preview*

Mr. Fifer reminded the Council that he hoped to have a draft bill from the Criminal Investigative Records Subcommittee after its next meeting. Delegate Griffith asked that anyone who knew of any upcoming FOIA bills let staff know so that the Council might be able to have a subcommittee address it before the upcoming 2011 Session, as otherwise it might just get referred to the Council by the General Assembly and thus delayed for a year.

James Conrad, a former law enforcement officer, suggested that law enforcement officers be able to get the results of their own background investigations. Currently such records are exempt from disclosure generally, and there are no special provisions for the subject of the record to be granted access. This is in contrast to the general exemption for personnel records, which allows records to be withheld from third parties but affirmatively grants

access to the subject of the records. Mr. Conrad noted that as it is, there is nothing stopping someone from lying to background investigators or defaming an applicant for law enforcement agency employment. He suggested a mechanism was needed to ensure the agency at least verifies that background information it receives is truthful. The Council took no action on this matter.

#### *Other Business*

Senator Houck spoke about efforts to provide FOIA education to the legislative branch, and his concerns regarding access to committees of conference, particularly the budget committees. He noted that while the judicial and executive branches have plenty of opportunities for private deliberations, the legislative branch does not. He stated that the goal was not leave people out of the process; but that the demands of time and frank conversation lead to "cat and mouse" games among budget conferences and the public. Senator Houck suggested that a way be explored to maintain the integrity of the process while giving relief to budget conferees in certain limited instances.

Mr. Fifer commented that the utility of private meetings must be balanced with the public's right to know, and the legislative branch ultimately has the same types of limitations as the others, and that votes must still be taken in public. He further noted that just as with the executive and judicial branches, legislative staff meetings are not subject to FOIA, and that legislators may use the working papers and correspondence exemption. Mr. Wiley stated that from a local government perspective, people are very interested in the work of budget conferees and want to see everything that goes on. However, he felt the greater public interest is in having a good budget, and there comes a point in the process where the inability to hold private discussions inhibits the ability to pass a budget. He suggested there should be a limited exemption for budget conferences only, not for other committees of conference. He also noted that at the local level, the process is very different because the budget process typically is handled over four to eight weeks, whereas the budget conferees have only a few days to complete their work. Mr. Landon noted that the General Assembly has come a long way toward openness, and that making the committees of conference open and subject to FOIA was part of a political compromise in exchange for allowing political party caucus meetings not to be subject to FOIA. He further suggested looking to other states and the use of technology to help with timely access. Mr. Jones commented that the public is more interested than ever in frank exchanges between legislators, and in the legislative process itself rather than just the end results.

Senator Houck said he wants the dialogue and conversation on this matter to continue. Noting that he was the author of the compromise Mr. Landon mentioned, he indicated that he was less mindful of the dynamics at that time, particularly in regard to budget conferences. He noted that other conference committees appear to routinely violate these provisions without any intent to mislead or obstruct the public's right to know, but just because of how conference business is conducted by informal meetings and agreements. Noting the gravity of the budget conference committee's work and the burdens of the aforementioned compromise, Senator Houck suggested moving on to the next agenda item.

### *Public Comment*

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated that VCOG would hold its annual conference October 21-22, 2010, in House Room 3 of the Capitol, Richmond, Virginia.

Ginger Stanley, Executive Director of the Virginia Press Association (VPA), spoke in regard to the issue of access to budget conference committee meetings. She noted it was unusual to rush to change the law, and suggested considering the whole process, not just budget conferences, but the also the compromise made previously to including committees of conference under FOIA while excluding political party caucuses. She also handed out new copies of the Reporters' Guide to FOIA published by VPA.

## **November 9, 2010**

The Council held its final meeting of 2010.<sup>21</sup> The Council heard subcommittee reports, voted on subcommittee recommendations, and continued its annual legislative preview.

### *Subcommittee Reports*

#### *Rights and Remedies Subcommittee*

Staff reported that the Rights and Remedies Subcommittee met on October 4, 2010 to continue its deliberations. The subcommittee's work had begun with the discussion of HB 449 (Ware), which would have provided a remedy for public bodies to use against requesters who use FOIA as a tool for harassment, but the subcommittee did not favor the legislation as drafted. The subcommittee generally agreed that there are requesters who misuse FOIA to harass or impede the work of public bodies, but there was no agreement that a legislative fix was necessary. Mr. Wiley had proposed a draft that would allow a court to decline to order the production of requested records under certain conditions.<sup>22</sup>

After staff presented the draft, the Council took it up for consideration as a legislative proposal. Mr. Wiley stated that the draft was meant to follow the Kentucky approach discussed by the subcommittee at a prior meeting, but with more definite standards set forth for when a public body would be relieved of the burden to respond. Mr. Fifer opined that using terms such as "unreasonable" and "harassment" would be too vague. Further, he stated that he liked that the public body would bear the legal burden of proof, but that

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<sup>21</sup> The following members were present: Senator Houck, Fifer, Gregory, Jones, Landon, Miller, Spencer, Treadway, Whitehurst, and Wiley. Delegate Griffith and Mr. Selph were absent.

<sup>22</sup> Specifically, the court could decline to order the production of requested records if the evidence shows that "the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body; (ii) has been made with the intention of (a) harassing the public body or a public official or (b) preventing the public body from meeting its operational responsibilities; or (iii) has been made to evade the payment of charges assessed in accordance with § 2.2-3704."

because the requester must bring the suit, it could lead to public bodies denying requests and saying "so sue me, see you in court." Mr. Landon said he was concerned that the bill would invite litigation, while the Council was established, at least in part, to help avoid litigation through informal mediation. Mr. Miller observed he had personal experience with an abusive requester from Central State Hospital recently, and had considered bringing a bill before the Council that would add persons civilly committed after being acquitted by reason of insanity to the list of those excluded from FOIA rights.<sup>23</sup> However, he decided against it because an entire category of persons should not be locked out of FOIA due to one bad situation.

Mr. Wiley then stated that the reality is that some requesters are unreasonable and cannot be satisfied, that many examples had been given before the subcommittee, and that maybe it was time to decide on the issue. Mr. Fifer noted that as written, the only way for a public body to use the new provisions would be to deny a request in violation of FOIA and get sued. Mr. Gregory noted that at the subcommittee, no one liked the original bill because it allowed the government to initiate suit against a requester, but Mr. Wiley's bill was more defensive, in that the requester would still be the one to bring a suit, but now there was disagreement with that approach as well. He stated that the problem is a problem which occurs often enough that there needs to be some relief through the judicial system, and it has to be one way or the other. Senator Houck stated that it irked him that the law can be used for the purpose of harassing, but trying to translate that into statutory language was problematic. After some further discussion, Senator Houck asked if there was any motion on the proposal. Hearing none, the matter was left on the table.

#### *Criminal Investigative Records Subcommittee*

Chairman Fifer reported that the Criminal Investigative Records Subcommittee had met three times this year, including earlier this same day. The subcommittee considered the issue of policy changes regarding access to criminal investigative records, but could not find common ground for substantive changes. Instead, the subcommittee considered a re-draft of § 2.2-3706 intended to make the section easier to read and understand without introducing any substantive changes. The subcommittee agreed by consensus at its meeting today to present the draft to the full Council for consideration, but because there was not a quorum present, there was no official recommendation from the subcommittee. Staff then presented the latest version of the redraft, noting that while it made no substantive changes, it reorganized the section into separate subsections addressing definitions, discretionary releases, required releases, prohibited release, noncriminal records, and conflict resolution. Staff further noted technical amendments contained in the draft, and that it had a second enactment clause stating that it was declaratory of existing law. After brief discussion expressing concern that introducing the draft might open up the entire topic to re-examination, the Council voted 8-2 in favor of recommending the draft.<sup>24</sup>

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<sup>23</sup> Va. Code § 2.2-3703(C).

<sup>24</sup> By voice vote, members Fifer, Gregory, Jones, Landon, Miller, Spencer, Treadway, and Whitehurst voted in favor; Senator Houck and Mr. Wiley voted against.

### *Annual Legislative Preview*

David Blount, representing the Thomas Jefferson Planning District, spoke to inform the Council that legislation would be introduced affecting certain provisions of § 15.2-1418, outside of FOIA, regarding the notice provide to members of public bodies. He noted that the draft had been presented to the Virginia Municipal League, the Virginia Association of Counties, and Mr. Wiley, all without objection, and that it would not affect the public notice requirements of FOIA. There were no questions or comments on this matter.

### *Other Business*

#### *VITA charges to state agencies for retrieval of public records maintained by the Virginia Information Technologies Agency (VITA); experience of the Department of Environmental Quality (DEQ).*

Staff related that DEQ had received a FOIA request for records maintained by VITA. Under FOIA, DEQ remains the custodian of these records and was initially charged \$14,000 by VITA to make the records available to DEQ in response to the FOIA request. Ultimately, this charge was reduced by VITA to \$3,800. VITA's initial estimate came one month after the records were requested by DEQ, and the last estimate was almost two months after DEQ's request. The question was brought forth whether DEQ can pass on to the requester as part of the actual charges allowed under FOIA this additional charge to retrieve records from VITA, and whether it would be reasonable to do so. After some discussion, the Council agreed by consensus that more information was needed on the extent of this problem, particularly the frequency of occurrences and the costs involved. The Council directed staff to gather more information so that the matter could be taken up and addressed in detail by the Council in 2011.

#### *Use of the word "archive" in subsection J of § 2.2-3704; implications to the Library of Virginia and the VA Public Records Act.*

As an additional item of business, staff reported that the word "archive" is a term of art as used by the Library of Virginia in respect to its responsibilities under the VA Public Records Act (VPRA) and the archiving of public records. Under the VPRA, the Library becomes the custodian of records archived there. The legislative history of subsection J of § 2.2-3704,<sup>25</sup> which was added in 2010, was to capture VITA and the Division of Legislative Automated Systems (DLAS), which agencies provide IT support for the executive and legislative branches, respectively. The use of the term "archive" in this section of FOIA was not meant to capture the Library of Virginia within this provision. Staff presented two optional

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<sup>25</sup> In full, the subsection currently reads as follows: "In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester."



approaches to amend subsection J. After some discussion, the Council voted to recommend adding language to subsection J stating that "Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.)."

#### *Public Comment*

Craig Merritt, on behalf of the Virginia Press Association, suggested taking a hard look at the last matter to make sure that records permanently archived at the Library of Virginia were not inadvertently exempted from FOIA.

Mr. Miller suggested that staff survey local government and state agencies on issues such as harassment and VITA charges in order to provide information to the Council at its next meeting. The Council agreed without objection to examine those issues next year.

Senator Houck noted that Delegate Griffith, Vice-Chair of the Council, would be leaving the Council as he had been elected to the United States Congress. Formal recognition of his service will be recognized at the appropriate 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 1690 inquiries and conducted 53 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 government, media, or citizens. 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 solely on the facts and information provided to the Council by the person requesting the opinion. The Council is not a trier of fact. Thus, it is specifically noted in each opinion, whether written or verbal, that Council opinions are given based on the representations of fact made by the opinion requester.

For the period of December 1, 2009 to November 30, 2010, the Council, with a staff of two attorneys, fielded 1,690 inquiries. Of these inquiries, six 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. An index of formal opinions issued during the past year appears as Appendix C. The table below profiles who requested written advisory opinions for the period December 1, 2009 through November 30, 2010:

Written Advisory Opinions: 6

State and Local Government	2
Citizens of the Commonwealth	3
Members of the News Media	1

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 1, 2009 and November 30, 2010:

Telephone and E-mail Responses: 1,684

Government	899
Citizens	620
News Media	165

Appendix F to this report sets out the number of inquiries received by the Council each month from December, 2009 through November, 2010, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other). Appendix G

to this report provides an overview of the total number of inquiries received by the Council each year from 2000 through 2010.

