



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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## **2012 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 10 bills amending the Virginia Freedom of Information Act (FOIA) during the 2012 Session.

Of the 10 bills, two bills create new records exemptions as follows:

- Creates an exemption for personal information in constituent correspondence, unless the correspondence relates to the transaction of public business. HB 141 (Cole) amending § 2.2-3705.7;
- Creates an exemption for records of a fire/EMS company or fire/EMS department, 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. SB 193 (Miller) amending § 2.2-3705.2.

Eight bills amend existing provisions of FOIA as follows:

- Establishes the Virginia All-Payer Claims Database. Among other changes, amends an existing exemption for certain records disclosed to the State Health Commission to exempt certain records of the Virginia All-Payer Claims Database as well. HB 343 (O'Bannon) and SB 135 (Puller) amending § 2.2-3705.6;
- Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. HB 480 (Albo) amending § 2.2-3712;
- Changes the terminology used for mental health and developmental services, including technical changes within several existing provisions of FOIA. HB 552 (Garrett) and SB 387 (Martin) amending §§ 2.2-3705.3, 2.2-3705.5, and 2.2-3711;

- Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (Gilbert) and SB 678 (McDougle) amending §§ 2.2-3705.2, 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Amends an existing exemption to include certain information furnished to the Attorney General under the Virginia Fraud Against Taxpayers Act. SB 451 (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 2012 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, 2012.

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

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

**Governor's reorganization of executive branch of state government.** Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

**Freedom of Information Act; exemption for cell phone numbers for EMS personnel and firefighters.** Provides an exemption from the mandatory disclosure provisions of the Freedom of Information Act for records of a fire/EMS company or fire/EMS department, 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. SB 193 (2012 Acts of Assembly, c. 617).

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

**Mental health and developmental services; terminology.** Replaces the terms "mental retardation" and "mental deficiency" with the term "intellectual disability" when referring to the diagnosis of, and with the term "developmental" when referring to services for, individuals with intellectual disabilities; replaces the terms "mentally retarded," "mentally deficient," and "mentally defective" with the term "individual with intellectual disability"; replaces the terms "consumer," "patient," and "resident" with the term "individual receiving services" when used in connection with mental health or developmental services; updates the Code to reflect proper terminology for state hospitals

for individuals with mental illness and state training centers for individuals with intellectual disabilities; defines the terms "behavioral health services," "developmental services," "individual receiving services," "intellectual disability," and "mental health services"; and revises the definition of "training center." This bill contains technical amendments. HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

**Governor's reorganization of executive branch of state government.** *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

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

**Mental health and developmental services; terminology.** *See summary under § 2.2-3705.3, supra.* HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

**Governor's reorganization of executive branch of state government.** *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

**Virginia Fraud Against Taxpayers Act; regulation of medical assistance.** Makes several changes to the Virginia Fraud Against Taxpayers Act (VFATA) and the laws governing the Attorney General's duties with regard to the regulation of medical assistance, including (i) exempting certain information furnished to the Attorney General from disclosure under the Virginia Freedom of Information Act, (ii) imposing a three-year statute of limitations on claims for employer retaliation under the VFATA, (iii) permitting the Attorney General to share information obtained as part of a VFATA investigation with other state and federal governmental entities, (iv) allowing the Attorney General to propound interrogatories as part of an investigation of services furnished under medical assistance, and (v) requiring health care entities to disclose records to the Attorney General in connection with such investigations. SB 451 (2012 Acts of Assembly, c. 479).

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

**Virginia All-Payer Claims Database; creation.** Establishes the Virginia All-Payer Claims Database system, in order to facilitate data-driven, evidence-based improvements in access, quality, and cost of health care and to improve the public health through understanding of health care expenditure patterns and operation and performance of the health care system. Entities that choose to submit claims data to the database shall do so pursuant to data use and submission agreements executed with the nonprofit organization that contracts with the Commissioner of Health for public health data needs. The bill also directs the Commissioner to develop a work group to study continuing health information

needs in the Commonwealth. HB 343 (2012 Acts of Assembly, c. 693) and SB 135 (2012 Acts of Assembly, c. 709).

