

**REPORT OF THE**

**Virginia Freedom of  
Information Advisory Council**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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RICHMOND  
2013**





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VIRGINIA FREEDOM OF INFORMATION  
ADVISORY COUNCIL**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**

COMMONWEALTH OF VIRGINIA  
DECEMBER 2013

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

Senator Richard H. Stuart, Chair  
Delegate James M. LeMunyon, Vice Chair  
Christopher Ashby  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Forrest M. "Frosty" Landon  
James Schliessman  
John G. Selph  
Robert L. Tavenner  
Sandra G. Treadway  
George T. Whitehurst

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Staff

*Division of Legislative Services*

Maria J.K. Everett, *Executive Director and Senior Attorney*  
Alan Gernhardt, *Staff Attorney*  
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 2013**

## INTRODUCTION

*"...the access of citizens to information concerning their government and its process is crucial to a free society....."*

Clifton A. "Chip" Woodrum  
July 23, 1938 -February 19, 2013  
*In Memoriam*

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 Virginia 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

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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*.

of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens.

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 as well as 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 an ombudsman role, the Council is a resource for the public, representatives of state and local government, and members of the media.

## EXECUTIVE SUMMARY

In its thirteenth year, the Council continued to fulfill its role to the Virginia General Assembly as a clearinghouse for public access issues. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. In its 13 year history, the Council has provided more than 18,500 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials; and has conducted over 720 FOIA training programs. The Council is recognized as the forum for evaluating proposed FOIA and related public access legislation, and routinely conducts comprehensive studies of FOIA and other Virginia laws to ensure Virginia's commitment to open government while balancing the need to protect the public's negotiating and litigation positions, privacy, and safety.

During this reporting period --December 1, 2012 through November 30, 2013-- the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. The five bills referred to the Council by the General Assembly are as follows:

1. **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.
2. **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

3. **HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission.** Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).
4. **SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.
5. **SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies.** Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the 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) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

The Council appointed two subcommittees to study the bills referred to it: the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee. The Electronic Meetings Subcommittee, which began its work in 2012, was reconstituted to study HB 2032 (May) and SB 889 (Black).

The Electronic Meetings Subcommittee consisted of Council members Kathleen Dooley, chair, Stephanie Hamlett, John Selph, and George Whitehurst. The Electronic Meetings Subcommittee met on May 20, 2013 and June 6, 2013, to study HB 2032 (May) and SB 889 (Black).<sup>3</sup> After discussing the bills, the Subcommittee recommended taking no action on either bill. The Subcommittee felt that the legislation recommended by the Council and passed by the 2013 Session of the General Assembly would alleviate many of the problems

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<sup>3</sup> **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.

**SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.

these bills sought to address, as it will allow individual members of all public bodies to participate in meetings by electronic means when personal matters prevent their attendance in person.<sup>4</sup> As the legislative change recommended by the Council had not yet gone into effect when the Subcommittee met, the Subcommittee recommended taking a wait-and-see approach to see how this change would work in practice before recommending any additional legislation.<sup>5</sup> The Council voted unanimously to accept the Subcommittee's recommendation to take no action on HB 2032 and SB 889.

The Rights and Remedies Subcommittee, consisting of Council members Frosty Landon, chair, Stephanie Hamlett, Ed Jones, James Schliessmann, and Bob Tavenner, as well as industry representative David Ogburn, studied HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart). The Rights and Remedies Subcommittee met on May 20, 2013 and August 20, 2013, to study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart).<sup>6</sup> The Council concurred with the Subcommittee's recommendation that SB 1371 be tabled by a vote of nine-to-one (all present voted in favor, Senator Stuart voted against). Prior to the vote, the history of SB 1371 and previous bills that would have provided different forms of remedies for public bodies that felt overburdened or harassed by repetitive requests was the subject of in-depth discussion. Regarding HB 2125, the Council felt that because Virginia is one of the few states that limits access to its own citizens, and due to rapid changes in technology, the language granting FOIA rights only to citizens of the Commonwealth and certain media representatives may need to be re-written, but did not recommend a policy change at this time. Regarding HB 2321, the Council heard from Delegate Surovell in support of his bill, and from representatives of the State Corporation Commission (SCC) and regulated industries who opposed it. After giving consideration to the issues, the Subcommittee concluded its work without recommendation on HB 2321.

However, the Council indicated its support for the concept of making the SCC subject to FOIA as would be with any other state agency, but not the legislation as written. Therefore, although the work of the Subcommittee had concluded without recommendation, the Council continued to sponsor staff-facilitated meetings among the interested parties in an attempt to reach consensus. Parties in opposition to the bill continued to raise concerns about the need to protect frank discussions and voluntary submission of records from regulated industries and other entities such as Miss Utility. The opposing parties identified several types of records they felt should remain confidential, such

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<sup>4</sup> SB 1263 (Stuart) and HB 2026 (Dudenhefer).

<sup>5</sup> The relevant legislative change allowing members of public bodies to participate by electronic means when personal matters prevent their attendance in person went into effect July 1, 2013.

<sup>6</sup> **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

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as proprietary business data and trade secrets, information related to safety issues and critical infrastructure data (particularly from utilities companies), and any other records that might negatively affect business interests if made public by the SCC. The opposing parties also raised specific issues with the language used in the draft and whether the phrasing might provide too little or too much protection to specific types of records, and general concerns over possible unintended and unforeseen consequences. After hearing the concerns of the interested parties several revisions of the bill were drafted to address each concern that was raised. After the last discussion of the issues by the interested parties a final draft version of the bill was posted for comment before the last meeting of the Council for 2013. No comment was received. However, at the last meeting of the Council, several parties reiterated their objections and concerns over unintended consequences and the possibility of a chilling effect on businesses communicating with the SCC. The opposing parties expressed concern that FOIA by default makes all public records subject to disclosure unless a specific exemption allows the record to be withheld. Given this FOIA policy, the opposing parties indicated that they were unsure whether the exemptions as drafted would cover all of the records they felt should remain confidential. They instead indicated a preference for continuing to address SCC records outside of FOIA, which effectively renders all SCC records exempt from mandatory disclosure unless a specific statute requires their release. Senator Watkins appeared at the last meeting of the Council and informed the Council that he would introduce another bill addressing the same topics in the 2014 Session of the General Assembly, but that his bill would amend Title 12.1 rather than FOIA. A draft of that bill was not available for comparison or consideration. Senator Watkins reiterated some of the concerns expressed by the opposing parties and added his concern about introducing a third party, instead of the SCC, into the process of interpreting the disclosure laws applicable to the SCC. Although the Council supported the concept that the SCC be subject to FOIA, it then voted against recommending to the 2014 Session of the General Assembly the specific language of the final version of the draft offered by Delegate Surovell by vote of four in favor, five against, and two abstaining.

The Council continued to monitor Virginia court decisions relating to FOIA. 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>7</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. On remand, the Eastern District court issued an opinion on the merits in January 21, 2011, that upheld the existing provisions of FOIA limiting access rights to Virginia citizens.<sup>8</sup> The Eastern District determined that the limitation of rights to Virginia citizens did not burden a fundamental right and was closely related to a substantial state interest, therefore it did not violate the Privileges and Immunities clause of the United States Constitution. The court further determined that

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<sup>7</sup> *McBurney v. Mims*, (Mem. opinion)(2009 U.S. Dist. LEXIS 36971)(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.)

<sup>8</sup> *McBurney v. Cuccinelli*, 780 F.Supp.2d 439 (E.D.Va. 2011).

because Virginia's FOIA does not implicate principles of economic protectionism, and any effect on out-of-state business is incidental, it does not violate the dormant Commerce Clause. This decision was appealed to the Fourth Circuit, which heard arguments in the case on October 25, 2011 (*McBurney v. Young*, Case No. 11-1099). The Fourth Circuit issued its opinion on February 1, 2012, affirming the judgment of the Eastern District. The case was appealed to the Supreme Court of the United States, which granted certiorari on October 5, 2012 (Case No. 12-17). On April 29, 2013, the Supreme Court issued its opinion affirming the judgment below that Virginia's FOIA does not violate the Privileges and Immunities Clause or the dormant Commerce Clause of the United States Constitution<sup>9</sup> and thus was constitutional as written.

On September 7, 2012 the Virginia Supreme Court granted an appeal in the case of *Harmon v. Ewing* (Record No. 121118), which was appealed from a decision of the Circuit Court for the City of Williamsburg & James City County. It does not appear that the Circuit Court decision has been reported. On appeal to the Supreme Court, the three assignments of error in this case included issues over the use of the personnel exemption by law enforcement agencies; whether a request for information, as opposed to a request for an existing public record, falls within the ambit of FOIA; and the granting of attorney's fees by the Circuit Court. The Supreme Court issued its decision on February 8, 2013, affirming in part, reversing in part, and remanding the case. The Court held that the personnel exemption applicable to public bodies generally<sup>10</sup> also applies to law-enforcement agencies, reversing the decision of the court below on this point, which held that only the exemption for noncriminal incident records held by law-enforcement agencies<sup>11</sup> applied to such personnel records. The request at issue also asked for information on individuals arrested by a named officer. The Court affirmed the judgment below that such information must be released as FOIA requires the release of 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" and nothing in FOIA prevented making the request specific to arrests by a particular officer. Notably, in considering the release of such "information," the Court stated that the agency "may furnish copies of arrest records or produce the information via another appropriate format." However, the Court distinguished records in cases where the officer named in the request was involved, but was not designated as the arresting officer, stating that those records could be withheld as criminal investigative files. Finally, the Court remanded the issue of attorneys' fees to the court below. Note that the 2013 Session of the General Assembly also addressed the issue of personnel records of law-enforcement agencies in passing Senate Bill 1264 (Stuart), which was a recommendation of the Council.<sup>12</sup>

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes every opportunity to provide FOIA training programs. During 2013, Council staff conducted 57 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and

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<sup>9</sup> Please note that the style of the case has changed several times as the named defendant has changed; in chronological order, this case has been styled *McBurney v. McDonnell*, *McBurney v. Mims*, *McBurney v. Cuccinelli*, and most recently, *McBurney v. Young*.

<sup>10</sup> Subdivision 1 of § 2.2-3705.1.

<sup>11</sup> Former subsection G of § 2.2-3706, now codified as subsection B of § 2.2-3706.

<sup>12</sup> 2013 Acts of Assembly, c. 695 (amending Va. Code § 2.2-3706, which now provides in relevant part of subsection B: "Access to personnel records of persons employed by a law-enforcement agency shall be governed by the provisions of subdivision A 2 i of this section and subdivision 1 of § 2.2-3705.1, as applicable.")

citizens. Training programs are tailored to meet the needs of the requesting organization and are provided free of charge. Also all Council-sponsored training programs, whether the statewide workshops or specialized programs, are pre-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, the Virginia Municipal Clerks Association, and the Virginia School Board Association for academy points.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,507 inquiries. Of these inquiries, ten resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: two by government officials, three by media representatives, and five by citizens. The remaining requests were for informal opinions, given via telephone and e-mail. Of these requests, 872 were made by government officials, 452 by citizens, and 173 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 2013 Session. The General Assembly passed a total of 16 bills amending the Virginia Freedom of Information Act (FOIA) during the 2013 Session. House Bill 2026 (Dudenhefer) and Senate Bills 1263 (Stuart) and 1264 (Stuart) all passed the General Assembly as recommendations of the Council. HB 2026 and SB 1263 concerned electronic meetings and SB 1264 concerned access to law-enforcement records.

Four of the 16 bills created new records exemptions as follows:

- Created an exemption for certain records of the Department of Aviation. HB 1855 (Knight) amending §§ 2.2-3705.6 and 2.2-3705.7;
- Created an exemption for certain records of disaster recovery and evacuation plans of hospitals and nursing homes. HB 2280 (Ward) amending § 2.2-3705.2;
- Created an exemption for certain records containing trade secrets provided to the Department of Environmental Quality. SB 1212 (Stuart) amending § 2.2-3705.6;
- Created an exemption for certain records of the Commonwealth's Attorneys' Services Council. SB 1334 (Norment) amending § 2.2-3705.7.