#### *The Council's Website*

The website address for the Council is <http://foiacouncil.dls.virginia>. During the past year, the website received approximately 503,116 visits, for a total of 1,725,938 page views and 5,713,611 hits.<sup>26</sup> 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 five 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*

After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, 2006 was the first year where statewide FOIA training workshops were not offered. The Council viewed declining attendance over the previous two years as a sign that its basic training mission had been successfully accomplished. Statewide workshops are now offered 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 are provided free of charge. 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 1, 2009 to November 30, 2010, the Council conducted 53 such training programs. A listing of these trainings appears as Appendix B to this report.

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<sup>26</sup> Please note that the software used to track website hits changed this year and now presents the information in a different format.

### *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
- Guides to Electronic Meetings
  - Local and Regional Public Bodies
  - State Public Bodies
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- 2010 FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>27</sup>
- Legislators Guide to FOIA
- Law-Enforcement Records and FOIA

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. Response letters were developed by the Council to facilitate compliance with the procedural requirements of FOIA by public bodies. The Council website also includes a FOIA petition should enforcement of the rights granted under FOIA be necessary.

## **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. Celebrating its decennial year, the Council continued to serve as a resource for the public, representatives of state and local government, and members of the media, responding to approximately 1690 inquiries. It formed two 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

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<sup>27</sup> Developed in cooperation with the Virginia Association of Counties and the Virginia Municipal League.

commitment to facilitating compliance with FOIA through training continued in the form of 53 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.

Respectfully submitted,

Senator R. Edward Houck, Chair  
Delegate H. Morgan Griffith  
Craig T. Fifer  
Eric A. Gregory  
Edward Jones  
Forrest M. "Frosty" Landon  
E. M. Miller, Jr.  
John G. Selph  
Mary Yancey Spencer  
Sandra G. Treadway  
George T. Whitehurst  
Roger C. Wiley

**2011 LEGISLATIVE RECOMMENDATIONS**

**1. BILL SUMMARY: Freedom of Information Act; proceedings for enforcement.**

Requires that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the filing of the petition. The bill contains technical amendments and is a recommendation of the FOIA Council.

**BILL TEXT:**

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

**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. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. 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;

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. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made. ~~However, any, provided the party against whom the writ is brought has received a copy of the petition at least three working days prior to filing. The hearing on any~~ petition made outside of the regular terms of the circuit court of a ~~county locality~~ that is included in a judicial circuit with another ~~county or counties, the hearing on the petition~~ locality or localities 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, including costs and reasonable fees for expert witnesses, 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.

#

**2. BILL SUMMARY: Freedom of Information Act; transfer of records.** Clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made pursuant under FOIA.

**BILL TEXT:**

A BILL to amend and reenact § 2.2-3704 of the Code of Virginia, relating to the Freedom of Information Act; transfer of 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; transfer of records for storage, etc.

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 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 identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records 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 identify with reasonable particularity the subject matter of withheld portions, and 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 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 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 subsection G, 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. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be

responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). The Library of Virginia shall be deemed to be the custodian of such records permanently archived for the purposes of responding to requests for such records made pursuant to this chapter.

#

**3. BILL SUMMARY: Freedom of Information Act; access to criminal records.** Rewrites the current § 2.2-3706 of FOIA to make the section clearer and more user-friendly. The bill contains no substantive changes in the current law. The bill contains numerous technical amendments and is a recommendation of the FOIA Council.<sup>28</sup>

**BILL TEXT:**

A BILL to amend and reenact §§ 2.2-3706, 2.2-3711, and 15.2-1713.1 of the Code of Virginia, relating to the Freedom of Information Act; access to criminal records.

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

**1. That §§ 2.2-3706, 2.2-3711, and 15.2-1713.1 of the Code of Virginia are amended and reenacted as follows:**

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<sup>28</sup> However, after the vote to recommend the bill, there was concern expressed by several members of the Council that introducing the draft might open up the entire topic to re-examination and unwanted mischief. Given that 2011 was an election year in the House of Delegates, it was suggested that introduction of the redraft of § 2.2-3706 be delayed until the 2012 Session of the General Assembly.

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

A. Definitions. As used in this section:

"Criminal incident information" means a general description of the criminal activity reported, the date and general location the alleged crime was committed, the identity of the investigating officer, and a general description of any injuries suffered or property damaged or stolen.

"Criminal investigative file" means any documents and information including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information.

~~B. Law enforcement agencies shall make available upon request criminal incident information relating to felony offenses. However, where the release of criminal incident information is likely to jeopardize an ongoing investigation or prosecution, or the safety of an individual; cause a suspect to flee or evade detection; or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information. Nothing in this subsection shall be construed to prohibit the release of those portions of such information that are not likely to cause the above-referenced damage.~~

~~C. Information in the custody of law enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released.~~

~~D. The identity of any victim, witness or undercover officer, or investigative techniques or procedures need not but may be disclosed unless disclosure is prohibited or restricted under § 19.2-11.2.~~

~~E. The identity of any individual providing information about a crime or criminal activity~~

~~under a promise of anonymity shall not be disclosed.~~

~~F.B. Discretionary releases.~~ 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. Criminal investigative files as defined in subsection A;
2. Adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation;
3. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to § 53.1-16 or ~~§~~66-3.1, and (iii) campus police departments of public institutions of higher education established pursuant to Chapter 17 (§ 23-232 et seq.) of Title 23;
4. ~~Portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity;~~
5. Records of local law-enforcement agencies relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;
- 6.5. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment;
- 7.6. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;
- 8.7. All records of adult persons under (i) investigation or supervision by a local pretrial services agency in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision or monitoring by a local community-based probation services agency in accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii)

investigation or supervision by state probation and parole services in accordance with Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1;

~~9.8.~~ Records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties;

~~10.9.~~ Those portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. Nothing in this subdivision shall operate to allow the withholding of information concerning the overall costs or expenses associated with undercover operations or protective details; ~~and~~

~~11.10.~~ Records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law;

~~11. The identity of any victim, witness or undercover officer, or investigative techniques or procedures. However, if disclosure of any victim or witness is prohibited or restricted under § 19.2-11.2, the identity of any such victim or witness shall be withheld; and~~

~~12. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, including information obtained from state, local and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913..~~

~~G. Records kept by law enforcement agencies as required by § 15.2-1722 shall be subject to the provisions of this chapter except that those portions of noncriminal incident or other investigative reports or materials that contain identifying information of a personal, medical or financial nature may be withheld where the release of such information would jeopardize the~~

~~safety or privacy of any person.~~

~~H. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1 are excluded from the provisions of this chapter, including information obtained from state, local and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913.~~

I-C. Required releases. Law-enforcement agencies shall make available upon request:

1. Criminal incident information relating to felony offenses. However, where the release of criminal incident information is likely to jeopardize an ongoing investigation or prosecution or the safety of an individual; cause a suspect to flee or evade detection; or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information. Nothing in this subdivision shall be construed to prohibit the release of those portions of such information that are not likely to cause the above-referenced damage; and

2. Information relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest.

D. Prohibited release. The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.

E. Noncriminal records. Records required to be maintained by law-enforcement agencies pursuant to § 15.2-1722 shall be subject to the provisions of this chapter except that those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person.

F. Conflict resolution. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.

§ 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. 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.

19. 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; or 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.

20. 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, or by the Board of the Virginia College Savings Plan, acting pursuant to § 23-38.80, 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 by the Virginia College Savings Plan or provided to the retirement system or the Virginia College Savings Plan 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, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan. 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.

21. 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.

22. 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.

23. 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.

24. Those portions of the meetings of the Health Practitioners' Monitoring 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.

25. 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.

26. 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.

27. 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.

28. 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, or any independent review panel appointed to review information and advise the responsible public entity concerning such records.

29. 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.

30. Discussion or consideration of grant or loan application records excluded from this chapter pursuant to subdivision 17 of § 2.2-3705.6 by (i) the Commonwealth Health Research Board or (ii) the Innovation and Entrepreneurship Investment Authority or a grant allocation committee appointed to advise the Innovation and Entrepreneurship Investment Authority on the grant applications.

31. 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.

32. [Expired.]

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

34. 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.

35. 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.

36. 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~~B 1 of § 2.2-3706.

37. 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.

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

39. Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, by the Investment Advisory Committee appointed pursuant to § 51.1-124.26, by any local retirement system, acting pursuant to § 51.1-803, by the Board of the Virginia College Savings Plan acting pursuant to § 23-38.80, or by the Virginia College Savings Plan's Investment Advisory Committee appointed pursuant to § 23-38.79:1 of records excluded from this chapter pursuant to subdivision 25 of § 2.2-3705.7.

40. Discussion or consideration of records excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.6.

41. Discussion or consideration by the Board of Education of records relating to the denial, suspension, or revocation of teacher licenses excluded from this chapter pursuant to subdivision 13 of § 2.2-3705.3.

42. Those portions of 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, during which there is discussion of records excluded from this chapter pursuant to subdivision 12 of § 2.2-3705.2.



43. Discussion or consideration by the advisory committee for veterans care centers established by the Commissioner of the Virginia Department of Veterans Services pursuant to § 2.2-2004.1 of records excluded from this chapter pursuant to subdivision 28 of § 2.2-3705.7.

44. Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of records excluded from this chapter pursuant to subdivision 29 of § 2.2-3705.7.

45. Discussion or consideration by the Virginia Tobacco Indemnification and Community Revitalization Commission of records excluded from this chapter pursuant to subdivision 23 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 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.

§ 15.2-1713.1. Local "Crime Stoppers" programs; confidentiality.

A. As used in this section, a "Crime Stoppers," "crime solvers," "crime line," or other similarly named organization is defined as a private, nonprofit Virginia corporation governed by a civilian volunteer board of directors that is operated on a local or statewide level that (i) offers anonymity to persons providing information to the organization, (ii) accepts and expends donations for cash rewards to persons who report to the organization information about alleged criminal activity and that the organization forwards to the appropriate law-enforcement agency, and (iii) is established as a cooperative alliance between the news media, the community, and law-enforcement officials.

B. Evidence of a communication or any information contained therein between a person submitting a report of an alleged criminal act to a "Crime Stoppers" organization and the person who accepted the report on behalf of the organization is not admissible in a court proceeding. Law-enforcement agencies receiving information concerning alleged criminal activity from a "Crime Stoppers" organization shall maintain confidentiality pursuant to subsection ~~E~~D of § 2.2-3706.

