



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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2011 FOIA LEGISLATIVE UPDATE

NOTE: Unless otherwise stated, the changes in the law described herein will take effect July 1, 2011.

I. Introduction

The General Assembly passed a total of 20 bills amending the Virginia Freedom of Information Act (FOIA) during the 2011 Session. House Bill 1860 (Anderson) and identical Senate Bill 763 (Puller), which require 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, and contain technical amendments, both passed as recommendations of the FOIA Council. Senate Bill 951 (Houck), which 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 under FOIA, also passed as a recommendation of the FOIA Council.

Of the 20 bills, two bills create new records exemptions, one of which also has a corresponding new closed meeting exemption, as follows:

- Creates an exemption from the mandatory disclosure requirements of FOIA for (i) records relating to rate structures or charges for using the facilities of the Commercial Space Flight Authority and (ii) records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (a) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected. The bill also contains a meeting exemption for the discussion of the above records. SB 1337 (Herring) amending §§ 2.2-3705.6 and 2.2-3711.

- Creates an exemption for certain records of a proprietary nature furnished by an agricultural landowner or operator as part of an agricultural resource management plan. HB 1830 (Scott, E.T.) amending § 2.2-3705.6.

Eighteen bills amend existing provisions of FOIA as follows:

- Doubles the civil penalties imposed for willful and knowing violations of FOIA. The bill also clarifies existing law that officers, employees, and members of public bodies may be subject to the civil penalties for knowing and willful violations of FOIA. HB 1457 (Marshall, R.G.) amending § 2.2-3714;
- Removes the requirement for the Commissioner of the Department of Veterans Services to establish an advisory committee on the administration of veterans care centers established in the Commonwealth. The bill also contains a technical amendment (removes the corresponding meeting exemption). HB 1666 (Cole) and SB 958 (Miller, J.C.) amending § 2.2-3711;
- 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. HB 1860 (Anderson) and SB 763 (Puller) amending § 2.2-3713;
- Clarifies that the definition of a "public record" does not include records that are not prepared for or used in the transaction of public business. The bill is in response to a court case in Loudoun County. HB 2020 (May) amending § 2.2-3701;
- Provides that the Attorney General shall investigate complaints of alleged abuse or neglect of persons in the care or custody of others who receive payments for medical assistance under the state plan for medical assistance, regardless of whether the patient is a recipient of medical assistance. The bill also exempts records or information provided to the Office of the Attorney General's Medicaid Fraud Control Unit from disclosure pursuant to the Freedom of Information Act. HB 2034 (Peace) and SB 1214 (Smith) amending § 2.2-3705.5;
- Allows any commission created by executive order to study and make recommendations concerning the prevention of closure and realignment of federal security installations in Virginia to withhold from public disclosure certain records relating to the relocation of national security facilities. The bill also allows those portions of meetings where such records are discussed to be closed to the public. HB 2041 (Anderson) and SB 1296 (Ruff) amending §§ 2.2-3705.2 and 2.2-3711;
- Establishes the Office of the State Inspector General to be headed by a State Inspector General to investigate complaints alleging fraud, waste, abuse, or corruption by a state agency or nonstate agency or the officers and employees thereof. Among other things, the bill makes corresponding changes to several record exemptions under the Freedom of Information Act. HB 2076 (Landes) and SB 1477 (Stosch) amending §§ 2.2-3705.3, 2.2-3705.6, and 2.2-3706;
- Among other changes, establishes a Research and Technology Investment Advisory Committee to assist the Innovation and Entrepreneurship Investment Authority in making awards from the Commonwealth Research Commercialization Fund by ensuring that applications considered for awards are

- based upon sound science and research, are in an area of focus identified in the roadmap, and present significant potential for commercialization in the Commonwealth. Makes corresponding amendments to an existing meeting exemption. HB 2324 (Lingamfelter) and SB 1485 (Newman) amending § 2.2-3711;
- Changes the title of the Virginia Liaison Office to the Office of Intergovernmental Affairs, and makes a corresponding technical amendment to an existing records exemption. HB 2479 (Byron) and SB 1414 (Norment) amending § 2.2-3705.7;
 - 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 under FOIA. This bill is a recommendation of the Freedom of Information Advisory Council. SB 951 (Houck) amending § 2.2-3704;
 - Exempts records of the Medicaid Fraud Control Unit from the mandatory disclosure provisions of the Virginia Freedom of Information Act. SB 1255 (Vogel) amending § 2.2-3705.5.