Twelve of the 16 bills amended existing provisions of FOIA as follows:

- Amended an existing exemption for certain records of minors participating in park and recreation programs. HB 1524 (Villanueva) amending § 2.2-3705.7;
- Defined "members of the General Assembly" to include legislative aides in the working paper and correspondence exemption. HB 1639 (Greason) amending § 2.2-3705.7;

- Made various technical and other statutory changes necessary to implement the privatization of the Virginia Office for Protection and Advocacy. HB 1844 (Orrock) amending §§ 2.2-3705.3 and 2.2-3711;
- Made various changes relating to the Fraud and Abuse Whistle Blower Reward Fund, including a technical amendment to an existing records exemption. HB 1845 (Loupassi) and SB 1178 (Ruff) amending § 2.2-3705.3;
- Amended an existing provision to allow a member of a public body to participate in a meeting by electronic communication means due to personal matters under certain circumstances. HB 2026 (Dudenhefer) amending § 2.2-3708.1;
- Amended an existing closed meeting exemption to allow the board of trustees of the Jamestown-Yorktown Foundation to convene a closed meeting when the topic is the discussion or consideration of matters relating to specific gifts, bequests, and grants. HB 2043 (Robinson) amending § 2.2-3711;
- Made various amendments relating to the State Inspector General, including a technical amendment to an existing records exemption. HB 2114 (Landes) and SB 1176 (Ruff) amending § 2.2-3705.3;
- Amended various provisions relating to the conduct of electronic meetings. SB 1263 (Stuart) amending §§ 2.2-3708 and 2.2-3708.1; also amends § 30-179, relating to the powers and duties of the FOIA Council;
- Amended various provisions relating to criminal and other records held by law-enforcement agencies and makes corresponding technical amendments. SB 1264 (Stuart) amending §§ 2.2-3706, 2.2-3711, and 15.2-1713.1;
- Created the Department of Small Business and Supplier Diversity by consolidating the powers and duties of the Department of Business Assistance and the Department of Minority Business Enterprise; makes a corresponding technical amendment to an existing records exemption. The bill has a delayed effective date of January 1, 2014. SB 1350 (McWaters) amending § 2.2-3705.6.

A more detailed report of the bills discussed above and those FOIA and other public access bills passed during the 2013 Session appear on the Council's website and are attached as Appendix D to this report.

In 2013, the Council welcomed Delegate LeMunyon to the Council. Delegate LeMunyon represents western Fairfax and Loudoun Counties and serves on the FOIA Subcommittee of the House General Laws Committee. Delegate LeMunyon was unanimously elected Vice Chair of the Council.

On March 16, 2013, Maria J.K. Everett, Executive Director of the Council, was invited to



attend the Commemoration of the 262nd anniversary of the birth of President James Madison at James Madison's Montpelier and participated in the annual wreath laying ceremony there. The wreath, placed in the Madison Family Cemetery at Montpelier, was presented by Ms. Everett on behalf of the Council in recognition of James Madison's 262nd birthday and the celebration of Madison's birthday (March 16) as FOIA day in Virginia in accordance with Senate Joint Resolution 170 (2006) and Senate Joint Resolution 176 (1991).

### **Remembering Delegate Clifton A. "Chip" Woodrum**

The Council made of special point of remembering former Delegate Clifton A. "Chip" Woodrum who passed away February 19, 2013. Delegate Woodrum served in the House of Delegates from 1980 through 2003, headed the General Assembly study of FOIA from 1998-2000, was chief patron of the House bill that created the Council, and was the first Chair of the Council. Delegate Woodrum is remembered as an honest and caring state legislator and for his wisdom, integrity, and wit. For Sunshine Week, Ms. Everett wrote an article remembering Delegate Woodrum and his role as an advocate for open government and the creation of the Council, which appeared in the Roanoke Times on March 10, 2013. A copy of the article is attached to the Council's 2013 annual report as Appendix G.

## **WORK OF THE COUNCIL**

### **March 18, 2013**

The Council held its first meeting of 2013.<sup>13</sup> This meeting was an organization meeting which included a brief overview of the 2013 legislative update, review of the bills referred to the Council by the 2013 Session of the General Assembly, establishment of a work plan including the appointment of appropriate subcommittees, the Council's participation in the March 16 celebration of James Madison's Birthday, which is also FOIA Day in Virginia, at James Madison's Montpelier, a recent opinion of the Attorney General concerning the use of license plate readers, and remembering Delegate Clifton A. "Chip" Woodrum, the first Chair of the Council, who passed away February 19, 2013.

### **Legislative Update**

Staff provided a legislative update that highlighted nine bills from the 2013 Session of the General Assembly that made substantive changes directly to FOIA, as well as two other access-related bills. Staff noted that House Bill 2026 (Dudenhefer) and Senate Bills 1263 (Stuart) and 1264 (Stuart) all passed the General Assembly as recommendations of the Council. Of the highlighted bills, three bills add new records exemptions to FOIA, and the other six amend existing provisions of FOIA. Regarding the other two bills, HB 1952 (Landes) requires boards of visitors of public institutions of higher education to participate

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<sup>13</sup> Council members Sen. Stuart, Del. Iaquinto, Dooley, Hamlet, Jones, Landon, Schliessmann, Selph, Tavenner, and Whitehurst were present; members Ashby and Treadway were absent.

in educational programs on certain topics, including a FOIA program to be developed and delivered in conjunction with the Council; SB 1335 (Obenshain) restricts access to concealed carry permits, and is mentioned because it is a topic that was studied previously by the Council in 2007 and 2008. Additionally, staff pointed out that this legislative preview is incomplete and subject to change. It will be revised after the General Assembly has concluded its Reconvened Session on April 3, 2013, and the Governor has taken action on the bills.

Staff also observed that among other provisions, SB 1263 requires the Council to develop an electronic meetings public comment form. A draft version of the form was presented and feedback from the Council and the public was invited. There was no comment at this time. Finally, staff also noted that SB 1263 would allow advisory public bodies at the state level to hold electronic meetings using audio/visual technology without having a quorum physically assembled in one location. As an advisory body, the Council and its subcommittees could choose to avail themselves of that provision.

### **Bills Referred by the 2013 Session of the General Assembly**

Five bills were referred by the 2013 Session of the General Assembly to the Council for study during the interim, each of which is summarized below:

1. **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.
2. **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.
3. **HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission.** Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).
4. **SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.
5. **SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies.** Allows a public body to petition the appropriate court for additional time

to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the 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) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

### **Subcommittee Appointments**

The Council appointed two subcommittees to study the bills referred to it: the Electronic Meetings Subcommittee, and the Rights and Remedies Subcommittee. The Electronic Meetings Subcommittee, which began its work in 2012, was reconstituted to study HB 2032 (May) and SB 889 (Black). The Electronic Meetings Subcommittee consists of Council members Kathleen Dooley, Stephanie Hamlett, John Selph, and George Whitehurst. The Rights and Remedies Subcommittee studied HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart). Staff noted that the Supreme Court of the United States had heard oral argument in the case of *McBurney v. Young* in February, 2013, which challenged the provisions of FOIA granting rights only to Virginia citizens and certain media representatives. It was recommended that consideration of HB 2125, which would expand FOIA rights to all citizens of the United States, be delayed pending the decision of the Supreme Court, which is expected to be rendered later this year. In regard to HB 2321, concerning the application of FOIA to the State Corporation Commission (SCC), Senator Stuart noted that industry representatives had expressed interest in serving on a Council subcommittee studying the issue, and suggested that it might also be helpful to include a representative from the SCC. The Rights and Remedies Subcommittee consists of Council members Stephanie Hamlett, Ed Jones, Frosty Landon, James Schliessmann, and Bob Tavenner, as well as industry representative David Ogburn and a member to be appointed by the SCC.

### **Other Business**

#### **March 16 Celebration of FOIA Day, James Madison's Birthday**

Maria J.K. Everett, Executive Director, related that she had attended the Commemoration of the 262nd anniversary of the birth of President James Madison at James Madison's Montpelier, and placed a wreath there on behalf of the Council. In addition to being James Madison's birthday, March 16 is also FOIA day in Virginia, pursuant to Senate Joint Resolution 170 (2006) and Senate Joint Resolution 176 (1991). The presentation included a slide show of the festivities as well as a program pamphlet.

#### **Remembering Delegate Clifton A. "Chip" Woodrum**

Delegate Clifton A. "Chip" Woodrum, who served in the House of Delegates from 1980 through 2003, headed the General Assembly study of FOIA from 1998-2000, was chief patron of the House bill that created the Council, and was the first Chair of the Council. He

passed away February 19, 2013. Delegate Woodrum is remembered as an honest and caring state legislator and for his wisdom, wit, and integrity. For Sunshine Week, Ms. Everett wrote an article remembering Delegate Woodrum and his role as an advocate for open government and the creation of the Council that appeared in the Roanoke Times on March 10, 2013. The Council directed staff to post a copy of the article on the Council's website.

### **Attorney General's Opinion on License Plate Readers**

Staff related that the Attorney General had issued an opinion February 13, 2013 concerning the use of license plate readers, an issue that had been brought to the Council's attention at its meeting on September 5, 2012. At that meeting staff reported that there had been numerous news articles on the topic, which indicated that various law enforcement agencies across the state and the nation have technology which automatically reads and stores information about passing vehicles, including license plate numbers, location, time, and sometimes other data. Staff noted that the concern was more about over-collection of information, length of retention, and potential misuse, rather than access under FOIA. The opinion issued by the Attorney General was decided under the Government Data Collection and Dissemination Practices Act (GDCDPA), rather than FOIA. The Attorney General opined that general, passive collection using license plate readers to dredge data on all passing vehicles without a specific purpose violates GDCDPA, but that it was legal to use such devices in the context of specific investigations and to gather criminal intelligence information.

### **Public Comment**

Senator Stuart opened the floor to public comment; there was none.

## **June 6, 2013**

The Council held its second meeting of 2013.<sup>14</sup> This meeting was held to hear updates from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee, as well as to present other issues of interest to the Council.

### **Subcommittee Reports**

#### **Electronic Meetings Subcommittee**

Ms. Dooley reported that the Electronic Meetings Subcommittee had met on May 20, 2013, and June 6, 2013, to study HB 2032 (May) and SB 889 (Black).<sup>15</sup> She stated that after discussing the bills, the Subcommittee recommended taking no action at this time. The Subcommittee felt that the legislation recommended by the Council and passed by the 2013 Session of the General Assembly may alleviate many of the problems these bills sought to

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<sup>14</sup> Council members Sen. Stuart, Ashby, Dooley, Hamlet, Jones, Landon, Schliessmann, Selph, Tavenner, and Treadway were present; members Del. Iaquinto and Whitehurst were absent.

<sup>15</sup> **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.

**SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.

address, as it will allow individual members of all public bodies to participate in meetings by electronic means when personal matters prevent their attendance in person.<sup>16</sup> As the legislative change does not take effect until July 1, 2013, the Subcommittee recommended taking a wait-and-see approach to see how this change will work in practice before recommending any additional legislation. The Council voted unanimously to accept the Subcommittee's recommendation to take no action at this time on HB 2032 and SB 889. This concluded the Subcommittee's report and the work of the Subcommittee.

### **Rights and Remedies Subcommittee**

Mr. Landon reported that the Rights and Remedies Subcommittee met on May 20, 2013, to study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart).<sup>17</sup> Regarding HB 2125, Mr. Landon observed that the Council had been waiting for the federal courts to render a final decision on whether Virginia FOIA's citizenship limitation was constitutional, and that this year the Supreme Court of the United States had ruled that it was. The Subcommittee heard from Delegate Keam in support of his bill that would grant access rights to all citizens of the United States, and also heard from opposing parties who felt the current law should be kept with the citizenship limitation in place. The Subcommittee had no recommendation at this time, as it wishes to meet again and discuss the matter further, giving particular consideration to persons who are not citizens of the Commonwealth but have some nexus to Virginia, such as former citizens who have moved out-of-state, or citizens of other states who work or own property in Virginia.

Regarding HB 2321, the Subcommittee heard from Delegate Surovell in support of his bill, and from representatives of the State Corporation Commission (SCC) and regulated industries who opposed it. Through discussion it appeared that the patron and the representatives of the SCC had not previously discussed the issues among themselves before the bill was introduced; the Subcommittee suggested that such a discussion might be productive. Therefore the Subcommittee had no recommendation at this time, but planned to discuss the issue further at a later meeting after the patron and interested parties had a chance to discuss the matter among themselves.