**2. That the provisions of this act are declaratory of existing law.**

#

**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, 2009 through November 30, 2010, Council staff conducted 53 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 1, 2009	Special Consolidation Commission Clifton Forge, VA
December 2, 2009	Virginia Sheriff's Association Conference Richmond, VA
	Permit Technician Course Department of Housing and Community Development Richmond, VA
December 4, 2009	Department of State Police Richmond, VA
December 8, 2009	New Officers Training, Compensation Board Richmond, VA
January 8, 2010	Newly Elected Officials Conference Virginia Municipal League Charlottesville, VA
January 9, 2010	New Member Training, VA Association of Counties Richmond, VA
January 13, 2010	Asian Delegation Visit Richmond, VA
January 21, 2010	Richmond Regional Planning District Commission Richmond, VA

March 16, 2010	VA Lottery Department Richmond, VA
March 22, 2010	VA Lottery Department Richmond, VA
March 24, 2010	Powhatan County Powhatan, VA
April 14, 2010	Southside Soil and Water Conservation District Charlotte Court House, VA
April 27, 2010	City of Fredericksburg Police Department Fredericksburg, VA
April 29, 2010	City of Richmond Richmond, VA
May 21, 2010	Clarke County Public Schools Clarke County, VA
May 24, 2010	Virginia Fire Prevention Association Virginia Beach, VA
May 25, 2010	Virginia Commonwealth University Communications Ethics and Law Class Richmond, VA
May 26, 2010	Governor's Policy Advisors Richmond, VA
May 27, 2010	City of Richmond Richmond, VA
June 10, 2010	Town of Culpeper Culpeper, VA
July 12, 2010	Fredericksburg Economic Development Authority Fredericksburg, VA
July 13, 2010	VA Department of Planning and Budget Richmond, VA
July 16, 2010	Stafford County School Board Stafford, VA

	New Member Training, VA Municipal League Richmond, VA
July 29, 2010	Town of Glade Spring Glade Spring, VA
August 4, 2010	Library of Virginia Richmond, VA
August 17, 2010	VA State Board of Elections Conference Richmond, VA
August 24, 2010	VA Broadband Advisory Council Lynchburg, VA
September 1, 2010	Alexandria Sanitation Authority Alexandria, VA
September 2, 2010	Arlington County Police Department Arlington, VA
September 8, 2010	Town of Leesburg and surrounding jurisdictions Leesburg, VA
September 9, 2010	Alexandria Sanitation Authority Alexandria, VA
September 15, 2010	VA Coalition for Open Government Seminar Richmond, VA
September 17, 2010	VA Division of Motor Vehicles Richmond, VA
September 20, 2010	Committee Staff, Senate Finance Committee Richmond, VA
September 24, 2010	VA Department of Health Professions Richmond, VA
September 28, 2010	VA Library of Virginia, Trustee Workshop Richmond, VA
September 29, 2010	VA Library of Virginia, Trustee Workshop Charlottesville, VA

September 30, 2010	VA Library of Virginia, Trustee Workshop Front Royal, VA
October 5, 2010	City of Newport News Police Department Newport News, VA  New Member Training, VA Municipal League Hampton, VA
October 12, 2010	VA Library of Virginia, Trustee Workshop Victoria, VA
October 13, 2010	VA Library of Virginia, Trustee Workshop Radford, VA
October 14, 2010	VA Library of Virginia, Trustee Workshop Wise, VA
October 20, 2010 Council	Hampton Roads Emergency Services Media  Norfolk, VA
October 21, 2010	Virginia Library Association Annual Conference Portsmouth, VA
October 22, 2010 2010	VA Coalition for Open Government, Access Conference Richmond, VA
October 26, 2010	Municipal Clerks Institute Virginia Beach, VA
October 27, 2010	County of Roanoke Roanoke, VA
October 28, 2010	Local Social Services Directors Regional Meeting Warrenton, VA
November 10, 2010	Permit Technician Course Department of Housing and Community Development Richmond, VA
November 30, 2010	Fairfax County Board of Supervisors Fairfax, Virginia

INDEX OF WRITTEN ADVISORY OPINIONS  
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ADVISORY OPINIONS ISSUED  
2009

Opinion No.

Issue(s)

December

AO-12-09

The Virginia State Bar is a public body subject to FOIA. A task force created by a public employee to advise that employee is not a public body. Records in the possession of a public body or employee in the transaction of public business are public records. Questions regarding constitutional separation of powers are beyond the statutory authority of the FOIA Council. Public bodies do not have to create records that do not already exist in order to respond to a records request, but must inform the requester that the records do not exist.

AO-13-09

A motion to convene a closed meeting must identify the subject of the meeting, state its purpose, and provide a reference to an applicable exemption. Quoting or paraphrasing a statutory exemption states the purpose of the meeting, but does not identify the subject. FOIA places the duty to identify the subject of a closed meeting upon the public body holding the meeting, not its attorney.

**ADVISORY OPINIONS ISSUED  
2010**

**Opinion No.**

**Issue(s)**

**February**

AO-01-10

Records that have been entered into evidence and made part of the public record at a public hearing may not subsequently be withheld from disclosure as exempt records of a criminal investigation or prosecution.

**March**

AO-02-10

A motion to convene a closed meeting must identify the subject of the meeting, the purpose of the meeting, and cite an applicable exemption from the open meeting requirements. In order to avoid confusion and misunderstanding, the preferred practice is to make a separate motion for each topic that will come under consideration during a closed meeting.

**June**

AO-03-10

FOIA provides exemptions from mandatory disclosure for certain records related to closed meetings. However, FOIA does not address whether a mayor may demand that at the conclusion of a closed meeting members of a local governing body give to the mayor any documents distributed or notes taken during the closed meeting.

**November**

AO-04-10

For the purpose of the definition of public records, the meaning of "in the transaction of public business" must be examined on a case by case basis. FOIA does not mandate how to perform a search for records, but any search that is conducted must be carried out in good faith.



## APPENDIX D

### 2010 MEETINGS OF THE FREEDOM OF INFORMATION ADVISORY COUNCIL

**Monday, July 26, 2010**

**House Room D, General Assembly Building, Richmond**

Welcome newest members Ed Jones, Free Lance Star and Eric Gregory, Office of Attorney General. Senator Houck elected chair and Delegate Griffith elected vice-chair. Review of FOIA legislation enacted by 2010 Session of General Assembly and bills referred to Council General Assembly for study. Report from Rights and Remedies Subcommittee. Discussion of role of Council to proactively provide annual FOIA training to legislative bodies.

**Monday, September 13, 2010**

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

Annual legislative preview, Part I. Progress reports from Rights and Remedies and Criminal Investigative Records Subcommittees. Adoption of legislative recommendation of Rights and Remedies Subcommittee concerning when notice of FOIA petition must be given to public body against whom the petition is brought.

**Monday, November 8, 2010**

**House Room D, General Assembly Building, Richmond**

Annual legislative preview, Part II. Progress reports and final legislative recommendations from Rights and Remedies and Criminal Investigative Records Subcommittees. Discussion of legislation offered by Council member Wiley authorizing the court to decide when a public body would be relieved of the burden to respond to FOIA requests by an individual requester intending to harass the public body. Discussion concerning retrieval by state agencies of records from VITA and related charges therefrom. Approval of legislative recommendation eliminating the unintended consequences of the use of the word "archive" in § 2.2-3704 as it applies to the Library of Virginia and its responsibilities under the Virginia Public Records Act.

**STATUS OF FREEDOM OF INFORMATION  
AND OTHER RELATED ACCESS BILLS  
CONSIDERED BY THE 2010 GENERAL ASSEMBLY**

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2010*

**I. Introduction**

The General Assembly passed a total of 12 bills amending the Virginia Freedom of Information Act (FOIA) during the 2010 Session. House Bill 434 (Griffith), which allows the redaction of financial account numbers and routing information, passed as a recommendation of the Council. Note that this bill was passed with an emergency clause and became law effective April 11, 2010. The General Assembly also passed House Bill 433 (Griffith), which sets out the original date (January 1, 1975) when social security numbers were authorized to be collected or required by state and local agencies under federal law, and makes other changes to the Government Data Collection and Dissemination Practices Act (GDCDPA), as a recommendation of the Council.

Of the 12 bills, six bills created four new record exemptions to FOIA as follows:

- Exempts from mandatory disclosure financial account numbers and routing information. (HB 434 amending § 2.2-3705.1, effective April 11, 2010);
- Exempts certain records of threat assessment teams at public institutions of higher education related to specific individuals. (HB 903 and identical SB 207 amending § 2.2-3705.4);
- Exempts certain records of the Virginia Tobacco Indemnification and Community Revitalization Commission, and provides a corresponding closed meeting exemption. (HB 1073 and SB 555 amending §§ 2.2-3705.6 and 2.2-3711; note that each bill uses identical language for the meetings exemption, but not for the records exemption);
- Exempts certain records related to the Statewide Agencies Radio System (STARS) and similar communications systems. (SB 432 amending § 2.2-3705.2).

Two bills add one new closed meeting exemption to § 2.2-3711:

- Allows closed meetings to be held for the discussion or consideration of certain exempt records of the Virginia Tobacco Indemnification and Community Revitalization Commission. (HB 1073 and SB 555 amending §§ 2.2-3705.6 and 2.2-3711; as stated above, note that each bill uses identical language for the meetings exemption, but not for the records exemption).

Six bills amend existing provisions of FOIA as follows:

- Amends the definition of "scholastic record" to include records of applicants for admission. (HB 211 amending § 2.2-3701);
- Clarifies that a FOIA action may be brought in the name of a person notwithstanding that a request for public records was made by the person's attorney in his representative capacity, and that costs and reasonable fees for expert witnesses may be recovered by the petitioner. (HB 431 amending § 2.2-3713);
- Includes the Clerks of the House of Delegates and Senate of Virginia among those who may invoke the existing exemption for working papers and correspondence (HB 432 amending § 2.2-3705.7);
- Clarifies who is the custodian of records transferred for storage, maintenance, or archiving; defines "criminal investigative file" and clarifies what records are exempt from FOIA as so defined; provides that undercover operations and protective detail records as well as records of background and internal affairs investigations held by any state or local law-enforcement agencies are exempt. (HB 518 amending §§ 2.2-3704 and 2.2-3706);
- Technical amendment to reflect name change from "Innovative Technology Authority" to "Innovation and Entrepreneurship Investment Authority." (HB 678 amending § 2.2-3711);
- Prohibits any public body from conducting a meeting required to be open in any building or facility where any recording devices are prohibited, and clarifies that no public body may prohibit or prevent any person from recording any portion of a meeting required to be open. (HB 1028 amending § 2.2-3707).

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 2010 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself.

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

### **§ 2.2-3701. Definitions.**

**Definition of scholastic record.** Includes in the definition of scholastic records, those records of an applicant for admission that are maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution. HB 211 (2010 Acts of Assembly c. 706.)

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

**Applicability; disclosure of criminal records; noncriminal incident information.** Provides that in the event a public body transferred possession of public records for storage, maintenance or archiving, the public body initiating the transfer shall remain the custodian of the records for the purpose of responding to FOIA requests. Also makes changes in § 2.2-3706, *infra*. HB 518 (2010 Acts of Assembly, c. 627).

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

**Exemption for credit card and bank account data.** Exempts from the mandatory disclosure provisions of the Freedom of Information Act those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. The bill provides, however, that access shall not be denied to the person who is the subject of the record. The bill defines "financial institution" and contains an emergency clause. The bill is a recommendation of the Freedom of Information Advisory Council. HB 434 (2010 Acts of Assembly, c. 553). **Note:** *This bill passed with an emergency clause and became effective April 11, 2010.*

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

**Record exemption for the Statewide Agencies Radio System.** Provides an exemption from FOIA for documentation or other information that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system (similar communications system) (ii) relates to radio frequencies assigned to or utilized by STARS or similar communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, programming maintained by or utilized by STARS or similar communications system; those portions of engineering and construction drawings and plans that reveal critical structural components, interconnectivity, security equipment and systems, network monitoring, network operation center, master sites, ventilation systems, fire protection equipment, mandatory building emergency equipment, electrical systems, and other utility equipment and systems related to STARS or similar communications system; and special event plans, operational plans, storm plans, or other pre-arranged programming, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of any person. SB 432 (2010 Acts of Assembly, c. 672).