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 2011 Session of the General Assembly.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes will become effective July 1, 2011.

II. Amendments to the Freedom of Information Act

§ 2.2-3701. Definitions.

Virginia Freedom of Information Act; definitions. Clarifies that the definition of a "public record" does not include records that are not prepared for or used in the transaction of public business. The bill is in response to a court case in Loudoun County. HB 2020 (2011 Acts of Assembly, c. 242).

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

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 under FOIA. This bill is a recommendation of the Freedom of Information Advisory Council. SB 951 (2011 Acts of Assembly, c. 604).

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

Virginia Freedom of Information Act; record and meeting exemption for certain commissions. Allows any commission created by executive order to study and make recommendations concerning the prevention of closure and realignment of federal security installations in Virginia to withhold from public disclosure certain records relating to the relocation of national security facilities. The bill also allows those portions of meetings where such records are discussed to be closed to the public. HB 2041 (2011 Acts of Assembly, c. 111), SB 1296 (2011 Acts of Assembly, c. 536).

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

Office of the State Inspector General. Establishes the Office of the State Inspector General to be headed by a State Inspector General to investigate complaints alleging fraud, waste, abuse, or corruption by a state agency or nonstate agency or the officers and employees thereof. The bill also authorizes the State Inspector General to examine the management and operation of state agencies. The bill defines "nonstate agency" and provides a record exemption under the Freedom of Information Act for certain investigative/audit documents of the Office. The bill consolidates the offices of inspector general of the Departments of Behavioral Health and Developmental Services, Corrections, Juvenile Justice, and Transportation and the Department of the State Internal Auditor into this new office, and adds responsibility for tobacco indemnification and revitalization. The bill contains technical amendments and has a delayed effective date. HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

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

Attorney General; investigation of complaints. Provides that the Attorney General shall investigate complaints of alleged abuse or neglect of persons in the care or custody of others who receive payments for medical assistance under the state plan for medical assistance, regardless of whether the patient is a recipient of medical assistance. The bill also exempts records or information provided to the Office of the Attorney General's Medicaid Fraud Control Unit from disclosure pursuant to the Freedom of Information Act. HB 2034 (2011 Acts of Assembly, c. 110), SB 1214 (2011 Acts of Assembly, c. 175).

FOIA exemption; Medicaid Fraud Control Unit. Exempts records of the Medicaid Fraud Control Unit from the mandatory disclosure provisions of the Virginia Freedom of Information Act. SB 1255 (2011 Acts of Assembly, c. 535).

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

Agriculture; resource management plans. Allows owners of agricultural land who implement and maintain a resource management plan to be deemed as being in full compliance with (i) any load allocation contained in a total maximum daily load (TMDL) established under § 303(d) of the federal Clean Water Act addressing benthic, bacteria, nutrient, or sediment impairments; (ii) any requirements of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan; and (iii) applicable state water quality requirements for nutrients and sediment. The presumption does not prevent or preclude enforcement of provisions pursuant to (i) a resource management plan otherwise required by law, (ii) a Virginia Pollutant Discharge Elimination System permit, (iii) a Virginia Pollution Abatement permit, or (iv) requirements of the Chesapeake Bay Preservation Act. The Soil and Water Conservation Board shall by regulation, and in consultation with the Department of Agriculture and Consumer Services and the Department of Environmental Quality, specify the criteria to be included in a resource management plan. The bill sets out minimum criteria for such regulations. The bill includes a FOIA exemption for certain proprietary records. HB 1830 (2011 Acts of Assembly, c. 781).

Office of the State Inspector General. *See summary under § 2.2-3705.3, supra.* HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

Freedom of Information Act; Commercial Space Flight Authority. Creates an exemption from the mandatory disclosure requirements of FOIA for (i) records relating to rate structures or charges for using the facilities of the Commercial Space Flight Authority and (ii) records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (a) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected. The bill also contains a meeting exemption for the discussion of the above records. SB 1337 (2011 Acts of Assembly, c. 541).