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

**Freedom of Information Act; personal information in constituent correspondence.**

Provides an exemption from the mandatory disclosure provisions of the Freedom of Information Act (FOIA) for the names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. The bill provides that no record that is otherwise open to inspection under FOIA shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence. HB 141 (2012 Acts of Assembly, c. 726).

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

**Mental health and developmental services; terminology.** *See summary under § 2.2-3705.3, supra.* HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

**Governor's reorganization of executive branch of state government.** *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

**§ 2.2-3712. Closed meetings procedures; certification of proceedings.**

**Virginia Freedom of Information Act (FOIA); attendance by certain members in a closed meeting.** Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. HB 480 (2012 Acts of Assembly, c. 428).

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

#### **Uncodified Acts.**

**Budget Bill.** Provides an exemption for certain records of the Virginia Information Technologies Agency pertaining to its contracts with a private entity regarding the operation of the Commonwealth's information technology infrastructure. HB 1301, Item 31, ¶ E 4. (2012 Acts of Assembly, c. 3.)

**Budget Bill.** Provides for access to certain records of the Department of Forensic Science related to the Post Conviction DNA Testing Program. HB 1301, Item 405, ¶¶ B 1 and B 2. (2012 Acts of Assembly, c. 3.)

**Budget Bill.** Provides an exemption for certain records of the Geographic Information Network Division of the Virginia Information Technologies Agency. HB 1301, Item 424, ¶ B. (2012 Acts of Assembly, c. 3.)

## **Title 2.2 Administration of Government.**

**Government Data Collection and Dissemination Practices Act; not applicable to certain records of the Department of Social Services.** Provides that the provisions of the Government Data Collection and Dissemination Practices Act do not apply to personal information systems maintained by the Department of Social Services related to child welfare, adult services or adult protective services, or public assistance programs when requests for personal information are made to the Department of Social Services. Such personal information requests are required to be made to the appropriate local department of social services. HB 217 (2012 Acts of Assembly, c. 229).

**Government Data Collection and Dissemination Practices Act; exemptions.** Exempts personal information systems maintained by auditors appointed by the local governing body of any county, city, or town or a school board that deals with local investigations. HB 329 (2012 Acts of Assembly, c. 268).

**Secretary of the Commonwealth; organizational chart of state government.** Requires the Secretary of the Commonwealth to include in the Secretary's annual report an organizational chart of state government. The bill specifies what information is to be contained in the organizational chart and that it is to be posted on the Commonwealth's website. HB 465 (2012 Acts of Assembly, c. 271).

**State and Local Government Conflict of Interests Act; disclosure forms.** Removes the signature notarization requirement from the Statement of Economic Interests disclosure form filed by certain state and local officers and employees. In addition, the bill clarifies that no person shall be mandated to file any disclosure under the State and Local Government Conflict of Interests Act unless specifically required by the Act. The bill also makes technical changes. HB 481 (2012 Acts of Assembly, c. 429).

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

**School records; self-authentication.** Provides that school records shall be admissible in any matter where such records are material and otherwise admissible, provided that they are authenticated as true and accurate copies by the custodian of the records or by the person to whom the custodian reports, if they are different. Currently, such authenticated

school records are only admissible in cases involving custody of the student or termination of parental rights. HB 424 (2012 Acts of Assembly, c. 499).

**Clerks of court; certain duties of the circuit court clerk.** Clarifies when the clerk of the court may destroy case file papers, and also clarifies that a person seeking authorization to perform marriages must file a petition with the clerk and pay any applicable fees. The bill allows the clerk to require the filing of a separate instrument acknowledging a confessed judgment and relieves the clerk of the requirements to (i) obtain or update a list of volunteer firefighters and (ii) provide marriage license applicants with health information. HB 1284 (2012 Acts of Assembly, c. 802).