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

**Threat assessment teams; records.** Authorizes threat assessment teams to receive health and criminal history records of students for the purposes of assessment and intervention, and exempts records of threat assessment teams from the Freedom of Information Act. However, if an individual who had been under assessment commits certain violent acts, any records created by the team shall be made publicly available. HB 903 (2010 Acts of Assembly, c. 524), SB 207 (2010 Acts of Assembly, c. 456).

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

**Proprietary records of the Virginia Tobacco Indemnification and Community Revitalization Commission.** Excludes from the mandatory disclosure provisions of FOIA trade secrets and certain proprietary records disclosed to, provided to, or held by the Virginia Tobacco Indemnification and Community Revitalization Commission in support of or as may be required for an application for or the awarding of a grant. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission. The bill requires the grant applicant to specify the records for which protection is sought before submitting them to the Commission. The bill contains a corresponding meeting exemption for the Commission when discussing the excluded records. HB 1073 (2010 Acts of Assembly, c. 310), SB 555 (2010 Acts of Assembly, c. 808). **Note:** *Each bill uses identical language for the meetings exemption, but they vary slightly as to the records exemption.*

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

**Working papers and correspondence of the Clerks of the House of Delegates and the Senate of Virginia.** Provides an exemption from the mandatory disclosure requirements of FOIA for the working papers and correspondence of the Clerks of the House of Delegates and the Senate of Virginia. HB 432 (2010 Acts of Assembly, c. 300).

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

**Applicability; disclosure of criminal records; noncriminal incident information.** In addition to changes to § 2.2-3704, *supra*, adds a definition of "criminal investigative file" and clarifies what records are exempt from FOIA as so defined. The bill provides that undercover operations and protective detail records as well as records of background and internal affairs investigations held by any state or local law-enforcement agencies are exempt from the mandatory disclosure provisions of FOIA. HB 518 (2010 Acts of Assembly, c. 627).

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

**Recording of public meetings.** Prohibits any public body from conducting a meeting required to be open in any building or facility where any recording devices are prohibited. The bill also clarifies that no public body may prohibit or prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. HB 1028 (2010 Acts of Assembly, c. 309).

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

**Innovation and Entrepreneurship Investment Authority (IEIA) and the Commonwealth Research and Commercialization Fund (CRCF).** Updates obsolete references to the predecessors of the IEIA and the CRCF. HB 678 (2010 Acts of Assembly, c. 630).

**Proprietary records of the Virginia Tobacco Indemnification and Community Revitalization Commission.** In addition to providing an exemption for certain records containing trade secrets or proprietary information in § 2.2-3705.6, *supra*, contains a corresponding meeting exemption for the Commission when discussing the excluded records. HB 1073 (2010 Acts of Assembly, c. 310), SB 555 (2010 Acts of Assembly, c. 808). **Note:** *Each bill uses identical language for the meetings exemption, but they vary slightly as to the records exemption.*

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

**Proceedings for enforcement.** Clarifies that a FOIA action may be brought in the name of a person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. The bill also clarifies that costs and reasonable fees for expert witnesses may be recovered by the petitioner in a FOIA action. HB 431 (2010 Acts of Assembly, c. 299).

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

### **Joint Resolutions**

**Commending Edward W. Jones.** SJ 261. **Note:** Commends Mr. Jones, the editor of Fredericksburg's *Free Lance-Star*, for his participation on a state panel working on the Virginia Freedom of Information Act (FOIA) in the 1980's and also on the Virginia Press Association's Freedom of Information Committee in the 1990's. Also of note, Mr. Jones has been appointed as a member of the Council for a 4-year term beginning July 1, 2010.

## Uncodified Acts

**Virginia Network for Geospatial Health Research Authority; created.** Requires the Secretaries of Health and Human Resources and Technology to evaluate opportunities to partner with nonprofit organizations and institutions of higher education in the Commonwealth to develop a network for geospatial health research, and to report on their findings to the Governor; the Senate Committees on Education and Health, Finance, and General Laws and Technology; and the House Committees on Appropriations, Health, Welfare, and Institutions, and Science and Technology no later than December 1, 2010. SB 549 (2010 Acts of Assembly, c. 679).

## Title 2.2 Administration of Government

**Government Data Collection and Dissemination Practices Act; collection of social security numbers.** Sets out the original date (January 1, 1975) when social security numbers were authorized to be collected/required by state and local agencies under federal law, which is a recommendation of the Freedom of Information Advisory Council. The bill also provides that nothing shall be construed to prohibit the collection of a social security number for the sole purpose of debt collection by state and local agencies. HB 433 (2010 Acts of Assembly, c. 749).

**Open Education Curriculum Board; established.** Establishes the Open Education Curriculum Board. The purpose of the Board is to designate qualifying entities as Open Education Consortia and set the standards for submission of education materials and subsequent licensing of educational curriculum developed by the Consortia. Materials submitted to a Consortium may be edited in any manner and released under a Creative Commons license or licensed for use as a commercial product, subject to restrictions developed by the Board. Consortia may offer incentives to encourage individuals to submit educational materials to the Consortium. SB 241 (2010 Acts of Assembly, c. 787).

**Land conservation practices; information management.** Requires the Secretary of Natural Resources, with assistance from the Secretary of Agriculture and Forestry, to establish and maintain a database of the critical data attributes for onsite best management practices that limit the amount of nutrients and sediment entering state waters. The database is intended to document voluntary actions taken by the agricultural and silvicultural sectors and should enable the application of the collected data towards projections of progress towards Virginia's water quality goals. The bill declares that an emergency exists and that the bill is effective upon passage. SB 346 (2010 Acts of Assembly, c. 172). **Note:** *The bill was enacted effective March 13, 2010.*

**Workforce and education program evaluation and policy analysis.** Provides for certain agencies to share encrypted (de-identified) data to create one-time restricted-use data sets in order to evaluate postsecondary and career readiness programs, pursuant to specified requirements. SB 459 (2010 Acts of Assembly, c. 803). **Note:** *The bill as introduced amended*

*the Government Data Collection and Dissemination Practices Act (GDCDPA). However, the bill as enacted does not amend the GDCDPA, but instead adds a new section in the law regarding Coordination of Workforce Development (Chapter 4.2 of Title 2.2).*

## **Title 6.2 Financial Institutions and Services**

**Revision of Title 6.1.** Creates proposed Title 6.2 (Financial Institutions and Services) as a revision of existing Title 6.1 (Banking and Finance). Proposed Title 6.2 consists of 22 chapters divided into four subtitles: Subtitle I (General Provisions); Subtitle II (Depository Institutions and Trust Organizations); Subtitle III (Other Regulated Providers of Financial Services); and Subtitle IV (Other Financial Activities). Subtitle I includes title-wide definitions and chapters addressing money and currency, interest and usury, lending practices generally, including credit card laws currently in Title 11, and equal credit opportunity laws that are currently in Title 59.1. Subtitle II addresses deposits and accounts at financial institutions, as well as provisions applicable to specific types of depository institutions, including financial institution holding companies, banks, savings institutions, credit unions, and entities conducting trust business. Subtitle III sets out provisions relating to providers of financial services that are subject to licensure or registration with the State Corporation Commission, including industrial loan associations, consumer finance companies, mortgage lenders and brokers, mortgage loan originators, payday lenders, money order sellers and money transmitters, agencies providing debt management plans, and check cashers. Subtitle IV includes provisions regulating the conduct of other financial activities, including refund anticipation loans, safe deposit boxes, and securitization transactions. The Wet Settlement Act and provisions regarding real estate settlement agents are relocated to Title 55. SB 295 (2010 Acts of Assembly, c. 794). **Note:** *The bill recodifies an exemption for a payday loan database, currently found at § 6.1-453.1.*

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

**Technological efficiencies in circuit court clerks' offices; fees.** Makes technical changes in circuit court clerks' handling of electronic or digital filing and their maintenance and support of electronic filing. HB 974 (2010 Acts of Assembly, c. 430).

**Attorney-client privilege; work product protection; limitations on waivers.** Provides that when the disclosure of a communication or information covered by attorney-client privilege or work product protection made in a proceeding or to any public body operates as a waiver of the privilege or protection, such waiver only extends to undisclosed communications or information if (i) the waiver was intentional, and (ii) the disclosed and undisclosed communications or information concern the same subject matter and ought in fairness be considered together. Inadvertent disclosures do not operate as a waiver if reasonable steps were taken to prevent disclosure and to rectify the error. The bill also provides that an agreement between parties as to the effect of a disclosure is only binding upon the parties to the agreement unless it has been incorporated into a court order. The bill does not limit any otherwise applicable waiver of attorney-client privilege or work product protection by an



inmate who files an action challenging his conviction or sentence. As introduced, this bill was a recommendation of the Boyd-Graves Conference. SB 384 (2010 Acts of Assembly, c. 350).

## **Title 9.1 Commonwealth Public Safety**

**Availability of presentence reports to counsel for convicted person.** Provides that counsel representing a person who has been convicted of a crime for which a presentence report was prepared by a probation officer may be provided a copy of the report, without a court order, when the convicted person is pursuing a post-conviction remedy. HB 13 (2010 Acts of Assembly, c. 223).

**Line of Duty Act; access to records of investigation.** Provides that evidence and documents obtained by or created by, and the report of investigation prepared by, the Department of State Police in carrying out the provisions of the Line of Duty Act shall (i) be deemed confidential, (ii) be exempt from disclosure under the Freedom of Information Act (§ 2.2-3700 et seq.), and (iii) not be released in whole or in part by any person to any person except as provided in the Line of Duty Act. HB 857 (2010 Acts of Assembly, c. 568).

## **Title 12.1 State Corporation Commission**

**Personal identifying information; State Corporation Commission filings.** Declares that a person preparing or submitting a document or information that is filed with the clerk of the State Corporation Commission is responsible for ensuring that the document or information does not contain any personal identifiable information, which includes a social security number or other number on a driver's license, information on credit cards or other electronic billing and payment systems, an individual's date of birth or parent's maiden name, and financial account numbers. The provision does not apply if the information is publicly available or is required or authorized by law to be included in the filed information. The measure also authorizes the clerk of the Commission to remove, delete, or obliterate such information from a document, and to refuse to accept for filing any document that includes personal identifiable information. The State Corporation Commission, its members, the clerk of the Commission, and any member of his staff are declared to be immune from liability for any acts or omissions in implementing these provisions. HB 526 (2010 Acts of Assembly, c. 513).

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

**Bristol Virginia Utilities Authority.** Creates an authority and converts Bristol Virginia Utilities into that authority, to be known as the BVU Authority. HB 27 (2010 Acts of Assembly, c. 210), SB 12 (2010 Acts of Assembly, c. 117). **Note:** *The bill contains provisions concerning access to certain records of the Authority, as well as certain meeting requirements unique to the Authority.*

**Certain firearms taxes; destruction of records.** Repeals local authority to impose a license tax of not more than \$25 on persons engaged in the business of selling pistols and revolvers. Also, a recordkeeping requirement for such persons is deleted and the clerk of the circuit court shall destroy any such existing records. HB 109 (2010 Acts of Assembly, c. 495).