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

Virginia Liaison Office; Office of Intergovernmental Affairs; powers and duties. Changes the title of the Virginia Liaison Office to the Office of Intergovernmental Affairs. The bill also reorganizes and clarifies the responsibilities of the Office and removes a general policy statement regarding the support of federal efforts to encourage pooling of health insurance by small businesses. HB 2479 (2011 Acts of Assembly, c. 827), SB 1414 (2011 Acts of Assembly, c. 867).

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

Office of the State Inspector General. *See summary under § 2.2-3705.3, supra.* HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

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

Department of Veterans Services; duties of Commissioner; establishment of advisory committees for veterans care centers. Removes the requirement for the Commissioner of the Department of Veterans Services to establish an advisory committee on the administration of veterans care centers established in the Commonwealth. The bill also contains a technical amendment. HB 1666 (2011 Acts of Assembly, c. 89), SB 958 (2011 Acts of Assembly, c. 147).

Virginia Freedom of Information Act; record and meeting exemption for certain commissions. *See summary under § 2.2-3705.2, supra.* HB 2041 (2011 Acts of Assembly, c. 111), SB 1296 (2011 Acts of Assembly, c. 536).

Investment in research and technology in the Commonwealth. Amends the Commonwealth Research Commercialization Fund (CRCF) to allow for awards for a matching funds program and an eminent researcher program. The bill also expands upon the Innovation and Entrepreneurship Investment Authority's (IEIA) current responsibility to develop a strategic roadmap for research in the Commonwealth. The roadmap shall identify areas of focus for research investment in the Commonwealth based upon criteria set forth in the bill, and any awards from the CRCF must fall into one of these areas of focus. The bill establishes a Research and Technology Investment Advisory Committee to assist the IEIA in making awards from the CRCF by ensuring that applications considered for awards are based upon sound science and research, are in an area of focus identified in the roadmap, and present significant potential for commercialization in the Commonwealth. HB 2324 (2011 Acts of Assembly, c. 816), SB 1485 (2011 Acts of Assembly, c. 874).

Freedom of Information Act; Commercial Space Flight Authority. *See summary under § 2.2-3705.6, supra.* SB 1337 (2011 Acts of Assembly, c. 541).

§ 2.2-3713. Proceedings for enforcement of chapter.

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. HB 1860 (2011 Acts of Assembly, c. 783), SB 763 (2011 Acts of Assembly, c. 133).

§ 2.2-3714. Violations and penalties.

Freedom of Information Act; violations and penalties. Doubles the civil penalties imposed for willful and knowing violations of FOIA. The bill also clarifies existing law that officers, employees, and members of public bodies may be subject to the civil penalties for knowing and willful violations of FOIA. HB 1457 (2011 Acts of Assembly, c. 327).

III. Other Access-Related Legislation

Joint Resolutions

Commending Esson McKenzie Miller, Jr. Among other things, commends Mr. Miller on the occasion of his retirement from public service as one of the original members of the Virginia Freedom of Information Advisory Council, who has provided thoughtful insight as the Council encouraged and facilitated compliance with the Freedom of Information Act. HJ 963, SJ 506.

Uncodified Acts

Personal Property Tax Relief Act; transmission of certain information. Provides that the Department of Motor Vehicles shall include in the information furnished to commissioners of the revenue regarding vehicles qualifying for personal property tax relief whether the vehicle is held in a private trust for nonbusiness purposes by an individual beneficiary. HB 2244 (2011 Acts of Assembly, c. 13).

Title 2.2 Administration of Government

Public procurement; posting on website. Requires all state authorities, agencies, institutions, departments, and other units of state government to put requests for proposal and invitations to bid on the Department of General Services' website. The bill encourages, but does not require, local public bodies to likewise. HB 1592 (2011 Acts of Assembly, c. 332).

Address Confidentiality Program. Expands the Address Confidentiality Program for victims of domestic violence to all jurisdictions within the Commonwealth. The bill also provides that the Office of the Attorney General will prepare an evaluation of the statewide implementation of the program by December 31, 2012, and repeals the enactment clause that conditioned the continuation of the program upon an appropriation for that purpose. HB 1757 (2011 Acts of Assembly, c. 97), SB 1199 (2011 Acts of Assembly, c. 172).