### **Title 10.1 Conservation.**

**Nutrient management.** Provides that the Department of Conservation and Recreation operate a voluntary nutrient management program to assist owners and operators of agricultural land and turf to effectively manage and apply nutrients to their land. In developing the program, the Department is to begin testing the software for assisting owners and operators of agricultural lands and turf by July 1, 2013, and begin full implementation by July 1, 2014. The development of the software may be deferred until funds become available. [Note: The bill contains a FOIA exemption for certain personal and proprietary information.] HB 932 (2012 Acts of Assembly, c. 781).

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

**Clerks of court; certain duties of the circuit court clerk.** *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

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

**Adoption procedures.** Makes various changes to adoption procedures, including establishing a procedure for review of petitions filed for the purpose of obtaining a juvenile and domestic relations district court's assistance with the execution of consent to an adoption when the consent is executed pursuant to the laws of another state; expanding the venue for consent hearings in parental placement adoptions to include any city or county in the Commonwealth, provided that diligent efforts are made to conduct the hearing where the child was born, where the birth parents reside, or where the adoptive parents reside; eliminating the need for parental consent for an adoption in cases in which a birth parent has, without just cause, neither visited nor contacted the child for a period of six months immediately prior to the filing of a petition for adoption or a petition to accept consent to an adoption; adding language setting forth requirements for establishment of a date of birth for a child adopted from a foreign country; and clarifying the requirements for stepparent adoptions. The bill also makes changes to the process of registering with the Putative Father Registry. HB 445 (2012 Acts of Assembly, c. 424).

### **Title 17.1 Courts of Record.**

**Court records; secure remote access; interfacing computer systems.** Provides that the operational expenses associated with providing secure remote access to land records includes locating technology in an offsite facility for purposes of improving public access or for the implementation of a disaster recovery plan. The bill extends the prohibition on selling or posting data accessed by secure remote access to include land records. The bill further requires the Executive Secretary of the Supreme Court to establish security and data standards for interfacing between a circuit court's case management or financial management system and the systems of the Supreme Court. HB 484 (2012 Acts of Assembly, c. 234).

**Circuit court clerks; remote access to land records; fees collected by clerks; debit cards.** Provides for the acceptance of debit cards in addition to credit cards and allows the clerk to outsource the processing of credit and debit card transactions. The bill also provides that the clerk may charge a convenience fee for processing credit or debit cards of up to \$2 per transaction or four percent of the amount paid. Currently, such fee may not exceed four percent of the amount paid. The bill also provides that certain court fees collected by the clerk shall be deposited into a special fund held by the clerk. The bill also makes permanent a Prince William program authorizing the clerk to charge a convenience fee of up to \$2 per transaction and a separate per image download fee for access to land records. HB 926 (2012 Acts of Assembly, c. 780).

**Clerks of court; certain duties of the circuit court clerk.** *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

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

**Internet publication of personal information of certain public officials prohibited.** Adds various public officials to the current provision prohibiting 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 and obtains a court order. The bill also deletes the requirement for a hearing and adds personal email addresses to the personal information subject to protection. HB 556 (2012 Acts of Assembly, c. 143).

**Methamphetamine precursors; sale and tracking; penalties.** Requires the Department of State Police to enter into a memorandum of understanding to establish the Commonwealth's participation in a real-time electronic recordkeeping and monitoring system for the nonprescription sale of ephedrine or related compounds. Most pharmacies and retail distributors will be required to enter nonprescription sales of ephedrine or related compounds into the electronic system. The bill retains the existing sales limit of no more than 3.6 grams of ephedrine or related compounds per day per individual retail customer and no more than nine grams per 30-day period. The bill is effective January 1, 2013. HB 1161 (2012 Acts of Assembly, c. 252) and SB 294 (2012 Acts of Assembly, c. 160).

## **Title 19.2 Criminal Procedure.**

**Critical incident stress management teams; privileged information.** Provides that information communicated to critical incident stress management team members by public safety personnel who are the subjects of peer support services shall not be disclosed. The bill allows the public safety personnel to waive the privilege. HB 856 (2012 Acts of Assembly, c. 148) and SB 362 (2012 Acts of Assembly, c. 320).