## **Title 16.1 Courts Not of Record**

**Electronic filing of civil actions.** Provides that the general district courts shall accept case data in an electronic format for any civil action filed. The use of the electronic transfer shall be at the option of the plaintiff or the plaintiff's attorney, and if electronic transfer is utilized, the plaintiff or the plaintiff's attorney shall comply with the security and data configuration standards established by the Office of the Executive Secretary of the Supreme Court. HB 283 (2010 Acts of Assembly, c. 622).

**Exception to confidentiality of juvenile records; fugitives and escapees.** Allows for the release of identifying information of a juvenile who is charged with or convicted of any misdemeanor or felony and is a fugitive from justice or an escapee. Currently, only juveniles charged with or convicted of certain serious offenses (e.g., murder, rape, robbery) may have identifying information released once they become a fugitive or escapee. HB 918 (2010 Acts of Assembly, c. 526).

**Juvenile records; gang information; exceptions to confidentiality.** Places an affirmative duty on the Department of Juvenile Justice to provide information to law enforcement that may aid in initiating or furthering an investigation of a criminal street gang. The bill also requires, rather than allows, the Department and locally operated court services unit to release to law enforcement information on a juvenile's criminal street gang involvement and the criminal street gang-related activity of others. The Department is prohibited from releasing information on a juvenile who is not affiliated with a gang unless the information relates to a specific crime. The Department is required to provide information to the Organized Criminal Gang File maintained by the State Police. HB 1121 (2010 Acts of Assembly, c. 367), SB 486 (2010 Acts of Assembly, c. 472).

## **Title 17.1 Courts of Record**

**Technological efficiencies in circuit court clerks' offices; fees.** See entry under Title 8.01, *supra*. HB 974 (2010 Acts of Assembly, c. 430).

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

**Public disclosure of personal information; law-enforcement officers.** Prohibits a state or local agency from publicly posting or displaying on the Internet the home address or personal telephone numbers of a law-enforcement officer if the officer has made a written demand that such information not be disclosed. The written demand must include a copy of

a court order authorizing the state or locality to remove the information. The bill also clarifies that the publication of a person's primary residence address along with his name or photograph with the intent to coerce, intimidate, or harass is unlawful. HB 1382 (2010 Acts of Assembly, c. 767).

## **Title 19.2 Criminal Procedure**

**Availability of presentence reports to counsel for convicted person.** See entry under Title 9.1, *supra*. HB 13 (2010 Acts of Assembly, c. 223).

**Bail bondsman to receive criminal history information.** Provides that if a judicial officer sets a secured bond and the person engages the services of a licensed bail bondsman, the magistrate executing recognizance for the accused shall, upon request of the bondsman, provide the bondsman with a copy of the person's Virginia criminal history record, if readily available, to be used by the bondsman only to determine appropriate reporting requirements to impose upon the accused upon his release. The bondsman may review the record on the premises only and must promptly return it to the magistrate. The bondsman will pay a \$15 fee which will be payable to the state treasury to be credited to the Literary Fund. HB 1255 (2010 Acts of Assembly, c. 862).

**Admissibility in evidence of non-existence of an official record.** Provides that at a hearing or trial an affidavit signed by a government official who is competent to testify, deemed to have custody of an official record, or signed by his designee, stating that after a diligent search, no record or entry of such record is found to exist among the records in his custody, is admissible as evidence that his office has no such record or entry, provided that the procedures for admission of such an affidavit as set forth in the statute governing admission of affidavits indicating non-registration of a sex offender have been followed, *mutatis mutandis*. SB 385 (2010 Acts of Assembly, c. 464).

## **Title 22.1 Education**

**Reports of certain acts to school authorities.** Provides that for any report from local law-enforcement authorities to the principal or his designee and the division superintendent regarding certain offenses committed by a juvenile student that would be an adult misdemeanor, local law-enforcement authorities and attorneys for the Commonwealth shall also be authorized to disclose information regarding terms of release from detention, court dates, and terms of any disposition orders entered by the court to the superintendent of such student's school division. HB 907 (2010 Acts of Assembly, c. 525).

## **Title 23 Educational Institutions**

**State Council of Higher Education for Virginia; duties.** Provides that when performing its duty to develop a uniform, comprehensive data information system designed to gather all information necessary to the performance of the Council's duties, the Council may contract

with private entities to create de-identified student records for the purpose of assessing the performance of institutions and specific programs relative to the workforce needs of the Commonwealth. HB 7 (2010 Acts of Assembly, c. 68).

## **Title 24.2 Elections**

**Campaign finance information and reports; public access.** Clarifies that information, not required to be entered into the campaign finance database that candidates or committees may include in campaign finance report-creation software managed by or for the State Board is not required to be disclosed to the public. HB 1387 (2010 Acts of Assembly, c. 297).

**Lists of registered voters; disclosure to commissioners of the revenue and treasurers.** Allows the State Board of Elections to furnish, for a reasonable fee, lists of registered voters to commissioners of the revenue and city or county treasurers for tax assessment, collection, and enforcement purposes. SB 137 (2010 Acts of Assembly, c. 452).

## **Title 30 General Assembly**

**General Assembly Conflicts of Interests Act; House and Senate Ethics Advisory Panels.** Opens ethics inquiries to the public after a preliminary investigation. During the preliminary investigation, the Panel will require that (i) the facts stated in the complaint taken to be true are sufficient to show a violation of the Conflicts of Interests Act, (ii) the complainant appear and testify under oath as to the complaint and the allegations, and (iii) such violation has occurred by a preponderance of the evidence. Once the Panel determines to proceed with an inquiry into the conduct of any legislator, the Panel shall complete its investigations notwithstanding the resignation of the legislator during the course of the Panel's proceedings. HB 655 (2010 Acts of Assembly, c. 876).

**General Assembly Conflicts of Interests Act; disclosure of salary.** Requires a member of the General Assembly to disclose in his annual disclosure of personal interests any salary and wages in excess of \$10,000 paid to him or his immediate family for employment with a state or local government or advisory agency, except for his salary received as a member of the General Assembly. HB 740 (2010 Acts of Assembly, c. 418), SB 512 (2010 Acts of Assembly c. 474).

**State Government Spending Accountability Act.** Directs the Auditor of Public Accounts to include on a searchable database a register of all funds expended for major agencies of the Commonwealth. In regard to the registry, the database would include the vendor name, date of payment, and a description of the expense, including also credit card purchases with the same information. The bill also requires the Auditor of Public Accounts to conduct a review of searchable databases used by other states and incorporate best practices for ease of use and transparency of state agency expenditures. SB 431 (2010 Acts of Assembly, c. 671).

## **Title 32.1 Health**

**Notification of breach of medical information.** Requires notification to residents of the Commonwealth if their unredacted or unencrypted medical information or health insurance information is the subject of a database breach. The notification required by this section would apply only to state and local government entities. This bill would become effective January 1, 2011. HB 1039 (2010 Acts of Assembly, c. 852).

## **Title 46.2 Motor Vehicles**

**DMV records; release of photographs.** Provides for release by DMV of a hard copy image of any photographs of deceased persons who held driver's licenses or special identification cards when requested by members of the deceased person's family or the executor of his estate. HB 61 (2010 Acts of Assembly, c. 15).

**Disabled parking; windshield placard contents.** Provides that permanent and removable windshield placards shall not show the name, age, and sex of the person to whom issued. Instead, holders of permanent windshield placards are required to carry Disabled Parking Placard Identification Cards issued by DMV. SB 45 (2010 Acts of Assembly, c. 47).

**Salvage vehicles; maintenance and contents of records; reports.** Clarifies items that must be contained in the records that licensees maintain on receipt of any vehicles and allows the governing body of any locality to require that the records be reported to the police. The bill further provides that licensees keep vehicles for up to 10 days before crushing them. SB 406 (2010 Acts of Assembly, c. 873).

## **Title 52 Police (State)**

**Juvenile records; gang information; exceptions to confidentiality.** See entry under Title 16.1, *supra*. HB 1121 (2010 Acts of Assembly, c. 367), SB 486 (2010 Acts of Assembly, c. 472).

## **Title 67 Virginia Energy Plan**

**Virginia Offshore Wind Project Development Authority.** Creates the Virginia Offshore Wind Development Authority to facilitate and support the development of the offshore wind industry and wind-powered electric energy facilities located off the coast of the Commonwealth beyond the Commonwealth's three-mile jurisdictional limit. The Authority is charged with, among other tasks, (i) identifying existing state and regulatory or administrative barriers to the development of the offshore wind industry, (ii) collecting metocean and environmental data, (iii) upgrading port facilities to accommodate the manufacturing and assembly of project components and vessels that will support such projects, and (iv) applying to the U.S. Department of Energy for loan guarantees for such

projects. HB 389 (2010 Acts of Assembly, c. 507), SB 577 (2010 Acts of Assembly, c. 601).  
**Note:** *The bill contains provisions concerning access to certain records of the Authority, and explicitly states that members of the Authority are subject to FOIA.*

#

## APPENDIX F

### Breakdown of Inquiries to Council December 1, 2009 through November 30, 2010

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 government, media, or citizens. 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, 2009 through November 30, 2010

Total number of inquiries: 1690

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	1	0	0	0	0	0	1	0	0	0	0	0	2
Citizens	1	0	1	1	0	0	0	0	0	0	0	0	3
News Media	0	0	0	0	0	0	0	0	0	0	0	1	1
<b>TOTAL</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>6</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	70	66	85	84	72	85	79	70	78	53	73	84	899
Citizens	54	53	61	77	53	46	53	51	52	33	38	49	620
News Media	8	15	15	14	3	22	24	17	22	13	5	7	165
<b>TOTAL</b>	<b>132</b>	<b>134</b>	<b>161</b>	<b>175</b>	<b>128</b>	<b>153</b>	<b>156</b>	<b>138</b>	<b>152</b>	<b>99</b>	<b>116</b>	<b>140</b>	<b>1684</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	71	66	85	84	72	85	80	70	78	53	73	84	901
Citizens	55	53	62	78	53	46	53	51	52	33	38	49	623
News Media	8	15	15	14	3	22	24	17	22	13	5	8	166
<b>TOTAL</b>	<b>134</b>	<b>134</b>	<b>162</b>	<b>176</b>	<b>128</b>	<b>153</b>	<b>157</b>	<b>138</b>	<b>152</b>	<b>99</b>	<b>116</b>	<b>141</b>	<b>1690</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	0	2	0
Citizens	2	1	1
News Media	1	0	0
<b>TOTAL</b>	<b>3</b>	<b>3</b>	<b>1</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	591	202	126
Citizens	329	57	255
News Media	104	47	28
<b>TOTAL</b>	<b>1024</b>	<b>306</b>	<b>409</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	591	204	126
Citizens	331	58	256
News Media	105	47	28
<b>TOTAL</b>	<b>1027</b>	<b>309</b>	<b>410</b>



## APPENDIX G

### OPINIONS ISSUED BY THE COUNCIL JULY 2000 THROUGH NOVEMBER 2010

Written Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Government</b>	4	20	6	8	8	4	4	2	1	3	2
<b>Citizens</b>	3	41	11	13	15	11	6	8	8	10	3
<b>News Media</b>	1	10	2	3	3	1	0	3	2	0	1

Informal Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Government</b>	45	275	465	472	616	756	845	854	827	910	899
<b>Public</b>	43	324	360	331	429	687	664	674	641	618	620
<b>News Media</b>	21	169	165	198	145	209	232	167	206	150	165

Total Number of Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Government</b>	49	295	471	480	624	760	849	856	828	913	901
<b>Public</b>	47	365	371	344	444	698	670	682	649	628	623
<b>News Media</b>	22	179	167	201	148	210	232	170	208	150	166
<b>GRAND TOTAL</b>	118	539	1009	1025	1216	1668	1751	1708	1685	1691	1690

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OPINIONS ISSUED BY THE COUNCIL  
JULY 2000 THROUGH NOVEMBER 2010

2000

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
<b>September</b>	
<hr/>	
<a href="#"><u>AO-1-00</u></a>	Inquiries as to the status of e-mail under the Freedom of Information Act, charges for electronic records, the working papers exemption, assessment of fees for producing a requested record, the meaning of "reasonable specificity."
<hr/>	
<a href="#"><u>AO-2-00</u></a>	Access to property appraisal cards containing the calculations and methodology used in arriving at the individual assessed property value.
<hr/>	
<b>October</b>	
<hr/>	
<a href="#"><u>AO-3-00</u></a>	Access to a preliminary "master list" of courses offered during the next academic year at a public high school.
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<a href="#"><u>AO-4-00</u></a>	Meeting of three members of a public body to tour a permit-application site.
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<a href="#"><u>AO-5-00</u></a>	Access to records in the possession of the treasurer related to local license taxes.
<hr/>	
<a href="#"><u>AO-6-00</u></a>	Authority and scope of the FOI Advisory Council.
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<a href="#"><u>AO-7-00</u></a>	Presence of a lawyer during a meeting closed pursuant to subdivision A 7 §2.1-344 (consultation with legal counsel).