Title 3.2 Agriculture, Animal Care, and Food

Fertilizer; regulation of application and labeling. Among other things, provides exemptions for personal information collected in reports concerning lawn fertilizer use, and exempts records regarding certain nutrient management plans for golf courses. HB 1831 (2011 Acts of Assembly, c. 341), SB 1055 (2011 Acts of Assembly, c. 353).

Title 10.1 Conservation

Fertilizer; regulation of application and labeling. *See summary under Title 3.2, supra.* HB 1831 (2011 Acts of Assembly, c. 341), SB 1055 (2011 Acts of Assembly, c. 353).

Supplemental environmental projects. Authorizes the Virginia Soil and Water Conservation Board, the Director of the Department of Conservation and Recreation, and courts to provide for the undertaking of supplemental environmental projects through orders. Among other things, provides that nothing in the section requires the disclosure of documents which are exempt from disclosure pursuant to FOIA. HB 2368 (2011 Acts of Assembly, c. 505).

Title 15.2 Counties, Cities, and Towns

Bonds; public notice. Provides that the public notice issued prior to a public hearing held in conjunction with the issuance of bonds shall state the proposed use of the proceeds, and if there is more than one use, state the proposed uses for which more than 10 percent of the total bond proceeds is expected to be used. In addition, a similar notice shall be provided to voters prior to a referendum involving the issuance of bonds. HB 2004 (2011 Acts of Assembly, c. 590).

Special meeting notification. Allows a member of a local governing body to be notified of special meetings via electronic mail or facsimile, in lieu of in writing delivered to his home or business, if he so requests. SB 1302 (2011 Acts of Assembly, c. 180).

Title 16.1 Courts Not of Record

Law-enforcement employment; disclosure of juvenile records. Provides that a person who was adjudicated delinquent may be denied employment with the State Police or a local police department or sheriff's office where such denial is based on the nature and gravity of the offense, the time since adjudication, the time since completion of any sentence, and the nature of the job sought. The bill also provides that juvenile record information may be disseminated to the State Police or a local police department or sheriff's office for the purpose of screening a person for employment. HB 2012 (2011 Acts of Assembly, c. 622).

Title 17.1 Courts of Record

Secure remote access to court records. Provides that restrictions on the secure remote access to court records do not apply to secure access by attorneys in good standing with the Virginia State Bar and their authorized agents and attorneys admitted to practice pro hac vice. The bill also permits secure remote access by governmental agencies authorized by the clerk. HB 1565 (2011 Acts of Assembly, c. 689), SB 1274 (2011 Acts of Assembly, c. 557).

Report of the Secretary of the Commonwealth; list of local officers. Eliminates the requirement that local governments send to the Secretary of the Commonwealth and that the Secretary of the Commonwealth publish a printed certified list of all local officers and constitutional officers. There is no need to print such a report since it is online. HB 2149 (2011 Acts of Assembly, c. 63).

Title 18.2 Crimes and Offenses Generally

Identity Theft Passport. Makes the issuance of an Identity Theft Passport under certain conditions discretionary with the Office of the Attorney General, rather than mandatory. The bill also provides that the provisions of the Government Data Collection and Dissemination Practices Act denying the right of a government agency to require the disclosure of a social security number do not apply to the Code provisions that provide for issuance of an Identity Theft Passport. HB 1714 (2011 Acts of Assembly, c. 619).

Title 19.2 Criminal Procedure

Public availability of a search warrant affidavit. Provides that the affidavit for a search warrant may be made publicly available only after the warrant that is the subject of the affidavit has been executed or 15 days after issuance of the warrant, whichever is earlier. HB 1479 (2011 Acts of Assembly, c. 196).

Sealing of order; court-ordered disclosure of electronic communication service records. Provides that when a court orders the disclosure of records of a provider of electronic communication services or remote computing services, the order and any written application or statement of facts may be sealed for 90 days for good cause shown upon application of the attorney for the Commonwealth in an ex parte proceeding and that the attorney for the Commonwealth can apply to have the sealing continue for additional 90-day periods. HB 1593 (2011 Acts of Assembly, c. 392).

Criminal history record information; certain agencies. Authorizes the Department of Rehabilitative Services and the Department for the Blind and Vision Impaired to obtain criminal history record information for the purpose of evaluating an individual's fitness for various types of employment and for the purpose of delivering comprehensive vocational rehabilitation services that will assist the individual in obtaining employment. HB 1707 (2011 Acts of Assembly, c. 449), SB 956 (2011 Acts of Assembly, c. 432).