The Subcommittee reported that it had discussed the history of SB 1371 and previous bills that would have provided different forms of remedies for public bodies who felt overburdened or harassed by repetitive requests. As there appeared to be no support for the bill moving forward, the Subcommittee recommended laying the bill on the table, and it was so moved for the Council's consideration. Because he was the patron of the SB 1371,

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<sup>16</sup> SB 1263 (Stuart) and HB 2026 (Dudenhefer).

<sup>17</sup> **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

**HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission.** Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).

**SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies.** Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the 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) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

Senator Stuart made Mr. Landon the Acting Chair of the Council for the purpose of considering the motion to lay SB 1371 on the table. The motion passed by a vote of nine-to-one (all present in favor except Senator Stuart voted against), and Mr. Landon returned the gavel to Senator Stuart. The Subcommittee reported that its next meeting was not yet scheduled; this concluded the Subcommittee's report.<sup>18</sup>

## **Other Business**

### **2013 FOIA Workshops**

Staff reported that in fulfilling its statutory mission to conduct FOIA educational programs, the Council conducts a series of day-long workshops around the state. From 2000 through 2005 the workshops were held every year in multiple locations in an effort to maximize the availability of training throughout the Commonwealth. From 2005 through 2012, the workshops were held every other year instead due to declining attendance as many interested persons had already attended a conference just the year before. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without over-saturating any particular area, the Council will resume presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations will remain available by request, as always). The workshops will be held in the City of Richmond every year due to its central location and large concentration of interested participants. This year, the workshops will be held as follows:

Richmond, VA -- Tuesday, September 10, 2013  
Lebanon, VA -- Monday, September 16, 2013  
Lynchburg, VA -- Tuesday, September 17, 2013  
Harrisonburg, VA -- Wednesday, September 18, 2013

For 2014, staff expects to present workshops in Richmond, Northern Virginia, and Tidewater (exact locations to be determined). Staff also discussed the general format and content of the workshops, covering public records, public meetings, law enforcement records, and a topical segment that changes from year to year. Senator Stuart and the Council expressed their appreciation and support for the workshops in fulfilling the Council's educational mission.

### **Attorney General's Statement regarding the application of FOIA to the Office of the Attorney General**

Staff noted that there had been several news reports and editorials recently discussing a footnote in FOIA responses from the Office of the Attorney General (OAG) that raised the possibility that the OAG may not be subject to FOIA, following the Virginia Supreme Court's reasoning in the *Christian v. State Corporation Commission* case.<sup>19</sup> Staff read into the record the official statement from Attorney General Cuccinelli dated May 20, 2013:

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<sup>18</sup> Note that the next meeting of the Rights and Remedies Subcommittee was subsequently scheduled to be held at 1:00 PM on August 20, 2013 in the Speaker's Conference Room, Sixth Floor, General Assembly Building.

<sup>19</sup> *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (Va. 2011).

"I have always instructed my staff to fully abide by FOIA. Several staff members are assigned to work on FOIA requests, we have always complied with all FOIA requests, and we will continue to respond to every one of the hundreds of requests we get each year.

The attorneys who work on FOIA requests were diligently attempting to preserve any potential legal arguments this office may have based on a 2011 Supreme Court case. However, I have instructed my staff to remove the recently inserted footnote referencing *Christian v. SCC* because it has created confusion and it does not comport with the office's practice of fully complying with FOIA."

Senator Stuart asked if there was any comment or question from the Council, or the public; there was none.

### **Treatment of Geographic Information Systems (GIS) under FOIA**

Staff informed the Council that FOIA currently addresses GIS maps in subsection F of § 2.2-3704, which provides special charging provisions for copies of topographic maps.<sup>20</sup> This language has been in FOIA since 1987. Unfortunately, the FOIA GIS terminology is outdated and refers only to the production of topographical maps. Staff has been told by GIS professionals that topographic maps are a very small part of GIS capabilities, and the current charging provisions do not provide for actual cost recovery. Staff had been contacted by the Virginia Information Technologies Agency (VITA) about this issue, but was unable to reach the contact person before today's meeting. As no one appeared before the Council today to request any specific action, the Council directed staff to try again to reach the contact person at VITA, and to add this item to the agenda for a future meeting as appropriate.

### **Public Comment**

Senator Stuart opened the floor to public comment; there was none.

## **September 12, 2013**

The Council held its third meeting of 2013.<sup>21</sup> This meeting was held to welcome Delegate LeMunyon to the Council, to elect a Vice-Chair, to hear updates from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee, to begin the annual Legislative Preview, and to present other issues of interest to the Council.

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<sup>20</sup> "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."

<sup>21</sup> Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Jones, Landon, Schliessmann, Selph, Tavenner, and Whitehurst were present; members Hamlett and Treadway were absent.

## **Geographic Information Systems and FOIA**

After calling the meeting to order, Senator Stuart announced that certain agenda items would be taken up out of order. He first invited Dan Widner, Coordinator of the Virginia Geographic Information Network (VGIN) for the Virginia Information Technologies Agency (VITA), to speak regarding his concerns over the treatment of Geographic Information Systems (GIS) under FOIA.<sup>22</sup> Mr. Widner informed the Council that the current language in FOIA only addresses charges for topographic maps and is outdated. He stated that while data collection remains much the same as it was in the past, the technology used is more accurate, higher quality, and easier to access. He referred to Google mapping technology which allows for viewing by address, tax parcel, aerial views, structural footprints, and other means as one example, along with other competitive software providers and "cloud" technologies. He noted that many states and localities now provide free online access to mapping technology. Given this technological progress, he proposed that GIS data need not be treated differently from other records subject to FOIA. As a further example, Mr. Widner related that the Virginia Base Mapping Program has a FOIA exemption and latitude to set charges, but now operates at a much lower cost than it did in 2002. In response to questions from the Council, Mr. Widner stated that there should not be any privacy issues from using "cloud" technologies, and that maps could be produced at any desired size. He suggested simply striking the relevant language concerning charges for topographic maps, so that charges for GIS data would then be the same as charges for other public records under FOIA. Senator Stuart proposed without objection that staff and interested parties form a workgroup to consider the issue and draft language to bring before the Council at its next meeting.

## **2013 FOIA Workshops**

Staff reported that the Richmond FOIA Workshop was held Tuesday, September 10, 2013, but that due to a lack of air conditioning at the facility, a number of participants had to leave. Make-up dates will be scheduled for October and November for those who were registered at the Richmond FOIA Workshop. The other Workshops will be held next week in Lebanon, Virginia on Monday, September 16, 2013, Lynchburg, Virginia on Tuesday, September 17, 2013, and Harrisonburg, Virginia on Wednesday, September 18, 2013. For 2014, we expect to present workshops in Richmond, Northern Virginia, and Tidewater (exact locations to be determined).

## **Subcommittee Reports**

### **Electronic Meetings Subcommittee**

Ms. Dooley reminded the Council that the Electronic Meetings Subcommittee had met on

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<sup>22</sup> Subsection F of § 2.2-3704 provides as follows: "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."



May 20, 2013, and June 6, 2013, to study HB 2032 (May) and SB 889 (Black).<sup>23</sup> She stated that the Subcommittee had not met since June. She reminded the Council that after discussing the bills, the Subcommittee recommended taking no action at this time, in order to gauge the effects of the 2013 Council-recommended amendments to electronic meetings law before considering additional changes. The Council voted unanimously at its June meeting to accept the Subcommittee's recommendation to take no action, which concluded the Subcommittee's report and the work of the Subcommittee.

### **Rights and Remedies Subcommittee**

Mr. Landon reported that the Rights and Remedies Subcommittee met on May 20, 2013, and August 20, 2013, to study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart).<sup>24</sup> Mr. Landon reminded the Council that following the Subcommittee's recommendation, the Council had tabled SB 1371 at the Council's meeting on June 6, 2013. Regarding HB 2125, Mr. Landon reported that after hearing from Delegate Keam in support of his bill, and also from opposing parties, he felt that because Virginia is one of the few states that limit access to its own citizens, and due to rapid changes in technology, the language granting FOIA rights only to citizens of the Commonwealth and certain media representatives should be rewritten. However, the Subcommittee had no recommendation as it did not feel a need to make a policy change at this time. Regarding HB 2321, the Subcommittee had heard from Delegate Surovell in support of his bill, and from representatives of the State Corporation Commission (SCC) and regulated industries who opposed it. After giving consideration to the issues, the Subcommittee concluded its work without recommendation on HB 2321.

### **Legislative Preview**

#### **Delegate Surovell - State Corporation Commission and FOIA**

Delegate Surovell discussed his bill, HB 2321, which would have made the SCC subject to FOIA. He related a brief history of the bill, stemming from the Virginia Supreme Court's decision holding that the SCC was not subject to FOIA, to the bill's introduction to the General Assembly, referral to the Council, and study by the Rights and Responsibilities Subcommittee. He stated that he personally believed the SCC should be entirely subject to FOIA, but that after hearing from interested parties and discussing the matter with SCC

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<sup>23</sup> **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.

**SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.

<sup>24</sup> **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

**HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission.** Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).

**SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies.** Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the 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) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

representatives, he was willing to compromise. To that end, he brought a second draft of his bill that attempts to carve out regulatory functions of the SCC as exempt from FOIA, but that the language was a little vague. Delegate Surovell went on to note that the SCC is incredibly powerful and should be subject to as much sunshine as possible, that various news media had run editorials in support of his bill, and that he had received no emails in opposition. Finally, he stated that contrary to the Supreme Court's decision, he did not believe that the General Assembly had ever intended that the SCC would not be subject to FOIA.

Delegate LeMunyon indicated that HB 2321 was the kind of bill he would like to vote for, but was unsure if the language of the draft was clear enough. Senator Stuart indicated he shared the same concerns over whether the draft language was too vague as to "regulatory activities." Mr. Ashby raised the issue of differentiating based on the function being performed (such as judicial, regulatory, or administrative functions) rather than subject matter. He further asked what would be available if the SCC was subject to FOIA that is not available now. Delegate Surovell stated that the SCC would tell you they provide all they can even if they do not have to, but it is difficult to prove a negative, to know what's missing without already knowing. The Council and Delegate Surovell also discussed whether other statutes would need to be amended and whether there would be a retroactive effect were the SCC made subject to FOIA.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), observed that under FOIA, everything is open unless exempt, which allows citizens to decide what is important to disclose. She further stated that many other states subject their agencies which are equivalent to the SCC to their access laws. A citizen<sup>25</sup> stated that she was shocked to read about the SCC, that the SCC does not separate legislative, executive, and judicial activities, and also that the SCC's stated goals including balancing business interests, but as a state agency it should serve the public interest, not business interests.

Scott White, on behalf of the SCC, stated that while the SCC appreciates and shares Delegate Surovell's concerns regarding transparency in government, the SCC does not support placing the SCC under FOIA. Instead, the SCC supports continuing to use the existing scheme providing separate access laws for the SCC. He noted that the existing scheme had worked well for years and continued to do so. He further observed that the SCC is not like the agencies in other states due to the SCC's judicial function. He suggested that additional laws could be added outside of FOIA as needed to cover any records not already covered.

David Ogburn, speaking on behalf of Verizon, and Brent Archer, speaking on behalf of natural gas utilities, both expressed concern that the language concerning "regulatory activities" of the SCC was too vague and could have unintended consequences. A representative of the Sierra Club spoke in support for Delegate Surovell's proposal, stating that as general policy all government bodies should be accountable to the people, and that there should be greater oversight of the SCC. After further discussion by the members of the

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<sup>25</sup> The citizen's first name was Marie and last name began with "St," but staff is unsure of the proper spelling.