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**November**

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[AO-8-00](#)

Closed meeting to discuss publicly-held real property, and scope of discussion at closed meeting.

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[AO-9-00](#)

Voting requirements of FOIA; conflict between FOIA and *Robert's Rules of Order*.

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**December**

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[AO-10-00](#)

Status of the Virginia School Boards Association (VSBA) as a public body; attendance of school board members at VSBA conferences; public access to documents obtained at VSBA conference or provided to VSBA by public official.

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[AO-11-00](#)

Request for public body to compile information from multiple databases; format of records requests; public body's response to request for electronic records.

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[AO-12-00](#)

Vote by public body to proceed with action negates working papers exemption; application of working papers exemption; dissemination of working papers.

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[AO-13-00](#)

Notice requirements for special meetings.

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[AO-14-00](#)

Access to information concerning complaints filed against public officials; application of personnel records exemption; access to amount of settlement paid out of public funds; access to amount paid to private attorney out of public funds.

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[AO-15-00](#)

Access to sealed divorce records.

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[AO-16-00](#)

Definition of a public body.

<a href="#"><u>AO-17-00</u></a>	Access to records containing job classification information.
<a href="#"><u>AO-18-00</u></a>	Access to death certificate.
<a href="#"><u>AO-19-00</u></a>	Closed meeting to discuss religious exemption from attending private school; procedures to hold closed meeting; attendance of nonmembers at closed meetings; discretion of public body to hold closed meeting; remedies.
<a href="#"><u>AO-20-00</u></a>	Access to documents prepared and used by commission to study and develop new compensation plan; access to annual report of the Department of Personnel and Training concerning compensation system.
<a href="#"><u>AO-21-00</u></a>	Access to complaints relating to a criminal investigation by the Natural Tunnel Soil and Water Conservation District.

**2001**

<b><u>Opinion No.</u></b>	<b><u>Issue(s)</u></b>
<b>January</b>	
<a href="#"><u>AO-1-01</u></a>	City's proposed e-mail network for council members constitutes an electronic meeting.
<a href="#"><u>AO-2-01</u></a>	Access to list of applicants applying for licensure by board governed by the Department of Health Professions.
<a href="#"><u>AO-3-01</u></a>	Application of notice and agenda provisions for open meetings; remedies.
<a href="#"><u>AO-4-01</u></a>	Access to identity, qualifications, and resumes of candidates for city manager position.
<a href="#"><u>AO-5-01</u></a>	Definition of a meeting; chance meetings.

<a href="#"><u>AO-6-01</u></a>	Access to noncriminal police reports; access to telephone directory of city employees.
<a href="#"><u>AO-7-01</u></a>	Access to school bus videotapes; Family Educational Rights and Privacy Act (FERPA).
<a href="#"><u>AO-8-01</u></a>	Application of attorney-client privilege exemption.
<b>February</b>	
<a href="#"><u>AO-9-01</u></a>	Status of local Neighborhood Connections Office as a public body.
<a href="#"><u>AO-10-01</u></a>	Access to audit information from the Virginia Employment Commission for unemployment compensation hearing.
<a href="#"><u>AO-11-01</u></a>	Access to lists of names and addresses of businesses to whom licenses have been issued; access to lists of businesses or individuals on a locality's tax rolls.
<a href="#"><u>AO-12-01</u></a>	Costs for copying public records.
<a href="#"><u>AO-13-01</u></a>	Access to records indicating whether an individual attended school in locality; Family Educational and Privacy Rights Act (FERPA).
<a href="#"><u>AO-14-01</u></a>	Requirements of motion to enter into closed session to discuss litigation.
<a href="#"><u>AO-15-01</u></a>	Access to records concerning the qualifications of a public official.
<b>March</b>	
<a href="#"><u>AO-16-01</u></a>	Access to list of concealed handgun permit holders.

<a href="#"><u>AO-17-01</u></a>	FOIA exemptions relating to economic development prospects; application of FOIA to the Governor's Development Opportunity Fund.
<a href="#"><u>AO-18-01</u></a>	Notice requirements for a change in location of a public meeting.
<a href="#"><u>AO-19-01</u></a>	Access to presentence reports.
<a href="#"><u>AO-20-01</u></a>	Application of FOIA of meetings of a two-person subcommittee.
<a href="#"><u>AO-21-01</u></a>	Explanation of a public body concerning costs accrued in searching for and providing public records; obligation of a public body to respond to a new FOIA request if the requestor has not paid costs associated with a prior request.
<b>April</b>	
<a href="#"><u>AO-22-01</u></a>	Freedom of Information Advisory Council lacks authority to conduct investigations; application of attorney-client privilege exemption.
<a href="#"><u>AO-23-01</u></a>	Application of FOIA to student government at state college.
<b>May</b>	
<a href="#"><u>AO-24-01</u></a>	Status of a citizen's advisory group as a public body.
<a href="#"><u>AO-25-01</u></a>	Costs for copying public records.
<a href="#"><u>AO-26-01</u></a>	Open meeting exemptions for discussion of prospective business or industry, negotiation of siting agreements.
<a href="#"><u>AO-27-01</u></a>	Access to name and address of firm or corporation transacting business under a fictitious name from local tax officials; access to tax information.

<a href="#"><u>AO-28-01</u></a>	Exemption for personnel records; access to information concerning position and salary of public employees.
<b>June</b>	
<a href="#"><u>AO-29-01</u></a>	Access by parent to child's scholastic records.
<a href="#"><u>AO-30-01</u></a>	Access to records maintained in case file of the Board of Social Work by subject of the records.
<a href="#"><u>AO-31-01</u></a>	No FOIA requirement that a board of supervisors conduct a public hearing before it may sell a piece of real property.
<a href="#"><u>AO-32-01</u></a>	Access to budget proposals submitted by city departments to city council for preparation of city's annual budget.
<a href="#"><u>AO-33-01</u></a>	Access to directory information of students; application of the Federal Educational Rights and Privacy Act.
<a href="#"><u>AO-35-01</u></a>	Public body not required to adhere to a standing request for public documents that are not in existence at the time the request is made.
<b>July</b>	
<a href="#"><u>AO-34-01</u></a>	Definition of a public body and application of definition to New Market Financial Control Board; access to documents held by town council's finance committee.
<a href="#"><u>AO-36-01</u></a>	Analysis of "supported wholly or principally by public funds" language in the definition of a public body.

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**August**

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**[AO-37-01](#)**

Virginia Workers' Compensation Commission is the custodian of "proof of coverage" information for purposes of FOIA even though the records are actually collected and maintained by a third party, because the Commission is required by law to collect such information.

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**[AO-38-01](#)**

Motion passed in closed session does not become official until public body votes on it in open session; a motion to enter into closed session must identify the subject matter, state the purpose of the meeting, and make specific reference to the applicable exemption.

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**[AO-39-01](#)**

Public body may make reasonable charges for its actual costs in responding to a FOIA request.

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**[AO-40-01](#)**

Discussion or transaction of public business by three or more members of a public body constitutes a meeting under FOIA.

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**September**

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**[AO-41-01](#)**

Application of FOIA to a tourism program run by a local chamber of commerce for the city council.

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**[AO-42-01](#)**

Access to list of the names of individuals who have made a FOIA request to a public body.

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**[AO-43-01](#)**

FOIA requires that notice of public meetings be posted in two physical locations.

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**[AO-44-01](#)**

Name of physician at a state correctional facility is available under FOIA.



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**October**

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**[AO-45-01](#)**

A motion offered by a public body to enter into a closed meeting must contain three procedural requirements of FOIA, in that it states specific statutory exemption, the subject, and the purpose of the closed meeting. A public body may properly enter into closed meeting to discuss a potential request for financial assistance relating to the expansion of an existing business or industry.

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**[AO-46-01](#)**

Where three or more members of a public body continue discussions of public business after a public meeting has adjourned, such a gathering is a meeting under FOIA, even if the members are discussing the business with staff. The procedural requirements for conducting a meeting would not be invoked if three or more members attend a function that was not arranged for the purpose of discussing or transacting public business (i.e. dinner), so long as no public business is actually discussed.

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**[AO-48-01](#)**

Receiving a line of credit from a public body does not make a non-profit hospital a public body. The removal and reappointment of a hospitals' directors by a board of supervisors does not make the hospital a public body.

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**November**

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**[AO-47-01](#)**

A public body's requirement to provide two-business days' notice to review scholastic records is consistent with the five day statutory deadline.

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**December**

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**[AO-49-01](#)**

A public body may create a new record in its discretion; however, it cannot charge a requestor without prior consent. A public body may not charge a requestor for sending courtesy copies of a FOIA request to a third party as it is a general cost associated with the transacting of general business of the public body. Staff time spent responding to a FOIA request is an actual cost that may be passed on to a requestor; however, whether or not the actual cost is also reasonable is a question for the courts.

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[AO-50-01](#)

A county administrator, as the chief executive officer, may properly withhold correspondence between her and the board of supervisors.

**2002**

**Opinion No.    Issue(s)**

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**January**

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[AO-01-02](#)

A public body must release the names of current public employees and salary information under FOIA. FOIA does not require, however, the release of records related to the retirement of specific public employees which may properly be withheld as personnel records.

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**March**

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[AO-02-02](#)

Three members of a public body may gather at a private meeting without the private meeting becoming a meeting under FOIA if the members of the public body do not "discuss" or "transact" public business.

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[AO-03-02](#)

Records of expenditures for Building Code Academy are not exempt from disclosure nor is the disclosure of such records otherwise prohibited by law. The format or degree of detail included in the record is within the discretion of the public body that is the custodian of the record.

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**April**

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[AO-04-02](#)

A public body must release records generated during contract negotiations in the absence of a statutory exemption from the mandatory disclosure requirements of FOIA for such records.

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**May**

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[AO-05-02](#)

The inclusion of fringe benefits as part of the charges that may be assessed is an extraneous fee to recoup the general costs of transacting the general business of the public body and therefore may not be computed in the charges allowable under FOIA for the production of requested records.

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**July**

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[AO-06-02](#) Definition of a meeting; notice requirements for public meetings; waiver of notice by public officials.