Law-enforcement employment; disclosure of juvenile records. *See summary under Title 16.1, supra.* HB 2012 (2011 Acts of Assembly, c. 622).

Title 23 Educational Institutions

Public procurement; posting on website. *See summary under Title 2.2, supra.* HB 1592 (2011 Acts of Assembly, c. 332).

Title 24.2 Elections

Bonds; public notice. *See summary under Title 15.2, supra.* HB 2004 (2011 Acts of Assembly, c. 590).

Referendum elections; voter petition requirements. Provides that the person circulating a petition calling for a referendum election must include on each page, front and back, of the petition: his name, his residence address, and, if different, his mailing address, and the name of the organization, if any, that he represents. The bill also specifies that a voter signing the petition may provide the last four digits of his social security number rather than the entire number. HB 1646 (2011 Acts of Assembly, c. 333).

Title 32.1 Health

Death certificates; organ procurement organizations. Requires the State Registrar or the city or county registrar to disclose data about or issue a certified copy of a death certificate to a nonprofit organ, eye or tissue procurement organization that is a member of the Virginia Transplant Council for the purpose of determining the suitability of organs, eyes and tissues for donation. HB 2017 (2011 Acts of Assembly, c. 109).

Drinking water community confidence reports; publication. Requires the Board of Health to include in its regulations governing waterworks, water supplies, and pure water a process whereby waterworks serving fewer than 10,000 people may seek and the Board may grant a waiver of the requirement that the waterworks mail copies of its consumer confidence report to each customer of the waterworks at least once annually and provides for an alternate means of notifying customers of the existence of the consumer confidence report in a newspaper of general circulation or by other means as the Board may deem appropriate. HB 2173 (2011 Acts of Assembly, c. 804), SB 1024 (2011 Acts of Assembly, c. 843).

Health records; disclosure requirements. Clarifies that a health care entity is required to share, at the request of the subject of the records, health records with other health care entities, in the format requested by the individual in the manner authorized by the federal law unless (i) the electronic format is not reasonably available without additional cost to the health care entity, (ii) the records would be subject to modification in the format required, or (iii) the health care entity determines that the integrity of the records could be

compromised in the electronic format requested. HB 2515 (2011 Acts of Assembly, c. 668).

Title 38.2 Insurance

Virginia Life, Accident and Sickness Insurance Guaranty Association; advertisements. Requires that the Virginia Life, Accident and Sickness Insurance Guaranty Association's summary document be posted on the Association's website. SB 916 (2011 Acts of Assembly, c. 306).

Title 52 Police (State)

Virginia Fusion Intelligence Center; review of databases. Changes the requirement that data in the Virginia Fusion Intelligence Center databases be reviewed every year to a requirement that it be reviewed every three years. Information that is determined to not be related to terrorist activity shall be removed from the database. HB 1948 (2011 Acts of Assembly, c. 467), SB 1259 (2011 Acts of Assembly, c. 556).

Title 54.1 Professions and Occupations

Schedule II drugs; identification required in filling prescriptions. Specifies that certain duties imposed upon a pharmacist in the delivery of Schedule II drugs may be undertaken by the agent of the pharmacist. The bill also provides that if the person seeking to take delivery of a drug listed on Schedule II pursuant to a prescription is not the patient for whom the drug is prescribed and the person is not known to the pharmacist or his agent, the pharmacist or his agent shall either make a photocopy or electronic copy of the person's identification or record the full name and address of the person. The bill also reduces the period of time for which the pharmacist must maintain records of the names and addresses or copies of the proof of identification of persons taking delivery of Schedule II drugs when they are not the person for whom the drug is prescribed from one year to one month. HB 2256 (2011 Acts of Assembly, c. 262), SB 1150 (2011 Acts of Assembly, c. 318).

Title 56 Public Service Companies

Public procurement; posting on website. *See summary under Title 2.2, supra.* HB 1592 (2011 Acts of Assembly, c. 332).

Title 58.1 Taxation

Publication of information contained in local payment warrants. Authorizes local governments to publish aggregated information relating to warrants paid by the locality. HB 2155 (2011 Acts of Assembly, c. 485), SB 844 (2011 Acts of Assembly, c. 597).