Council and the patron, the Council voted to indicate its support for the concept of Delegate Surovell's bill, but to have staff and interested parties meet again to try to improve the draft language due to concerns that it was too vague as written.<sup>26</sup>

### **Delegate Peace - Definition of "meeting"**

Delegate Peace stated that he brought forth a proposal on behalf of Hanover County concerning the definition of "meeting" under FOIA. Currently, the law provides that a meeting occurs when three or more members of a public body gather.<sup>27</sup> The proposal from Hanover was to change that language to a quorum instead of three. Delegate Peace indicated that the initial proposal was for legislation, but he suggested asking the Council first to study the issue instead. He noted the current practice often involves members meeting two at a time, which is not a "meeting" subject to FOIA. He also observed that the proposal raises issues of transparency and accountability versus efficiency and consistency with other states' laws. Questions and discussion among the Council and Delegate Peace elucidated that the new rule would be a quorum (simple majority), rather than three, which in the case of large public bodies could allow far more than three members to meet at once, for example, six members out of a ten-member body, and even more for boards of visitors and some regional bodies. Delegate Peace indicated his understanding was that the proposal was intended to apply to local bodies such as boards of supervisors, and that he could see both sides of the issue.

Sterling Rives, Hanover County Attorney, said that the request was for the Council to study the issue. He confirmed that the proposal would change the definition of "meeting" for all public bodies to apply to a quorum, which would match current rules for the General Assembly and be more in keeping with rules in other states. He suggested it would be advantageous for "brainstorming" sessions, particularly because members may be reluctant to speak frankly in front of the press. Senator Stuart questioned whether they felt it was necessary to do so privately, noting that this proposal would allow more members to meet out of public view. Mr. Rives agreed, stating that it was not different from other professionals, or meetings with the General Assembly, citizen groups, or business groups. After some further discussion, Senator Stuart asked whether there was any motion on the matter. There being none, the Council did not take any action on this issue.

### **Welcome to Delegate LeMunyon & Election of Vice Chair**

Having rearranged the suggested agenda, Senator Stuart took this time to welcome Delegate LeMunyon to the Council. Delegate LeMunyon introduced himself, stating that he represented western Fairfax and Loudoun, and serves on the FOIA Subcommittee of the House General Laws Committee. Senator Stuart then opened nominations for Vice Chair of the Council. Delegate LeMunyon was nominated and unanimously elected Vice Chair.

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<sup>26</sup> The vote was unanimous, except for an abstention by Mr. Schliessmann, who stated for the record that the Office of the Attorney General took no position on the bill.

<sup>27</sup> The term "meeting" is defined in § 2.2-3701 to mean "the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."

### **Public Comment**

Senator Stuart opened the floor to public comment. Ginger Stanley of the Virginia Press Association (VPA) expressed her appreciation for the work of Maria Everett and the Council in putting on the annual FOIA "road show" seminars, stating that the VPA was honored to continue as a co-sponsor. She also stated she was pleased that the Council expressed support for Delegate Surovell's proposal; she continued that she did not believe the bill would work as written, but she appreciated the opportunity to continue to work on it.

Ms. Rhyne stated that she had left a handout regarding a college internship in the name of the late Delegate "Chip" Woodrum, the first Chair of the Council, which would allow a recipient to learn about and participate in the legislative process.<sup>28</sup>

### **December 5, 2013**

The Virginia Freedom of Information Advisory Council (the Council) held its fourth and final meeting of 2013.<sup>29</sup> This meeting was held to hold the Legislative Preview for proposals to be brought before the 2014 Session of the General Assembly and to present other issues of interest to the Council.

### **Legislative Preview**

#### **Senator Watkins- State Corporation Commission and FOIA**

Senator Watkins indicated that he planned to offer a bill to the 2014 Session of the General Assembly that would address access to records of the State Corporation Commission (SCC). He indicated that the bill would be in Title 12.1 rather than FOIA, and that it would describe records that must be made available for public inspection regarding administrative activities of the SCC, but that a draft was not available at this time. He stated that the SCC helps Virginia, and that businesses trust that proprietary information given to the SCC will be kept confidential. He went on to say he was not sure putting a third party into the process would be in the best interest of businesses in Virginia, and that he was concerned there may be evolving interpretations of the law that change over time. He further stated that in 32 years as a legislator he had not heard of any complaints about the SCC from a citizen who could not get information.

Senator Stuart asked whether Senator Watkins' bill would do the same things as Delegate Surovell's bill that had been referred to the Council for study. Senator Watkins replied that his bill would address administrative matters and would do so outside of FOIA. Senator Stuart asked whether there was a concern over unintended consequences; Senator Watkins

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<sup>28</sup> More information is available on VCOG's website at <http://www.opengovva.org/chip-internship>.

<sup>29</sup> FOIA Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Hamlett, Jones, Landon, Schliessmann, Selph, Tavenner, and Treadway were present; member Whitehurst was absent.

replied that there was a lot of proprietary information of businesses that should not be made public. Delegate LeMunyon stated that it appeared to be a difference in form rather than substance, and asked why put the bill in Title 12.1 instead of FOIA. Senator Watkins replied that the Council does not have the experience and understanding of the proprietary side of business in Virginia. Mr. Ashby inquired whether other agencies receive proprietary business information. Senator Watkins responded that the SCC is the primary recipient of proprietary information, but he was unsure what proprietary information businesses divulged to other agencies. Mr. Jones inquired of staff whether there were existing FOIA exemptions for proprietary information. Staff replied that there are currently 27 of them in their own section.<sup>30</sup> Mr. Jones asked whether staff was aware of a significant number of court cases over the current proprietary records exemptions; staff replied in the negative. Mr. Landon asked whether there was a timing issue here, or whether the matter could be carried over. Senator Watkins replied he did not know of any time pressure, but the sooner the matter was clarified the sooner there would be more transparency. The Council did not take any action on this item.

### **Delegate Surovell - State Corporation Commission and FOIA**

Delegate Surovell's proposal to make the SCC subject to FOIA was referred to the Rights and Responsibilities Subcommittee, which concluded its work without recommendation. Delegate Surovell addressed the Council at its September meeting with a modified proposal. While the Council did not support that proposal as written, it suggested that the Delegate work with other interested parties and staff to come up with a new legislative draft proposal. Delegate Surovell appeared again today with another modification of his draft proposal. He observed that the Council had expressed its support for the concept of making the SCC subject to FOIA, but felt that the language of the prior draft was too vague. He stated that the new draft had clearer language, including an exemption for proprietary information. The Delegate noted that there were two approaches being considered, one in FOIA, the other in Title 12.1. He indicated his preference for FOIA because it has established precedents and authority. He noted that a bill in Title 12.1 would be the opposite of FOIA because the default rule of FOIA is to state that all records must be disclosed unless exempt, whereas the other bill would say what is open and leave the rest exempt by default. Delegate Surovell then discussed the specific changes made in the new draft, and how each part of the proposal addressed concerns raised previously by the opposing parties. In response to questions from Senator Stuart, Delegate Surovell stated that he hoped the Council would vote to recommend the bill, and stated that he did intend to introduce it, or one like it, to the 2014 Session of the General Assembly.

Delegate LeMunyon moved to recommend the bill. The motion was seconded and there was discussion on the motion. Delegate LeMunyon noted that it would have been great to be able to compare the two bills, but he felt the difference was more form than substance and should not slow the process. Mr. Jones agreed and indicated his support for the motion, noting that there would not be "peace in the valley" on the underlying policy question whether to approach the issue in Title 12.1 or in FOIA. Mr. Landon agreed there would be no "peace in the valley," but hoped there would be more agreement on specific language. He also stated that he hoped the SCC would take advantage of technology to

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<sup>30</sup> § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

broaden its dissemination of information. Ms. Dooley expressed her understanding at the last meeting was that the Council agreed that personnel and procurement records of the SCC would be brought under FOIA, and asked why the bill was not drafted that way. Delegate Surovell stated it was not drafted that way because FOIA mandates disclosure of all public records then exempts certain ones, so the bill follows the standard approach of FOIA. Mr. Ashby indicated he understood the draft was an attempt at compromise to address the concerns of the interested parties, but he felt the exemptions as drafted may be too broad. Mr. Schliessman stated for the record that the Office of the Attorney General (OAG) continued to take no position on the bill and would abstain from any vote on it. Senator Stuart indicated his concern that the new draft had not been fully vetted and may have unintended consequences, so he would not endorse it today but remained in support of the concept that the SCC should be subject to FOIA.

Arlen Bolstad, representing the SCC, expressed several concerns about the draft, particularly that the process of designating proprietary records to be exempted would be cumbersome and voluminous, and that some of language would likely be the source of future litigation. He elaborated in response to inquiry from Senator Stuart that the process of designating proprietary records would be burdensome on businesses and the agency, as it would likely require an in camera proceeding before a hearing officer. Additionally, applying FOIA to the SCC would lead to appeals before the Supreme Court, and questions of the application of FOIA's petition for mandamus versus the SCC's rules of practice and procedure. By contrast, he stated that Senator Watkins' bill in Title 12.1 would codify that budget, personnel, and procurement records would be open, it would not include additional regulatory or legal proceedings, and that records available now would continue to be available. He stated that the two bills were not similar, and that he would request that the Council not recommend Delegate Surovell's draft.

Delegate LeMunyon asked why the draft of Senator Watkins' bill was not available. Mr. Bolstad indicated it was still being discussed internally at the SCC. Delegate LeMunyon asked for assurance that the SCC was working in good faith, not just to slow the process so nothing happens. Mr. Bolstad stated that the SCC provides voluminous records to the public on a daily basis but in the interest of protecting confidential and proprietary information, the SCC must exercise discretion. Ms. Dooley asked whether Senator Watkins' bill would address procedural matters as FOIA does, such as time limits for responses. Mr. Bolstad stated that when requests come in, responses are prompt and thorough, but there is no language like that in the bill. Noting that courts regularly file protective orders for confidential and proprietary business information, Mr. Ashby asked whether there was a difference between that practice and the procedure in Delegate Surovell's draft. Mr. Bolstad replied that there was. As an example, he stated that in a large rate case with voluminous documents and months of work, there would be a protective order at the outset of the case. By contrast, under Delegate Surovell's bill, he felt that businesses would want a new "mini protective order" each and every time the SCC asked for records. Mr. Ashby observed that the Commonwealth has stated a policy of access in FOIA as a matter of right, and asked whether there is a countervailing public policy from the General Assembly to be considered. Mr. Bolstad stated that the Supreme Court found such a policy in the *Christian* case based on the separate laws covering specific SCC records.

Craig Merritt, on behalf of the Virginia Press Association (VPA), stated that the VPA shares the view that something needs to be done, and applauds the work of Delegate Surovell and the interested parties. However, he expressed concerns over Delegate Surovell's bill, and stated he did not think it was ready. He went on to state the hope that whatever bill goes forward be based on a real-world understanding of the SCC, and that it does not create or conflate problems in matters already covered under the law. He also related the general goal that the SCC have the same transparency as other agencies when it acts as an agency, but not when it acts as a court.

Delegate Surovell addressed the concerns raised, noting that the Supreme Court has repeatedly followed the narrow construction rule for FOIA exemptions. He stated that courts will read exemptions as narrowly as possible and will give independent meaning to each exemption following statutory rules of construction. He also stated how individual clauses in his proposed draft would address specific concerns over the judicial aspects of the SCC, and that the existing laws concerning the SCC outside of FOIA would still apply if his proposal was enacted. He continued by observing that the underlying public policy debate centers around the idea that the SCC is special because it is the only agency that regulates monopolies, that it stands between monopolies and the people, yet it has very little accountability to the people or the General Assembly. He concluded by stating that the SCC should have transparency, that it belongs in FOIA, and he felt the proposal should be approved.

The Council then voted on the motion to recommend the draft; the motion failed to pass by vote of four in favor, five against, and two abstentions. Delegate LeMunyon and members Ashby, Jones, and Landon voted in favor of recommendation. Senator Stuart and members Dooley, Selph, Tavenner, and Treadway voted against recommendation. Members Hamlett and Schliessmann abstained, reiterating that the OAG took no position on the matter.