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[AO-07-02](#) Application of personnel records exemption to employee timesheets.

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**August**

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[AO-08-02](#) Individual polling of city council members by city manager is allowable under FOIA; motion to enter into closed session must meet all three statutory requirements; discussion in closed session may not stray from exemptions cited in motion; votes must be taken in open meeting.

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[AO-09-02](#) Corporation is subject to FOIA when it is wholly owned by a public body, and its records are subject to public disclosure.

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**October**

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[AO-10-02](#) Delinquent tax information is public record; public body may make reasonable charges for the actual costs incurred in providing copies of records; public body has five working days to respond to a FOIA request.

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[AO-11-02](#) Court records are subject to disclosure pursuant to FOIA; a requester has the right to request records in any medium used by a public body in the course of its regular business.

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[AO-12-02](#) The mayor or the chief executive officer of a locality, but not both, may exercise the working papers exemption.

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[AO-13-02](#) The procedures and practices governing the process by which those people designated by an inmate are notified in case of serious illness, injury or death are subject to disclosure under FOIA.

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**November**

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[AO-14-02](#)

Public body may make reasonable charges for its actual costs incurred in responding to request for records; question of reasonableness is for the courts.

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[AO-15-02](#)

Use of a "straw poll" in closed meeting is permitted by FOIA; however, no agreement reached in a closed meeting becomes effective until the membership of the public body votes in an open meeting.

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[AO-16-02](#)

Local public bodies may not conduct telecommunication meetings under FOIA.

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[AO-17-02](#)

The Halifax County Industrial Development Authority is a public body under FOIA and is subject to the open meeting requirements of FOIA; role of Council.

**2003**

**Opinion No.**

**Issue(s)**

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**January**

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[AO-01-03](#)

Members of a public body may reach a tentative agreement during a closed meeting, but no action will become effective until voted on in an open meeting; FOIA allows members to poll each other individually about their position on a matter of public business.

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[AO-02-03](#)

Portions of records concerning the disciplining of an identifiable employee must be released to that employee under the personnel exemption, even if those records may be withheld from public disclosure under § 2.2-3705(A)(8) as records compiled specifically for use in an active administrative investigation.

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**February**

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**[AO-03-03](#)**

Public bodies may adopt rules governing the placement and use of recording equipment during a meeting; however, one must examine the practical implication of the rules' application. A rule may not essentially prohibit a recording from being made.

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**[AO-04-03](#)**

Comments concerning identifiable employees on a "quality of work environment" survey may be redacted and withheld as personnel records.

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**[AO-05-03](#)**

When records are requested from a public body pursuant to a subpoena, the Rules of the Supreme Court of Virginia -- not FOIA -- apply.

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**March**

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**[AO-06-03](#)**

Deliberations of a school board to discuss whether a teacher's grievance is grievable may be kept private.

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**April**

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**[AO-07-03](#)**

Names of lawyers admitted to practice law in Virginia is public record and not subject to exemption.

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**[AO-08-03](#)**

Public body may only make reasonable charges for its actual costs incidental to a particular request; public body may not charge a requester for the time spent compiling records prior to the request.

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**[AO-09-03](#)**

The Appalachia Volunteer Fire Department appears to be a public body supported wholly or principally by public funds.

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[AO-10-03](#)

A suicide report is a noncriminal incident report subject to disclosure under FOIA, but portions of the report of a personal, medical or financial nature may be redacted.

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[AO-11-03](#)

A public body must disclose the salary of public employees for a particular date, upon request; dialogue between public body and requester to clarify request facilitates the production of records and is the intent of the law.

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**May**

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[AO-12-03](#)

Failure to respond to a FOIA request is deemed a denial of the request and is a violation of FOIA; person denied rights under FOIA may file a petition for mandamus or injunction.

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[AO-13-03](#)

The Virginia Baseball Stadium Authority is a public body subject to FOIA. All of its records must be available for inspection and copying and its meetings open to the public unless specifically exempted by statute.

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**June**

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[AO-14-03](#)

Onancock Business and Civic Association is not a public body under FOIA; it is not supported wholly or principally by public funds, nor is it acting as an agent of the town council in its participation in the Main Street Program.

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[AO-15-03](#)

A FOIA request from a government employee should not be treated differently than a request from a citizen or representative of the media; FOIA does not prohibit a public body from advising a third party that a particular FOIA request has been made; public body should not make promise of confidentiality about certain records when no FOIA exemption exists that would allow those records to be withheld.

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[AO-16-03](#)

Specific mandate in the Code of Virginia that schools provide school safety audits to Virginia Center for School Safety supercedes general FOIA exemption that allows portions of audits to be withheld; local school board retains the authority to determine which portions of the audits are subject to the exemption in response to a FOIA request.

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**July**

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[AO-17-03](#)

A public body may hold a closed meeting under the personnel exemption to discuss the performance and discipline of a fellow member of the public body only if the public body has the authority to censure, reprimand or otherwise discipline a member of the public body.

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[AO-18-03](#)

Student organizations at public institutions of higher education are public bodies if supported wholly or principally by public funds; the organization, and not the university, is the appropriate entity to ask for records of the organization.

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[AO-19-03](#)

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

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[AO-20-03](#)

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

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[AO-21-03](#)

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

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[AO-22-03](#)

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

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**September**

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[AO-23-03](#)

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

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**October**

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[AO-24-03](#)

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

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**December**

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[AO-25-03](#)

FOIA exemption for records containing attorney-client privilege parallels Common Law attorney-client privilege; exemption does not apply to records of public relations firm hired by law firm on behalf of city if the public relations firm is not acting as an agent of the law firm for purposes of rendering legal advice. Records are not subject to attorney-client privilege merely because they are sent to an attorney.

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[AO-26-03](#)

Exemption at subdivision A 10 of § 2.2-3705 allows library to withhold records that identify Internet sites visited by a patron on a library computer.

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[AO-27-03](#)

Records of homicide investigations may be withheld pursuant to subdivision F 1 of § 2.2-3706; the provisions at subsection G of § 2.2-3706 do not conflict with subdivision F 1.

**2004**

**Opinion No.**

**Issue(s)**

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**January**

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[AO-01-04](#)

Metropolitan Washington Airport Authority is subject to FOIA.

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[AO-02-04](#)

A public body must give notice of the time, date, and location of its meetings, even if the only item on the agenda for the meeting is a closed session; a public body may withhold records and conduct closed meetings relating to contract negotiations until a decision whether or not to enter into the contract is reached by the public body.



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**February**

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**[AO-03-04](#)**

The Penninsula SPCA is acting as the animal-control arm of local government, and its records and meetings are open under FOIA to the extent they relate to these animal control functions.

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**March**

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**[AO-04-04](#)**

FOIA requires a public body to make available salary records of public employees; however, FOIA does not require a public body to create a spreadsheet or list out of these records, and cannot charge a requester to create such spreadsheets or lists unless the public body reaches an agreement with the requester prior to the creation of the record.

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**[AO-05-04](#)**

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

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**April**

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**[AO-06-04](#)**

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

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**[AO-07-04](#)**

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

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**May**

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[AO-08-04](#)

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

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[AO-09-04](#)

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

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[AO-10-04](#)

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

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**June**

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[AO-11-04](#)

Records of all investigations of the Department of Health Professions, and not just records of active investigations, are confidential, even regarding the subject of the records.

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[AO-12-04](#)

Gathering of chairmen and vice-chairmen of a board of supervisors and school board to discuss bond issues is not a meeting for purposes of FOIA when they were not appointed by their respective public bodies to advise the public bodies or perform delegated functions.

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**July**

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[AO-13-04](#)

FERPA & FOIA give access to educational records to the subject of the records, except that "sole possession records" are excluded from this requirement; when a student is enrolled in an institution of post-secondary education, the student, and not the parent, has the right of access.

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[AO-14-04](#)

The exemption in subdivision 8 of § 2.2-3705.7 that allows for personal information concerning persons participating in federally funded rent-assistance programs to be withheld does not apply to records relating to landlords who enter into contracts with local housing authorities to provide such housing.

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[AO-15-04](#)

A gathering of three members of a school board at a citizen's home is a meeting under FOIA when the purpose of the gathering is to discuss matters of public business pending before the board.

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[AO-16-04](#)

A public body may request a deposit before proceeding with a request if it estimates that the request will exceed \$200 and may toll its response to the entire request until the deposit is received; a requester has the right to narrow a request in an attempt to lower the costs, but the requester must clearly state that he is narrowing the request, and not simply asking that certain records be provided immediately while the remainder of the request is being processed before paying the deposit; making a FOIA request is not an adversarial process, and clear communication from both parties is often the best way to avoid disputes.

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**August**

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[AO-17-04](#)

The working papers exemption found in subdivision 2 of § 2.2-3705.7 was designed to provide an unfettered zone of privacy for the deliberative process. The exemption does not expire unless the working papers are disseminated or otherwise made public by the official to whom the exemption applies. Absent such a release, a record created by or for one of the named officials for his personal or deliberative use retains the characterization of a working paper.

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[AO-18-04](#)

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

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[AO-19-04](#)

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

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[AO-20-04](#)

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

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**September**

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[AO-21-04](#)

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

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**October**

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**[AO-22-04](#)**

It is the policy of this office not to issue an opinion once litigation is commenced or a judge of competent jurisdiction has rendered an opinion on the same factual question(s) raised in a request for an advisory opinion of the Council. The court, and not the Council, is the appropriate body to decide and settle a dispute as a matter of law. An entity that was subject to FOIA by virtue of its receipt of sufficient public funds may later be excluded from the definition of a "public body" if it no longer is supported wholly or principally by public funds; it is a question of fact that must be decided on a case-by-case basis.

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**November**

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**[AO-23-04](#)**

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

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**December**

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**[AO-24-04](#)**

A motion to convene a closed meeting must identify the subject and purpose of the meeting, and cite to a specific statutory exemption. Decisions reached in closed session do not become effective until voted upon in an open meeting.

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**[AO-25-04](#)**

Open meeting minutes must be made available to any citizen of the Commonwealth upon request during the regular office hours of the custodian. Information that must be included in meeting minutes of a public body is set forth in FOIA. The intent of FOIA is best achieved by clear communication between the requester and the public body.

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[AO-26-04](#)

The Virginia Board of Bar Examiners has statutory discretion to decide whether or not to release bar examination scores, regardless of whether the scores in question are those of particular individuals or those of aggregate groups.

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[AO-27-04](#)

A task force of citizens organized by a mayor-elect is not a "public body" subject to the open records and meetings requirements of FOIA.

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[AO-28-04](#)

A private entity that exercises no governmental authority and is not wholly or principally supported by government funds is not a public body subject to FOIA's records and meeting requirements. Money received by a private entity from government sources under a procurement contract should not be used to determine whether an entity is wholly or principally supported by public funds.

**2005**

**Opinion**  
**No.**

**Issue(s)**

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**February**

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[AO-01-05](#)

No agreement reached in a closed meeting becomes effective until the public body takes an affirmative vote in an open meeting. FOIA requires the motion for that vote have its substance reasonably identified in the open meeting. For the purposes of the motion, substance is defined as a fundamental part, quality or aspect; the essential quality or import of a thing.

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**March**

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[AO-02-05](#)

**NOTICE:** This opinion has been rescinded. Please see Advisory Opinion 07 (June, 2005).

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[AO-03-05](#)

Letters of reference and recommendations are generally treated as personnel records under FOIA. Like other personnel records, they may be withheld from third parties but must be disclosed to their subject upon request. However, educational agencies and institutions may withhold these records, even from their subject, pursuant to subdivision 2 of § 2.2-3705.4.