**Criminal procedure; GPS tracking device.** Provides the authority and the protocol for a law-enforcement officer to apply for a search warrant to permit the use of a GPS tracking device. This bill contains an emergency clause and is effective from the date of its passage. HB 1298 (2012 Acts of Assembly, c. 636) and SB 685 (2012 Acts of Assembly, c. 679).

## **Title 20 Domestic Relations.**

**Clerks of court; certain duties of the circuit court clerk.** *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

## **Title 23 Educational Institutions.**

**Higher education; publication of graduate employment rates.** Requires public and private nonprofit institutions of higher education to publish data on the proportion of graduates with employment at 18 months and five years after the date of graduation. The data shall include the major and degree program, percentage of employment in the Commonwealth, average salary, and average higher education-related debt of graduates. The provisions of this bill will expire on June 30, 2017. HB 639 (2012 Acts of Assembly, c. 694).

## **Title 24.2 Elections.**

**Voter registration applications; protection of residence address information.** Adds active and retired federal and Virginia justices and judges and attorneys employed by the United States Attorney General or Virginia Attorney General to the list of persons whose residence addresses may be replaced by a post office box address on publicly available registration and elections documents. HB 56 (2012 Acts of Assembly, c. 491).

**Elections; provisional ballots; electoral board meetings.** Provides that the meeting of the electoral board on the day or days following an election is open only to authorized party and candidate representatives, the persons who cast the provisional ballots with their representatives or legal counsel, and the staff and legal counsel for the electoral board. The bill also specifies that the party and candidate representatives attend as observers and not as participants. HB 63 (2012 Acts of Assembly, c. 592).

**Campaign Finance Disclosure Act; general provisions applicable to penalties.** Provides that the Act's requirements for filing timely and complete statements and reports remain in full force and effect notwithstanding any pending investigation into activities of

any candidate campaign committee, political committee, or participant in the committee. HB 332 (2012 Acts of Assembly, c. 298).

**Elections, administrative matters, and duties of the electoral board and general registrar.** Provides for certain administrative efficiencies: permits general registrar to administer oath to voting equipment custodians; clarifies method to give notice of change in location of general registrar's office; modernizes procedures to give public notice of registration times and primaries; and permits absentee ballot envelopes to be opened before election day so long as the ballots are placed in a secure ballot container and no count is initiated. HB 623 (2012 Acts of Assembly, c. 328) and SB 566 (2012 Acts of Assembly, c. 486).

**Elections; persons eligible to obtain lists of persons voting at primaries and elections.** Allows access to the lists for all political purposes by members of the public and nonprofit organizations as well as by candidates, elected officials, and political party chairmen. HB 1118 (2012 Acts of Assembly, c. 664).

## **Title 27 Fire Protection.**

**Clerks of court; certain duties of the circuit court clerk.** *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

## **Title 30 General Assembly.**

**Virginia College Savings Plan Oversight Act.** Directs the Joint Legislative Audit and Review Commission (JLARC) to oversee and evaluate the Virginia College Savings Plan on a continuing basis. The bill requires JLARC and the Virginia College Savings Plan to make certain reports to the General Assembly. HB 739 (2012 Acts of Assembly, c. 659) and SB 599 (2012 Acts of Assembly, c. 591).

## **Title 32.1 Health.**

**Death, marriage, or divorce records; when public.** Reduces the time period after which death, marriage, divorce, or annulment records become public from 50 years to 25 years. HB 272 (2012 Acts of Assembly, c. 16).

**Storage of health records.** Replaces obsolete terminology and cross-references related to storage of health records, currently referred to as medical records or patient records. HB 1212 (2012 Acts of Assembly, c. 336).