#### **Roger Wiley; E-meetings, remote participation based on personal matters exception**

Roger Wiley, speaking on behalf of the Loudoun County Board of Supervisors, stated that there had been an instance where one Board member's participation by electronic means due to a personal matter had been denied, whereas another members' prior request had been approved. The resulting perception was that the denial in the second instance was due to how the majority felt the member who requested remote participation would vote on a controversial issue. Mr. Wiley stated that such a result was not what was intended by the law allowing such remote participation for personal matters, and that it was not meant to be used to pick and choose participants based on their positions on issues. He indicated that the proposal would require a one-time determination by each public body regarding its policy on approving such participation which would then be applied equally to all members. He also stated he was open to other fixes. Senator Stuart inquired whether this might be a case of a bad situation making for bad law, and stated that he was hesitant to amend the law due to a single instance. Mr. Wiley indicated he felt the situation would likely be repeated. Craig Merritt, on behalf of the VPA, indicated opposition to the measure as a classic case of

amending the Code due to one bad act. He also expressed the VPA's concern that the proposal would allow each local public body to set policy, rather than having a uniform access policy set by the General Assembly. Mr. Wiley offered an alternative proposal to remove the current procedure to approve by majority vote participation by individual members, and leave out the proposed policy determination altogether. Senator Stuart inquired as to what action by the Council was being sought; Mr. Wiley indicated he was bringing the matter up to alert the Council and any potential opponents, and to solicit alternative solutions. The Council took no action on this item.

### **Tom Moncure; George Mason University, employment promotion letters**

Tom Moncure, University Counsel and Assistant Attorney General, George Mason University, stated that Delegate Albo had agreed to introduce legislation in 2014 that would amend the current exemption allowing educational institutions to withhold letters of recommendation for applicants for employment to also cover such letters of recommendation for candidates for promotion.<sup>31</sup> Mr. Moncure explained that especially in a higher educational setting, people were extremely reluctant to provide frank appraisals of their colleagues when they knew that the subjects will be privy to those appraisals. The Council voted unanimously in favor of recommending this amendment to the 2014 Session of the General Assembly.

### **Records exemption for certain rental rates on behalf of the Fort Monroe Authority**

Staff reported that James Fiorelli of the OAG had contacted the Council on behalf of the Fort Monroe Authority to request an amendment to the existing exemption for "appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease."<sup>32</sup> The amendment would add language to exempt related negotiation records where competition or bargaining was involved and public disclosure would adversely affect the financial interest of the public body. The stated purpose of the exemption is to allow agents of the Commonwealth to negotiate in the best interest of the Commonwealth and to fulfill their fiduciary responsibilities to the citizens and taxpayers of the Commonwealth. The Council took no action on this item.

## **Other Business**

### **Geographic Information Systems and FOIA**

Staff reported that at its September meeting, the Council heard from Dan Widner, Coordinator of the Virginia Geographic Information Network (VGIN) about outdated language in FOIA concerning charges for topographic maps. The Council asked that Mr. Widner meet with interested parties and staff to come up with a legislative draft proposal for the Council's consideration. The workgroup met and decided that a guidance document from the Council concerning providing GIS records and charges therefore was a better alternative than proposing legislation.

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<sup>31</sup> Subdivision 2 of § 2.2-3705.4.

<sup>32</sup> Subdivision 8 of § 2.2-3705.1.



### **FOIA/Records Management guidance for the Governor-Elect Transition Team**

Staff reported working with the Library of Virginia to produce a guidance document for the Transition Team to assist them in setting up procedures to make handling FOIA requests easier as well as setting up systems now that will address records management issues over the course of this new administration. Staff thanked Dr. Treadway for her guidance in this project.

### **Review of Executive Summary for Council 2013 Annual Report**

Staff reported that the Council is statutorily required to report annually to the Governor and the General Assembly concerning its activities, and recommendations, if any. The executive summary is in draft form and will be updated following today's meeting. The executive summary and 2013 annual report will be posted on the General Assembly webpage as well as the Council's website.

### **Viewing of FOIA training video for Boards of Visitors**

Staff reported that this FOIA training video was produced by the Virginia State Council of Higher Education pursuant to HB 1952 (2013 Acts of Assembly, c.577) in conjunction with the Council staff and Stephanie Hamlett, Office of Attorney General, in order to provide guidance to Boards of Visitors of public institutions of higher education. Due to time considerations, the video itself was shown after adjournment of the meeting.

### **Public Comment**

Senator Stuart opened the floor to public comment. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she had heard of additional unintended consequences from the 2011 amendment to the definition of "public records."<sup>33</sup> Ms. Rhyne indicated that even though all agreed at the time that the amendment was merely a clarification of existing law, it was now being interpreted in other ways. She elaborated that the existing definition included (and still includes) records "in the possession of a public body or its officers, employees or agents in the transaction of public business," but that the new language excepted records "not prepared for or used in the transaction of public business," which has led to conflicting interpretations. For example, she indicated that some public bodies had stated that they were in *possession* of a record, but had not *used* it in the transaction of public business, and therefore it was not a "public record" subject to FOIA. Ms. Rhyne asked that the Council take the matter up for study next year. Senator Stuart inquired whether there had been any litigation on the issue; Ms. Rhyne replied there was none of which she was aware. The Council then voted unanimously to study the issue during the 2014 interim.

Ginger Stanley of the VPA observed that as part of his "Mainstream Project" proposal, Lieutenant Governor Bolling has recommended a comprehensive study of FOIA exemptions. She noted that as a Senator, Mr. Bolling headed the Senate General Laws

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<sup>33</sup> 2011 Acts of Assembly, c. 242 added a final sentence to the definition in § 2.2-3701: "Records that are not prepared for or used in the transaction of public business are not public records."

FOIA Subcommittee and was the patron of the Senate version of the bill that founded the FOIA Council.<sup>34</sup> She further noted that the General Assembly had not had a FOIA study in 14 years, and that the VPA supported this proposal.

Senator Stuart asked whether anyone else wished to speak; there was no further public comment. The meeting was then adjourned.

### **Future Meetings**

The Council will next meet after adjournment of the 2014 Session of the General Assembly (to be determined).

## **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 annually, 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 1,507 inquiries and conducted 57 training seminars statewide. A listing of these training seminars appears as Appendix A.

### **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

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<sup>34</sup>Senate Bill 340 (Bolling), enacted as 2000 Acts of Assembly, c. 987. Note there was a corresponding House bill, HB 551 (Woodrum), enacted as 2000 Acts of Assembly, c. 917.

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, 2012 to November 30, 2013, the Council, with a staff of two attorneys, fielded 1,507 inquiries. Of these inquiries, ten 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 B. The table below profiles who requested written advisory opinions for the period December 1, 2012 through November 30, 2013:

Written Advisory Opinions: 10

State and Local Government	2
Citizens of the Commonwealth	5
Members of the News Media	3

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, 2011 and November 30, 2012:

Telephone and E-mail Responses: 1,497

Government	872
Citizens	452
News Media	173

Appendix E to this report sets out the number of inquiries received by the Council each month from December, 2012 through November, 2013, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other).

### **The Council's Website**

The website address for the Council is <http://foiacouncil.dls.virginia>. During the past year, the website received approximately 412,451 visits, for a total of 1,975,532 page views and

5,373,099 hits.<sup>35</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**

In fulfilling its statutory mission to conduct FOIA educational programs, the Council conducts a series of day-long workshops around the state to provide FOIA training to recently-appointed public officials and employees. From 2000 through 2005 the workshops were held every year in multiple locations in an effort to maximize the availability of training throughout the Commonwealth. From 2005 through 2012, the workshops were held every other year instead due to declining attendance as many interested persons had already attended a conference just the year before and as a sign that its basic training mission had been successfully accomplished. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without over-saturating any particular area, the Council will resume presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations will remain available by request, as always). The workshops will be held in the City of Richmond every year due to its central location and large concentration of interested participants. As is customary, the workshops as well as all of the Council's training programs, are approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys, in-service credit for law-enforcement personnel by the Department of Criminal Justice Services, academy points for school board officials by the Virginia School Board Association, and continuing education credit for municipal clerks by the Virginia Municipal Clerks 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. From December 1, 2012 to November 30, 2013, the Council conducted 57 such training programs. A listing of these trainings appears as Appendix A to this report.

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<sup>35</sup> Please recall that the software used to track website hits changed in 2010 and now presents the information in a different format from prior years.

## **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
- FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>36</sup>
- Legislators Guide to FOIA
- Law-Enforcement Records and FOIA
- Law-Enforcement Guide for Handling 911 Requests
- FOIA Guide for Boards of Visitors
- Quick Reference Guide for Responding to FOIA Requests

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. 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 1,507 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

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<sup>36</sup> Developed in cooperation with VACo and VML.

a variety of educational materials on the application of FOIA. Its commitment to facilitating compliance with FOIA through training continued in the form of 57 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 Richard H. Stuart, Chair  
Delegate James M. LeMunyon, Vice-Chair  
Christopher Ashby  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Forrest M. "Frosty" Landon  
James Schliessman  
John G. Selph  
Robert L. Tavenner  
Sandra G. Treadway  
George T. Whitehurst

**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, 2012 through November 30, 2013, Council staff conducted 57 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 4, 2012	State Compensation Board New Officer Training Richmond, VA
December 12, 2012	Department of Housing and Community Development Permit Technician's Course Sandston, VA
January 4, 2013	Virginia Municipal League Newly Elected Officials Conference Glen Allen, VA
January 17, 2013	J. Sargeant Reynolds Community College Administrative Practice and Procedure Class Richmond, VA
January 30, 2013	Town of Leesburg Leesburg, VA
February 1, 2013	Harrisonburg Police Department Harrisonburg, VA
February 6, 2013	Virginia Commonwealth University Communications Law and Ethics Class Richmond, VA
February 26, 2013	ENDependence Center of Northern Virginia Arlington, VA
March 8, 2013	City of Suffolk Suffolk, VA

March 15, 2013 Andrew Kubincanek, Virginia Administrative Law Advisory Council  
Richmond, VA

March 25, 2013 Chesapeake Department of Human Services  
Chesapeake, VA

April 17, 2013 Virginia Economic Development Partnership  
FOIA Webinar  
Richmond, VA

April 23, 2013 Library of Virginia Records Management and FOIA  
Richmond, VA

May 9, 2013 Virginia Municipal League Statewide Workshops  
Farmville, VA

May 15, 2013 Virginia Municipal League Statewide Workshops  
Exmore, VA

May 16, 2013 Piedmont Criminal Justice Academy  
Martinsville, VA

May 21, 2013 Virginia Commonwealth University  
Communications Law Class  
Richmond, VA

May 22, 2013 Department of Housing and Community Development  
Permit Technician's Course  
Virginia Beach, VA

May 22, 2013 County of Henrico  
Henrico, VA

May 23, 2013 Virginia Municipal League Statewide Workshops  
Pulaski, VA

May 24, 2013 VITA, E-911 and GIS  
Chester, VA

May 30, 2013 Virginia Coalition for Open Government  
Records Management and FOIA  
Richmond, VA

June 7, 2013 Virginia Municipal League Statewide Workshops  
Bridgewater, VA



June 11, 2013	Regional Meeting of Local Departments of Social Services Winchester, VA
June 12, 2013	Virginia Municipal League Statewide Workshops Herndon, VA
June 20, 2013	Virginia Board of Accountancy Richmond, VA
June 27, 2013	City of Alexandria Public Schools Alexandria, VA
July 18, 2013	Statewide Independent Living Council Richmond, VA
July 25, 2013	Virginia Municipal League Statewide Workshops Richmond, VA
August 2, 2013	Board of Visitors, University of Virginia Charlottesville, VA
August 7, 2013	City of Alexandria Leadership Academy Alexandria, VA
August 27, 2013	City of Williamsburg/James City County Public Schools Williamsburg, VA
August 28, 2013	Richmond Paralegal Association Richmond, VA
August 29, 2013	Regional Meeting of Local Departments of Social Services Winchester, VA
September 10, 2013	2013 Statewide FOIA Workshops Richmond, VA
September 16, 2013	2013 Statewide FOIA Workshops Lebanon, VA
September 17, 2013	2013 Statewide FOIA Workshops Lynchburg, VA
September 18, 2013	2013 Statewide FOIA Workshops Harrisonburg, VA

September 25, 2013	Virginia Commonwealth University Communications Law and Ethics Class Richmond, VA
September 30, 2013	Local Government Class and FOIA Washington and Lee University Law School Lexington, VA
October 1, 2013	Piedmont Police Academy Weyers Cave, VA
October 8, 2013	Department for the Aging and Rehabilitative Services Richmond, VA
October 8, 2013	Virginia Municipal Clerks Association Virginia Beach, VA
October 15, 2013	Virginia Municipal League Annual Conference Arlington, VA
October 16, 2013	State of Montana Teleconference Richmond, VA
October 17, 2013	2013 Statewide FOIA Workshops Richmond, VA
October 22, 2013	New Board of Visitors Training State Council of Higher Education of VA Richmond, VA
October 24, 2013	Virginia State University Public Relations Class Petersburg, VA
October 28, 2013	Manassas Park Police Department Manassas Park, VA
October 29, 2013	Virginia Department of Agriculture and Consumer Services Richmond, VA
November 1, 2013	Sheriff's Office County of Loudoun Loudoun, VA

November 4, 2013	VITA E-911 and GIS Regional Meeting Culpeper, VA
November 6, 2013	VITA E-911 and GIS Regional Meeting Roanoke, VA
November 14, 2013	2013 Statewide FOIA Workshops Richmond, VA
November 15, 2013	VITA E-911 and GIS Regional Meeting James City County, VA
November 18, 2013	Haymarket Town Council Haymarket, VA
November 20, 2013	Virginia Sheriffs' Association New Sheriffs Orientation Richmond, VA

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Index of Written Advisory Opinions  
December 1, 2012 through November 30, 2013

ADVISORY OPINIONS ISSUED

**December, 2012**

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[AO-06-12](#)

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Considering three different records exemptions, an adult arrestee photograph ("mug shot") may not be withheld as a noncriminal incident record; may be withheld if its release would jeopardize a felony investigation; and may be withheld if the subject depicted is also a witness.