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**April**

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[AO-04-05](#)

Records concerning what websites and keywords are blocked by a computer network firewall may be withheld from public disclosure as such records describe the design and function of a security system (pursuant to subdivision 3 of § 2.2-3705.2).

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**May**

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[AO-05-05](#)

FOIA does not require a public body to inform a requester when a requested record does not exist. However, public officials would be well advised to clearly state when requested records do not exist in order to avoid confusion and frustration on the part of the requester. FOIA does not contain any specific provisions concerning the legibility of public records. However, as a practical matter, copies of records produced in response to a request should be legible, so long as the original records are legible. Public bodies and requesters may enter mutually satisfactory agreements to resolve any problems with regard to the production of records.

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[AO-06-05](#)

FOIA does not require a public body to create a new record to satisfy a request. If a public body elects to abstract or summarize records, it can only charge for such a newly-created record pursuant to a prior agreement with the requester. A public body must provide a requester with an estimate of all charges in advance of providing copies if the requester asks for one. The purposes of FOIA are best served by clear and open communication between requesters and public bodies.

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**June**

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**[AO-07-05](#)**

This opinion rescinds Advisory Opinion 02 (March, 2005). The identities of victims need not but may be released pursuant to subsection D of § 2.2-3706. The release of such information is discretionary except where disclosure is prohibited or restricted under § 19.2-11.2. Furthermore, FOIA establishes a conflict resolution rule in subsection H of § 2.2-3706, which provides that in the event of conflict between § 2.2-3706 as it relates to requests made under § 2.2-3706 and other provisions of law, § 2.2-3706 shall control.

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**July**

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**[AO-08-05](#)**

Under FOIA, motor vehicle accident reports concerning juveniles should be treated the same as those concerning adults, except as provided in § 2.2-3706(C).

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**[AO-09-05](#)**

Two members of a public body who also serve as members of the board of a private entity do not transform that private entity into a public body subject to FOIA. Whether an entity is a public body subject to FOIA because it is supported principally by public funds must be determined on a case-by-case basis.

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**[AO-10-05](#)**

A "special study group" composed of citizen members appointed by a county board of supervisors to make recommendations to the Board and the county's Planning Commission is a public body subject to FOIA. Public bodies may adopt rules governing the placement and use of recording equipment during a meeting. However, a public body may not prohibit a recording from being made.

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**August**

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**[AO-11-05](#)**

The definition of a public body includes committees, subcommittees and other entities of public bodies that advise or perform delegated functions of the larger public body. Meetings of such committees are subject to the open meeting requirements of FOIA. A gathering of three members of a public body, or a quorum if less than three, to discuss the public business of that body, is a meeting subject to FOIA.



2006

**Opinion  
No.**

**Issue(s)**

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**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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**[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.

2007

**Opinion  
No.**

**Issue(s)**

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**January**

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**[AO-01-07](#)**

The closed meeting exemption for consultation with counsel regarding specific legal matters may not be used for the purpose of discussing a general policy in the absence of any specific legal transaction or dispute.

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**March**

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**[AO-02-07](#)**

A public body may charge for the actual cost of staff time spent redacting records in response to a request. It may not charge any additional fee for a separate legal review of the same records.

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**[AO-03-07](#)**

An electronic mail message header showing the time and date when the message was received by a public body may not be withheld as *documentation or other information that describes the design, function, operation or access control features of any security system* under subdivision 3 of § 2.2-3705.2.

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**[AO-04-07](#)**

The authority of the FOIA Council is limited by statute to providing advisory opinions and guidance regarding FOIA. An opinion advising on the interaction of boat titling and registration laws with provisions of the Government Data Collections and Dissemination Practices Act would be beyond the authority of this office.

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**May**

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**[AO-05-07](#)**

The student government of a public institution of higher education is a public body subject to FOIA. The branches of student government are analogous to the organization of government generally (i.e., legislative, executive, and judicial).

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**June**

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[AO-06-07](#) Meetings must be noticed for the time when they actually begin. A public body must approve by vote in an open meeting a motion to convene a closed meeting, and must certify the closed meeting after reconvening in open session. The motion and certification must be included in the meeting minutes, along with records of the votes taken to approve the motion and certification.

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**July**

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[AO-07-07](#) A center for independent living that receives 93% of its funding from public sources is a public body subject to FOIA.

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[AO-08-07](#) FOIA requires public notice to be given when a public body holds a public meeting. Failure to give the required notice is a violation of FOIA.

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[AO-09-07](#) FOIA allows a public body to charge for existing records. FOIA does not address what a public body may charge for additional access features beyond inspection and copying of existing records.

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[AO-10-07](#) Determining whether an entity is a public body as a *committee, subcommittee, or other entity however designated of a public body* depends on how the entity was formed and what functions it performs.

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**October**

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[AO-11-07](#) A citizen advisory committee created by a constitutional officer is not itself a public body subject to FOIA. Records concerning such a committee in the possession of the constitutional officer are public records subject to FOIA.

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[AO-12-07](#) If a public body denies a request for public records in whole or part, it must send the requester a written response citing the law that allows the records to be withheld. The release of certain Department of Social Services records pertaining to child support enforcement matters is prohibited by law under Title 63.2 of the Code of Virginia.

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[AO-13-07](#) FOIA allows public bodies to hold closed meetings to discuss the acquisition of real property if holding the discussion *in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body*. Absent such jeopardy to the public body's bargaining position or negotiating strategy, these discussions must be open.

**2008**

**Opinion**      **Issue(s)**  
**No.**

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**February**

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[AO-01-08](#) Records concerning a public body's employment policies are open to disclosure. If a public body is unsure of the scope of a request, it should contact the requester to clarify the matter. A failure to respond to a records request is deemed a denial of the request and a violation of FOIA.

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**March**

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[AO-02-08](#) Weekends and legal holidays are not counted as working days when computing the five working day time limit for a response to a request for public records. A public body must inform a requester in writing when it does not have the records the requester seeks. Clear communications are essential to the operation of FOIA.

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[AO-03-08](#) The public policy of FOIA requires that exemptions from public access to records and meetings shall be narrowly construed. If a request is unclear, then the public body should contact the requester to clarify the matter.

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**April**

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[AO-04-08](#)

A public body may convene a closed meeting to discuss the formation and award of a procurement contract.

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**May**

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[AO-05-08](#)

FOIA does not require a public body to provide records, or portions thereof, that are not responsive to a request. Implementing a universal security policy requiring all visitors to present identification before entering a public building does not inherently exclude the public from attending public meetings which may be held therein.

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[AO-06-08](#)

Records concerning general law enforcement policy matters must be disclosed, but records specifying how policy will be implemented, i.e. the methods by which officers will conduct investigations, may be withheld as records of investigative techniques or procedures.

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**June**

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[AO-07-08](#)

Failure to respond to a request for records is deemed a denial of the request and a violation of FOIA. Clear communications are essential to FOIA transactions.

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**October**

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[AO-08-08](#)

A citizen advisory committee that was not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding, is not a public body subject to FOIA.

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[AO-09-08](#) FOIA provides that public bodies bear the burden of proof to establish an exemption by a preponderance of the evidence. However, FOIA is silent regarding whether a requester may challenge as an abuse of discretion a decision not to disclose records that are excluded from mandatory disclosure pursuant to a valid exemption, once the exemption has been established.

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[AO-10-08](#) The records of a community center created and funded by local government, operated by a nonprofit organization acting pursuant to a contract with the local government, are public records subject to FOIA.

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**November**

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[AO-11-08](#) A record that is not prepared, owned, or possessed in the transaction of public business is not a public record subject to FOIA. When conducting private business, public officials and employees should avoid indicia, such as agency letterhead, that make private records appear to carry the imprimatur of a public body.

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**December**

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[AO-12-08](#) As a general rule, an individual member of a board, designated as a liaison to staff, is not a public body for meetings purposes. Records prepared, owned, or possessed by that member in the transaction of public business are public records subject to FOIA. .

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[AO-13-08](#) A record which is not prepared by, owned by, or in the possession of a public body is not a public record subject to FOIA.

2009

**Opinion No.**

**Issue(s)**

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**March**

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[AO-01-09](#)

An agency that is supported wholly or principally by public funds is a public body subject to FOIA. A response to a records request that does not meet the procedural requirements of FOIA is not a proper response.

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[AO-02-09](#)

Scholastic records, by definition, are those records which contain 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. A denial of a records request must cite the specific Code section that authorizes the withholding of the records.

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**May**

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[AO-03-09](#)

A task force jointly created by multiple public bodies to advise them is itself a public body subject to FOIA. Likewise, a regional public body provided for by statute and established by the resolutions of several local public bodies is also subject to FOIA. Both must comply with the procedural rules for conducting public meetings.

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[AO-04-09](#)

Subsection D of § 15.2-2907 provides that certain meetings that are or would be subject to review by the Commission on Local Government are not subject to FOIA.

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[AO-05-09](#)

FOIA requires that meeting minutes be in writing and include a record of any votes taken.



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**June**

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**[AO-06-09](#)**

Public bodies may make reasonable charges not to exceed the actual cost incurred in accessing, duplicating, supplying, or searching for requested records. Public bodies are not required to waive charges, but may do so in their discretion. Public bodies may not charge a requester for using certified mail without the requester's agreement.

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**[AO-07-09](#)**

Generally, local public bodies may not meet or cast votes by electronic means. A telephone conversation between an administrator and a single member of a public body is not a meeting subject to FOIA.

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**August**

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**[AO-08-09](#)**

Public records posted on a public body's website or otherwise put into the public domain remain subject to FOIA. It is generally expected that public bodies will not charge for sending brief electronic mail messages providing web addresses or copied excerpts of electronic records, as the actual costs incurred usually are negligible.

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**October**

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**[AO-09-09](#)**

A nonprofit foundation that raises funds from private sources to pay for its own operations and to provide financial support to a government entity is not a public body subject to FOIA.

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**November**

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**[AO-10-09](#)**

Subsection G of § 2.2-3706 provides exemptions for certain records held by local sheriffs and chiefs of police. As written it does not apply to records of the Department of State Police.

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[AO-11-09](#)

An advisory group created by a public body to advise the public body would itself be a public body subject to FOIA. However, such a group created by a public employee to advise the employee would not be a public body. Likewise, such an advisory group would not be a public body if it was self-appointed.

**2010**

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**February**

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[AO-01-10](#)

Records that have been entered into evidence and made part of the public record at a public hearing may not subsequently be withheld from disclosure as exempt records of a criminal investigation or prosecution.

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**March**

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[AO-02-10](#)

A motion to convene a closed meeting must identify the subject of the meeting, the purpose of the meeting, and cite an applicable exemption from the open meeting requirements. In order to avoid confusion and misunderstanding, the preferred practice is to make a separate motion for each topic that will come under consideration during a closed meeting.

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**June**

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[AO-03-10](#)

FOIA provides exemptions from mandatory disclosure for certain records related to closed meetings. However, FOIA does not address whether a mayor may demand that at the conclusion of a closed meeting members of a local governing body give to the mayor any documents distributed or notes taken during the closed meeting..

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**November**

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[AO-04-10](#)

For the purpose of the definition of public records, the meaning of "in the transaction of public business" must be examined on a case by case basis. FOIA does not mandate how to perform a search for records, but any search that is conducted must be carried out in good faith.