**Clerks of court; certain duties of the circuit court clerk.** *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

**Vital records; records becoming public.** Provides that when 100 years have elapsed from the date of birth or 25 years from the date of death, marriage, divorce, or annulment, the records of such events shall, unless precluded from release by statute or court order,

or at law-enforcement's request, become public information and be made available to the public. The bill also requires the State Registrar to make original records that become public information available to the Library of Virginia for safekeeping and for public access consistent with other state archival records, directs the State Registrar and the Library of Virginia to enter into a memorandum of understanding to arrange for continued prompt access to such records by the State Registrar for amendments or other working purposes, and directs the State Registrar to enter into a long-term contract with a private company experienced in maintaining genealogical research databases to create, maintain, and update online indexes of records made available to the public. HB 660 (2012 Acts of Assembly, c. 356).

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

**Virginia Board of Accountancy; confidentiality of certain information.** Provides that tax returns, financial statements, and other financial information that is not generally available to the public through regulatory disclosure or otherwise, subdivision 3 of § 54.1-108 notwithstanding, provided to the Board by a complainant or as a result of an investigation of a licensee by the Board in response to a complaint shall be exempt from the provisions of the Virginia Freedom of Information Act. HB 275 (2012 Acts of Assembly, c. 375).

**Prescription Monitoring Program; disclosures.** Modifies the Prescription Monitoring Program to (i) require dispensers of covered substances to report the method of payment for the prescription, (ii) require the Director of the Department of Health Professions to report information relevant to an investigation of a prescription recipient, in addition to a prescriber or dispenser, to any federal law-enforcement agency with authority to conduct drug diversion investigations, (iii) allow the Director to disclose information indicating potential misuse of a prescription by a recipient to the State Police for the purpose of investigation into possible drug diversion, and (iv) allow prescribers to delegate authority to access the Program to an unlimited number, rather than the current limit of two, of regulated health care professionals under their direct supervision. HB 347 (2012 Acts of Assembly, c. 21) and SB 321 (2012 Acts of Assembly, c. 71).

**Veterans; disposition of cremains.** Provides for a funeral director to provide the names and any other identifying information on unclaimed cremains to the Department of Veterans Services in order for the Department to determine if the unclaimed cremains are those of a veteran. Under the bill, commencing July 1, 2014, the Department shall notify the funeral director within 30 days of receipt of the information if the cremains are those of a veteran and whether such veteran is eligible for burial in a veterans cemetery. In addition, the bill provides that the names and any personal identifying information submitted by a funeral director to the Department are exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). HB 439 (2012 Acts of Assembly, c. 24).

**Storage of health records.** *See summary under Title 32.1, supra.* HB 1212 (2012 Acts of Assembly, c. 336).

**Determination of status of unclaimed cremains belonging to veterans.** Provides for a funeral director to provide the names and any other identifying information on unclaimed cremains to the Department of Veterans Services in order for the Department to determine if the unclaimed cremains are those of a veteran. Under the bill, commencing July 1, 2014, the Department shall notify the funeral director within 30 days of receipt of the information if the cremains are those of a veteran and whether such veteran is eligible for burial in a veterans cemetery. In addition, the bill provides that the names and any personal identifying information submitted by a funeral director to the Department are exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). SB 433 (2012 Acts of Assembly, c. 120).

## **Title 55 Property and Conveyances.**

**Time-Share Act; advertising foreclosed time-share properties.** Provides the option of a more streamlined advertisement of the time-shares being foreclosed by requiring publication of the time, place, and date of sale; identification of the time-share being sold; contact information for obtaining further information about the sale; and a website address where more complete information and documentation can be obtained. HB 234 (2012 Acts of Assembly, c. 406).

## **Title 58.1 Taxation.**

**Warrants maintained by treasurers.** Specifies that the information regarding warrants that shall not be disclosed includes any invoice that has been presented to a locality for payment, which the locality has attempted to pay, but the payment has not been completed because electronic payment has failed or a check was mailed but not cashed. HB 255 (2012 Acts of Assembly, c. 88).

## **Title 63.2 Welfare (Social Services).**

**Adoption procedures.** *See summary under Title 16.1, supra.* HB 445 (2012 Acts of Assembly, c. 424).

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