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[AO-07-12](#)

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A public instrumentality exercising public and essential governmental functions is a public body subject to FOIA.

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**January, 2013**

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[AO-01-13](#)

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Generally, records submitted by a private company to a state agency as required by regulation are public records subject to FOIA. Marking such records "proprietary and confidential" does not, by itself, make them exempt from mandatory disclosure; records are only exempt if there is a specific provision of law that allows them to be withheld.

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**March, 2013**

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[AO-02-13](#)

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FOIA is silent regarding the logistics of holding a public meeting. In a situation where the meeting room lacks the capacity to accommodate all those who wish to attend, the best practice is to move to a larger venue and use technology to increase public access, when possible.

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**May, 2013**

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**AO-03-13**

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A motion to convene a closed meeting must identify the subject to be discussed, the purpose of the discussion, and cite an appropriate exemption. There are two requirements set forth in the exemption allowing public bodies to hold closed meetings to discuss real property matters: (1) that the discussion concern the acquisition of real property for a public purpose, or the disposition of publicly held real property, and (2) that discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

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**AO-04-13**

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A committee that was created by action of a city council, but does not advise the city council or perform a delegated function of the city council, is not a public body subject to FOIA for meetings purposes. However, records of such a committee that are in the transaction of public business are public records subject to FOIA.

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**AO-05-13**

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Charges for public records are limited to actual costs. The actual cost to provide electronic records is not the same as the cost to provide paper copies. Estimates must be provided in advance if requested.

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**June, 2013**

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**AO-06-13**

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A contract between a public body and a public employee settling an employment dispute may be withheld as a personnel record. However, accounting records that reflect payments pursuant to a settlement agreement are not exempt.

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**July, 2013**

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**AO-07-13**

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A committee or advisory group of a public body that performs a delegated function or advises the public body is itself a public body. A committee or advisory group created by an individual to advise that individual is not a public body. In either case, however, records prepared, owned, or possessed by the committee or advisory group in the transaction of public business are public records subject to FOIA.

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**November, 2013**

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**AO-08-13**

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Law-enforcement agencies may withhold personal identifying information contained in noncriminal records to protect the safety or privacy of any person. Information in the possession of law-enforcement agencies relative to the identity of adult arrestees must be provided upon request.

## APPENDIX C

### 2013 Meetings of the Council

**Monday, March 18, 2013**

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

Recap of the 2013 legislative update, review of the bills referred to the Council by the 2013 Session of the General Assembly, establishment of a work plan including the appointment of appropriate subcommittees, the Council's participation in the March 16 celebration of James Madison's Birthday, which is also FOIA Day in Virginia, at James Madison's Montpelier, a recent opinion of the Attorney General concerning the use of license plate readers, and remembering Delegate Clifton A. "Chip" Woodrum, the first Chair of the Council, who passed away February 19, 2013.

**Thursday, June 6, 2013**

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

Progress reports from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee. Planning of 2013 Statewide FOIA Workshops; review of Attorney General's statement of application of FOIA to Office of Attorney General; and discussion of outdated terminology in FOIA concerning GIS.

**Thursday, September 12, 2013**

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

Welcome to Delegate LeMunyon to the Council; election of a Vice-Chair; updates from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee; discussion of application of FOIA to SCC; and annual legislative preview.

**Thursday, December 5, 2013**

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

Annual Legislative Preview continued; consideration of legislative recommendations; study plan for 2014.

## APPENDIX D

### STATUS OF FREEDOM OF INFORMATION AND OTHER RELATED ACCESS BILLS

NOTE: *Unless otherwise stated, the changes in the law described herein became effective on July 1, 2013.*

#### **I. Introduction**

The General Assembly passed a total of 16 bills amending the Virginia Freedom of Information Act (FOIA) during the 2013 Session. House Bill 2026 (Dudenhefer) and Senate Bills 1263 (Stuart) and 1264 (Stuart) all passed the General Assembly as recommendations of the Council. HB 2026 and SB 1263 concerned electronic meetings, and SB 1264 concerned access to law-enforcement records.

Four of the 16 bills create new records exemptions as follows:

- Creates an exemption for certain records of the Department of Aviation. HB 1855 (Knight) amending §§ 2.2-3705.6 and 2.2-3705.7;
- Creates an exemption for certain records of disaster recovery and evacuation plans of hospitals and nursing homes. HB 2280 (Ward) amending § 2.2-3705.2;
- Creates an exemption for certain records containing trade secrets provided to the Department of Environmental Quality. SB 1212 (Stuart) amending § 2.2-3705.6;
- Creates an exemption for certain records of the Commonwealth's Attorneys' Services Council. SB 1334 (Norment) amending § 2.2-3705.7.

Twelve of the 16 bills amend existing provisions of FOIA as follows:

- Amends an existing exemption for certain records of minors participating in park and recreation programs. HB 1524 (Villanueva) amending § 2.2-3705.7;
- Defines "members of the General Assembly" to include legislative aides in the working paper and correspondence exemption. HB 1639 (Greason) amending § 2.2-3705.7;
- Makes various technical and other statutory changes necessary to implement the

privatization of the Virginia Office for Protection and Advocacy. HB 1844 (Orrock) amending §§ 2.2-3705.3 and 2.2-3711;

- Makes various changes relating to the Fraud and Abuse Whistle Blower Reward Fund, including a technical amendment to an existing records exemption. HB 1845 (Loupassi) and SB 1178 (Ruff) amending § 2.2-3705.3;
- Amends an existing provision to allow a member of a public body to participate in a meeting by electronic communication means due to personal matters under certain circumstances. HB 2026 (Dudenhefer) amending § 2.2-3708.1;
- Amends an existing closed meeting exemption to allow the board of trustees of the Jamestown-Yorktown Foundation to convene a closed meeting when the topic is the discussion or consideration of matters relating to specific gifts, bequests, and grants. HB 2043 (Robinson) amending § 2.2-3711;
- Makes various amendments relating to the State Inspector General, including a technical amendment to an existing records exemption. HB 2114 (Landes) and SB 1176 (Ruff) amending § 2.2-3705.3;
- Amends various provisions relating to the conduct of electronic meetings. SB 1263 (Stuart) amending §§ 2.2-3708 and 2.2-3708.1; also amends § 30-179, relating to the powers and duties of the FOIA Council;
- Amends various provisions relating to criminal and other records held by law-enforcement agencies and makes corresponding technical amendments. SB 1264 (Stuart) amending §§ 2.2-3706, 2.2-3711, and 15.2-1713.1;
- Creates the Department of Small Business and Supplier Diversity by consolidating the powers and duties of the Department of Business Assistance and the Department of Minority Business Enterprise; makes a corresponding technical amendment to an existing records exemption. The bill has a delayed effective date of January 1, 2014. SB 1350 (McWaters) amending § 2.2-3705.6.

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 2013 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, 2013.

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

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

**Virginia Freedom of Information Act; exempt records; disaster preparedness plans.** Exempts from mandatory disclosure records of hospitals and nursing homes regulated by



the Board of Health that are provided to the Board, to the extent such records reveal the disaster recovery plans or the evacuation plans for such facilities in the event of fire, explosion, natural disaster, or other catastrophic event. The bill provides that nothing shall be construed to prohibit the disclosure of records relating to the effectiveness of executed evacuation plans after the occurrence of fire, explosion, natural disaster, or other catastrophic event. HB 2280 (2013 Acts of Assembly, c. 600).

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

**Virginia Office for Protection and Advocacy; privatization.** Makes various technical and other statutory changes necessary to implement the privatization of the Virginia Office for Protection and Advocacy. HB 1844 (2013 Acts of Assembly, c. 571).

**Fraud and Abuse Whistle Blower Reward Fund; amount of reward; duties of the State Inspector General.** Reduces the minimum recovery required for an award from the Fraud and Abuse Whistle Blower Reward Fund from \$10,000 to \$5,000 and expands the purposes for which the Fund may be used to include supporting the administration of the Fund, defraying Fund advertising costs, and subsidizing the operation of the Fraud, Waste and Abuse Hotline, all expenditures for which are capped at five percent of the Fund. Under the bill, all moneys recovered by the Office of the State Inspector General as a result of whistle blower activity and alerts originating in the Office shall be deposited into the Fund. The bill also provides that by the end of each quarter 85 percent of all sums recovered be remitted to the institutions or agencies on whose behalf the recovered sums were secured, unless otherwise directed by a court of law. In addition, the bill (i) authorizes the State Inspector General to split a reward among multiple whistle blowers reporting the same qualifying incident of wrongdoing or abuse, (ii) requires the State Inspector General to submit an annual report to the General Assembly summarizing the activities of the Fund, and (iii) changes the name of the State Employee Fraud, Waste and Abuse Hotline to the Fraud, Waste and Abuse Hotline. The bill contains technical amendments, including a technical amendment to an existing records exemption. HB 1845 (2013 Acts of Assembly, c. 572) and SB 1178 (2013 Acts of Assembly, c. 690).

**State Inspector General; powers and duties.** Grants additional powers to the State Inspector General relating to audit functions of state and nonstate agencies and provides that the State Inspector General and no more than 30 members of the investigative unit shall be law-enforcement officers. The bill requires the State Inspector General to enter into a memorandum of understanding with the Department of State Police relative to their respective roles and responsibilities. The bill reorganizes the State Inspector General's powers and duties and generally reorganizes the law relating to the Office of the State Inspector General. The bill contains technical amendments, including a technical amendment to an existing records exemption. HB 2114 (2013 Acts of Assembly, c. 717) and SB 1176 (2013 Acts of Assembly, c. 723).

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

**Virginia Freedom of Information Act; exempt records of the Department of Aviation.** Exempts from the mandatory disclosure provisions of FOIA (i) documents and other information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board and (ii) records provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft, where the records would not be subject to disclosure by the entity providing the records. The bill requires in both instances that the submitting entity identify in writing the records or portions thereof to be protected and state why protection is necessary. HB 1855 (2013 Acts of Assembly, c. 574).

**Provision of information to Department of Environmental Quality; protection of trade secrets.** Requires that every person who the Department of Environmental Quality has reason to believe is generating or handling waste provide the Department with information about the waste upon request. The bill exempts trade secrets contained in such information from disclosure by the Department under certain conditions while still allowing the Department to provide such information to the Environmental Protection Agency or as otherwise required by law. SB 1212 (2013 Acts of Assembly, c. 54).

**Department of Small Business and Supplier Diversity created.** Creates the Department of Small Business and Supplier Diversity by consolidating the powers and duties of the Department of Business Assistance and the Department of Minority Business Enterprise. The bill abolishes the Department of Business Assistance and the Department of Minority Business Enterprise. The bill has a delayed effective date of January 1, 2014, and contains numerous technical amendments to accomplish this consolidation. The bill includes a technical amendment to an existing records exemption. SB 1350 (2013 Acts of Assembly, c. 482).

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

**Virginia Freedom of Information Act; exempt records of the Department of Aviation.** See summary under § 2.2-3705.6, *supra*. HB 1855 (2013 Acts of Assembly, c. 574).

**Virginia Freedom of Information Act; records exemption for the Commonwealth's Attorneys' Services Council.** Provides an exemption from the mandatory disclosure requirements of the Freedom of Information Act for records of the Commonwealth's Attorneys' Services Council to the extent such records are (i) prepared for and utilized by the Council in the training of state prosecutors or law-enforcement personnel, where such records are not otherwise available to the public and the release of such records would reveal confidential strategies, methods, or procedures to be employed in law-enforcement activities, or (ii) materials created for the investigation and prosecution of a criminal case. SB 1334 (2013 Acts of Assembly, c. 481).

**Virginia Freedom of Information Act; records of minors participating in park and recreation programs.** Reverses the default rule of FOIA that certain park and recreation records of minors are subject to the mandatory disclosure provisions of FOIA unless the

parent or an emancipated person who is the subject of the record requests in writing that the record not be disclosed. Under the bill, these records would be exempt from public disclosure unless and until the parent or emancipated person who is the subject of the record waives the protection. HB 1524 (2013 Acts of Assembly, c. 554).

**Virginia Freedom of Information Act; correspondence of legislative aides exempt.** Clarifies by defining "member of the General Assembly" that the working papers and correspondence of the legislative aides of members of the General Assembly are not subject to the mandatory disclosure provisions of FOIA when the aides are working on behalf of the member. HB 1639 (2013 Acts of Assembly, c. 199).

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

**Freedom of Information Act; access to criminal and other records held by public bodies engaged in criminal law-enforcement activities.** Reorganizes § 2.2-3706 of the Freedom of Information Act relating to access to criminal records and other records held by law-enforcement agencies. The only substantive changes in the bill are to (i) expand to the state law-enforcement agencies the ability to withhold portions of noncriminal incident information and (ii) allow law-enforcement agencies to make a verbal response for requests for criminal incident information. The bill also clarifies that personnel records of persons employed by a law-enforcement agency are not noncriminal records but subject to the personnel records and background investigation records exemptions. The bill contains technical amendments and is a recommendation of the Virginia Freedom of Information Advisory Council. SB 1264 (2013 Acts of Assembly, c. 695).

### **§ 2.2-3708. Electronic communication meetings; applicability; physical quorum required; notice; report.**

**Virginia Freedom of Information Act; meeting by electronic communication means by certain committees, subcommittees, etc., of state public bodies; personal matters.** Authorizes an advisory public body, defined as any state public body classified as advisory pursuant to § 2.2-2100 or any committee, subcommittee, or other entity, however designated, of a state public body created to advise the state public body, to meet by electronic communication means without a quorum of the advisory public body being physically assembled at one location, provided, among other requirements, the meeting is conducted utilizing a combined audio and visual communication method. The bill requires any advisory public body holding this kind of electronic communication meeting to make an audiovisual recording of the meeting, which recording shall be preserved by the advisory public body for a period of three years from the date of the meeting. The bill also enhances the annual reporting requirements for any public body authorized to conduct electronic communication meetings and requires the FOIA Council to develop a form that an authorized public body must make available to the public at any such meeting for public comment. The above-described provisions of the bill by its terms will expire on July 1, 2014.

Finally, the bill allows a member of any public body to participate in a meeting by electronic communication means due to personal matters under certain circumstances. Currently, such remote participation is allowed only for emergency, medical condition, or distance from the

meeting location of more than 60 miles. The bill is a recommendation of the Virginia Freedom of Information Advisory Council. SB 1263 (2013 Acts of Assembly, c. 694).

**§ 2.2-3708.1. Participation in meetings in event of emergency; certain disabilities; distance from meeting location for certain public bodies.**

**Virginia Freedom of Information Act; remote participation in a meeting by a member of a public body; personal matter.** Allows a member of a public body to participate in a meeting by electronic communication means due to personal matters under certain circumstances. Currently, such remote participation is allowed only for emergency, medical condition, or distance from the meeting location of more than 60 miles. The bill is a recommendation of the Virginia Freedom of Information Advisory Council. HB 2026 (2013 Acts of Assembly, c. 119).

**Virginia Freedom of Information Act; meeting by electronic communication means by certain committees, subcommittees, etc., of state public bodies; personal matters.** *See summary under § 2.2-3708, supra.* SB 1263 (2013 Acts of Assembly, c. 694).

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

**Virginia Office for Protection and Advocacy; privatization.** *See summary under § 2.2-3705.3, supra.* HB 1844 (2013 Acts of Assembly, c. 571).

**Virginia Freedom of Information Act; closed meetings; Jamestown-Yorktown Foundation.** Allows the board of trustees of the Jamestown-Yorktown Foundation to convene a closed meeting when the topic is the discussion or consideration of matters relating to specific gifts, bequests, and grants. HB 2043 (2013 Acts of Assembly, c. 580).

**Freedom of Information Act; access to criminal and other records held by public bodies engaged in criminal law-enforcement activities.** *See summary under § 2.2-3706; makes a corresponding technical amendment.* SB 1264 (2013 Acts of Assembly, c. 695).

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

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

**Consolidation of water quality programs.** Moves several water quality programs currently administered by the Department of Conservation and Recreation to the Department of Environmental Quality. The Department of Environmental Quality and the State Water Control Board will have oversight of water quality planning and laws dealing with stormwater management, erosion and sediment control, and the Chesapeake Bay Preservation Areas. The Virginia Soil and Water Conservation Board will have continuing responsibility for oversight of the soil and water conservation districts and of resource management planning. The Virginia Soil and Water Conservation Board will continue to be responsible for administration of the flood prevention and dam safety laws. The Board will continue to be staffed by the Department of Conservation and Recreation. The bill contains

provisions regarding the disclosure of certain records. HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

### **Title 3.2 Agriculture, Animal Care, and Food.**

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

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

**Voluntary regulatory self-assessments by banks; privilege.** Creates a privilege for self-assessment reports of a bank or its holding company, affiliates, and subsidiaries. The privilege makes a self-assessment report not admissible or subject to discovery in civil or administrative proceeding. The privilege shall not apply if it is waived; if the report is disclosed to certain third parties; if it is determined that the privilege is being asserted for a fraudulent purpose or that the report was prepared to avoid disclosure of information in a proceeding that was underway at the time of its preparation, or the report addresses a matter reasonably expected to cause imminent and substantial harm to bank customers or consumers; or if the report is requested by a bank regulator under certain circumstances. The bill also provides that such records shall not be disclosed under FOIA. HB 2237 (2013 Acts of Assembly, c. 32) and SB 988 (2013 Acts of Assembly, c. 148).

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

**Clerk's fees; electronic records; certification of records; etc.** Revises various powers and duties of circuit court clerks for certification of records, assessment of fees, etc., such as (i) providing that the use of the term "copy teste," "true copy," or "certified copy" is prima facie evidence that a document is a certified copy of the official record kept in the clerk's office; (ii) providing that no judgment for certain assessments or fees shall be recorded as a judgment in favor of the Commonwealth if such assessments or fees have been fully paid by the date of sentencing; (iii) defining "operational expenses," which are funded by certain clerk's fees, to include various technology maintenance and enhancements; (iv) clarifying that a clerk shall forward an abstract of certain convictions to the Department of Motor Vehicles within 18 days after such conviction or, in the case of civil judgments, within 30 days after the judgment has become final; (v) allowing the clerk to maintain records in adoption cases in electronic format; and (vi) repealing the requirement that a clerk verify the accuracy of a record made by him. HB 1658 (2013 Acts of Assembly, c. 263).

**Confidentiality of child support guidelines worksheets in mediated agreements.** Eliminates two provisions requiring the disclosure of financial information obtained for the purposes of completing a child support guidelines worksheet in the course of mediation to the court even when an agreement has not been reached by the parties. Under current law, these provisions conflict with a mediator's duty of confidentiality. This bill is a recommendation of the Committee on District Courts. HB 1795 (2013 Acts of Assembly, c. 283) and SB 1028 (2013 Acts of Assembly, c. 383).

## **Title 9.1 Commonwealth Public Safety.**

**Sex Offender and Crimes Against Minors Registry Act; offenses requiring registration.** Adds to the list of offenses that require a person to register on the Sex Offender Registry certain offenses comparable to those currently requiring registration where the conviction was under Title 18.1 of the Code of Virginia, which was in effect prior to 1975 when Title 18.2 came into effect. HB 1862 (2013 Acts of Assembly, c. 750) and SB 1032 (2013 Acts of Assembly, c. 781).

## **Title 10.1 Conservation.**

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

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

**Freedom of Information Act; access to criminal and other records held by public bodies engaged in criminal law-enforcement activities.** *See summary under § 2.2-3706; makes a corresponding technical amendment.* SB 1264 (2013 Acts of Assembly, c. 695).

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

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

**Retention of case records; general district court.** Permits the chief judge of a general district court to direct the clerk of that court to destroy documents related to civil and criminal cases that have been ended for a period of three years, provided that they have been microfilmed or converted to an electronic format. Currently, such documents must be retained for 10 years. This bill is a recommendation of the Committee on District Courts. HB 1451 (2013 Acts of Assembly, c. 187) and SB 979 (2013 Acts of Assembly, c. 377).

**Confidentiality of juvenile law-enforcement records; disclosures to school principal.** Provides that, in addition to disclosures of juvenile law-enforcement records that may already be made by chiefs of police and sheriffs to school principals, those same records (involving violent crimes, arson crimes, and firearm crimes) may also be released by the principal of the school to threat assessment teams established by the local school division. The bill also allows law enforcement to share with private school principals the same law-enforcement records concerning juveniles that it can share with public school principals and allows private school principals to share information with threat assessment teams. HB 2347 (2013 Acts of Assembly, c. 769).

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

**Clerk's fees; electronic records; certification of records; etc.** *See summary under Title 8.01, supra.* HB 1658 (2013 Acts of Assembly, c. 263).

**Clerks of circuit courts; electronic filing and records; remote access.** Makes various changes to the provisions that allow circuit court clerks to provide remote access to certain

records and to charge a fee for such access. The bill also directs that fees assessed for electronic filing of cases and other records and accessing certain records remotely shall be paid to the clerk's nonreverting local fund to be used to cover the clerk's operational expenses. HB 1715 (2013 Acts of Assembly, c. 77).

**Clerks' fees; case management systems, etc.** Allows circuit court clerks to establish and maintain their own case management systems, financial management systems, or other independent technology. Data from a clerk's independent system may be provided directly to designated state agencies or to such agencies through an interface with the systems of the Executive Secretary of the Supreme Court of Virginia. The Executive Secretary shall provide an electronic interface to the data available on his systems to a circuit court clerk upon the clerk's written request. The bill also defines the term "operational expenses" and requires the clerks to submit certain data in a format acceptable to the Central Criminal Records Exchange. HB 1716 (2013 Acts of Assembly, c. 422).

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

**Nondisclosure of concealed handgun permit information.** Prohibits the clerk of a circuit court who issued a concealed handgun permit from publicly disclosing an applicant's name and any other information contained in a concealed handgun permit application or in any order issuing a concealed handgun permit. SB 1335 (2013 Acts of Assembly, c. 659).

**Charitable gaming; network bingo.** Authorizes the conduct of a new charitable game known as network bingo. The bill sets out the terms and conditions under which network bingo may be conducted, provides for the licensing of network bingo providers, and sets the maximum prize amount for network bingo. The bill defines the terms "network bingo," "pari-mutuel play," and "network bingo provider." With the exception of the provision requiring the Board of Charitable Gaming to establish regulations, the bill has a delayed effective date of January 1, 2014. The bill also contains technical amendments. The bill also contains certain record-keeping requirements and exempts certain records from disclosure under FOIA. HB 2178 (2013 Acts of Assembly, c. 350) and SB 930 (2013 Acts of Assembly, c. 36).

## **Title 22.1 Education.**

**Public schools; personnel files.** Requires performance indicators, or other data used by the local school board to judge the growth or quality of a teacher, to be kept confidential but permits such information to be disclosed pursuant to court order, for the purposes of a grievance proceeding involving the teacher, or as otherwise required by state or federal law. HB 1889 (2013 Acts of Assembly, c. 291).

**Yearly school lock-down drills, school safety audits, and school crisis, emergency management, and medical emergency response plans.** Requires each school, in its annual school safety audit, to complete a school inspection walk-through using a standardized checklist provided by the Virginia Center for School Safety, which shall incorporate crime prevention through environmental design principles. Each completed walk-through checklist shall be made available to the chief law-enforcement officer of the locality or his

designee upon request. The bill requires the local school board to provide copies of each school crisis, emergency management, and medical emergency response plan to the chief law-enforcement officer, the fire chief, the chief emergency medical services official, and the emergency management official of the locality upon request. The bill also requires the division superintendent to establish a school safety audit committee that will review the school safety audits, and requires each school division to designate an emergency manager. The bill finally requires each public school to conduct at least two lock-down drills: one in September and one in January of each school year. HB 2346 (2013 Acts of Assembly, c. 609).

## **Title 23 Educational Institutions.**

**Boards of visitors of public institutions of higher education; public access to information and governance.** Adds specific topics to be covered during the educational programs for governing boards and requires such programs to be delivered by the State Council of Higher Education annually. The bill also requires each board of visitors to adopt bylaws with certain provisions relating to the Freedom of Information Act; annually meet with the president of the institution to deliver a review of the president's performance; designate its executive committee to organize the working processes of the board and recommend best practices for board governance; and annually deliver an executive summary of its interim activities to the General Assembly and the Governor. The bill is contingent on funding in the appropriation act. HB 1952 (2013 Acts of Assembly, c. 577).

## **Title 24.2 Elections.**

**Electoral boards; meetings.** Provides that a telephone call between two members of an electoral board or a telephone call between two members of the State Board of Elections in preparation for a meeting shall not constitute a meeting for Virginia Freedom of Information Act purposes if the discussion otherwise would not constitute a meeting. SB 802 (2013 Acts of Assembly, c. 525).

## **Title 33.1 Highways, Bridges and Ferries.**

**Quantitative rating of pavement condition and ride quality of highways.** Requires VDOT to determine a quantitative rating on the pavement condition and ride quality of every highway in the primary and secondary state highway systems at least every five years and to post the ratings on its website. HB 1885 (2013 Acts of Assembly, c. 290).

## **Title 36 Housing.**

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

## **Title 46.2 Motor Vehicles.**

**Clerk's fees; electronic records; certification of records; etc.** *See summary under Title 8.01, supra.* HB 1658 (2013 Acts of Assembly, c. 263).



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

### **Prescription Monitoring Program; disclosure of information to local law enforcement.**

Adds an agent designated by the chief law-enforcement officer of any county or city to the list of individuals to whom the Department of Health Professions must disclose information relevant to a specific investigation of a specific recipient, dispenser, or prescriber upon request, and provides that agents designated by the superintendent of the Department of State Police or the chief law-enforcement officer of a county or city to receive information relevant to a specific investigation of a specific recipient, dispenser, or prescriber shall have completed the Virginia State Police Drug Diversion School. The bill also provides that the Department may disclose information relating to prescriptions for covered substances issued by a specific prescriber to that prescriber. HB 1704 (2013 Acts of Assembly, c. 739).

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

**Clerk's fees; electronic records; certification of records; etc.** *See summary under Title 8.01, supra.* HB 1658 (2013 Acts of Assembly, c. 263).

## **Title 56 Public Service Companies.**

**Public-Private Transportation Act of 1995; review of proposals.** Requires public entities to post a notice, when they receive a proposal under the PPTA, and allow a 120-day submission period for competing proposals. The bill requires the notice to include information on the proposal and the public comment opportunities. The bill further requires, after negotiations are complete and a decision to award is made, that the public entity post the major business points of the agreement and outline how the public can submit comments. HB 1692 (2013 Acts of Assembly, c. 560) and SB 977 (2013 Acts of Assembly, c. 622).

## **Title 58.1 Taxation.**

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

**Charitable gaming; network bingo.** *See summary under Title 18.2, supra.* HB 2178 (2013 Acts of Assembly, c. 350) and SB 930 (2013 Acts of Assembly, c. 36).

## **Title 62.1 Waters of the State, Ports and Harbors.**

**Consolidation of water quality programs.** *See summary under Title 2.2, supra.* HB 2048 (2013 Acts of Assembly, c. 756) and SB 1279 (2013 Acts of Assembly, c. 793).

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

### **Licensure by the Commissioner of Social Services; submission of financial information.**

Reduces from three to one the number of credit references that an applicant for initial licensure as a child welfare agency, assisted living facility, or adult day care center must submit to be exempt from the requirement that the applicant make his financial records available to the Commissioner of Social Services for review; adds a requirement for submission of an operating budget at the time of application for an initial license as a child welfare agency, assisted living facility, or adult day care center seeking an exemption from the requirement that an applicant make financial records available to the Commissioner of Social Service; and eliminates the requirement that the Commissioner investigate the financial responsibility of an applicant for renewal of a license as a child welfare agency, assisted living facility, or adult day care center. The bill contains an emergency clause. HB 1443 (2013 Acts of Assembly, c. 182) and SB 1310 (2013 Acts of Assembly, c. 545).

**Clerk's fees; electronic records; certification of records; etc.** *See summary under Title 8.01, supra.* HB 1658 (2013 Acts of Assembly, c. 263).

## **Title 67 Virginia Energy Plan.**

**Virginia Nuclear Energy Consortium.** Establishes the Virginia Nuclear Energy Consortium Authority as a political subdivision of the Commonwealth for the purposes of making the Commonwealth a national and global leader in nuclear energy and serving as an interdisciplinary study, research, and information resource for the Commonwealth on nuclear energy issues. The 17-member board of directors of the Authority is directed to form a nonstock, nonprofit corporation, referred to as the Virginia Nuclear Energy Consortium. Membership in the Consortium is open to specified educational institutions, Virginia-based federal research laboratories, nuclear-related nonprofit organizations, business entities with operating facilities in Virginia that are engaged in activities directly related to the nuclear energy industry, and other persons whose membership is approved by the Consortium's board of directors. The purposes of the Consortium include carrying out the rights, powers, and duties of the Authority and conducting other activities useful in (i) making the Commonwealth a leader in nuclear energy, (ii) serving as an interdisciplinary study, research, and information resource for the Commonwealth on nuclear energy issues, and (iii) raising money on behalf of the Authority in the corporate and nonprofit community and from other nonstate sources. The Consortium is required to report to the Authority on its non-proprietary activities semiannually, and audits of its financial accounts shall be made available in accordance with the provisions of the Freedom of Information Act. HB 1790 (2013 Acts of Assembly, c. 57) and SB 1138 (2013 Acts of Assembly, c. 394).

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## APPENDIX E

### Breakdown of Inquiries to Council December 1, 2012 through November 30, 2013

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, 2012 through November 30, 2013

Total number of inquiries: 1,507

<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	0	1	0	0	0	0	2
Citizens	0	1	0	1	0	3	0	0	0	0	0	0	5
News Media	1	0	0	0	0	0	1	0	0	0	0	1	3
<b>TOTAL</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>10</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	49	77	63	85	55	86	71	99	90	52	90	55	872
Citizens	34	34	33	38	37	32	38	38	52	34	47	35	452
News Media	18	14	21	14	13	9	16	22	16	10	11	9	173
<b>TOTAL</b>	<b>101</b>	<b>125</b>	<b>117</b>	<b>137</b>	<b>105</b>	<b>127</b>	<b>125</b>	<b>159</b>	<b>158</b>	<b>96</b>	<b>148</b>	<b>99</b>	<b>1497</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	50	77	63	85	55	86	71	100	90	52	90	55	874
Citizens	34	35	33	39	37	35	38	38	52	34	47	35	457
News Media	19	14	21	14	13	9	17	22	16	10	11	10	176
<b>TOTAL</b>	<b>103</b>	<b>126</b>	<b>117</b>	<b>138</b>	<b>105</b>	<b>130</b>	<b>126</b>	<b>160</b>	<b>158</b>	<b>96</b>	<b>148</b>	<b>100</b>	<b>1507</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	0	1	2
Citizens	2	2	1
News Media	3	0	0
<b>TOTAL</b>	<b>5</b>	<b>3</b>	<b>3</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	584	184	143
Citizens	268	44	197
News Media	99	32	53
<b>TOTAL</b>	<b>951</b>	<b>260</b>	<b>393</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	584	185	145
Citizens	270	46	198
News Media	102	32	53
<b>TOTAL</b>	<b>956</b>	<b>263</b>	<b>396</b>

## APPENDIX F

### OPINIONS ISSUED BY THE COUNCIL JULY 2003 THROUGH NOVEMBER 2013

The purpose of this appendix is to show trends over time. In order to save space, we have chosen to present a ten-year time span rather than the full history of all opinions issued since the inception of the Council in July, 2000. For opinion count totals from prior years not shown in this appendix, please see previously issued Annual Reports.

#### Written Opinions:

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Government</b>	8	4	4	2	1	3	2	3	3	2
<b>Citizens</b>	15	11	6	8	8	10	3	4	2	5
<b>News Media</b>	3	1	0	3	2	0	1	0	0	3

#### Informal Opinions:

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Government</b>	616	756	845	854	827	910	899	820	846	872
<b>Public</b>	429	687	664	674	641	618	620	560	433	452
<b>News Media</b>	145	209	232	167	206	150	165	152	124	173

#### Total Number of Opinions:

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Government</b>	624	760	849	856	828	913	901	823	849	874
<b>Public</b>	444	698	670	682	649	628	623	564	435	457
<b>News Media</b>	148	210	232	170	208	150	166	152	124	176
<b>GRAND TOTAL</b>	1216	1668	1751	1708	1685	1691	1690	1539	1408	1507

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## APPENDIX G

### Remembering Delegate Clifton A. "Chip" Woodrum

*The Virginia Freedom of Information Advisory Council,  
A Living Legacy of Open Government for All Virginians*

Now in its 13th year, the Virginia Freedom of Information Advisory Council is a testament to the foresight, dedication, and legislative acumen of former Delegate Clifton A. "Chip" Woodrum. As we mourn the loss of Chip Woodrum, who died on February 19, 2013, we are heartened by his living legacy of open government to ensure the people's right to know. Acting on his long-held belief that "the access of citizens to information concerning their government and its process is crucial to a free society," Chip Woodrum played the leading role in the revision of Virginia's Freedom in Information Act (FOIA) in 1998 when he introduced and secured passage of House Joint Resolution No. 187, creating a legislative joint subcommittee to study the FOIA. With Woodrum's skillful hand as chairman, the joint subcommittee completed a major overhaul of FOIA that addressed advances in technology (email and other electronic records) and at the same time ensured that the law was written in plain English. The other major piece of legislation from Woodrum's joint subcommittee was the creation of the Virginia Freedom of Information Advisory Council, or FOIA Council as it is now known. As the chief patron of HB 551 (2000) creating the Council, Chip Woodrum and former Senator William T. Bolling, chief patron of SB 340, were the guiding hands behind the establishment of Virginia's "Sunshine Office." Modeled on the New York Committee on Open Government, Virginia's Council at the time of its creation joined the ranks of only six states in the U.S. with a "Sunshine Office." Because of concern that the legislative branch-based Council would be unduly harsh on executive branch agencies, then-Governor Gilmore attached a sunset provision to both bills, making the Council a temporary agency that would cease to exist in 2002. Given the volume of inquiries for advisory opinions, coupled with the frequency of requests for FOIA training in its first year, however, it was apparent that there was a very real need for the Council. As a result, the General Assembly removed the sunset provision and made the Council permanent. Not surprisingly, Chip Woodrum was unanimously elected chairman of the Council. Chip Woodrum's four years of FOIA leadership, marked by his wit, geniality, insight, flexibility, and uncompromising integrity, resulted in changes that will continue to benefit the citizens of Virginia. As an example of his wit, Woodrum once wrote in an email bemoaning the change in political climate in Virginia: "I could go on, but open records law being what they are, I'd have to kill you.... For reasons of national security, eat this e-mail." Has the Council lived up to the promises made in 2000? Let the facts speak for themselves. In 2013, the Council continues to fulfill its role as a clearinghouse for public access issues, having examined 51 bills referred by the General Assembly for additional study and is recognized as the forum for evaluating proposed FOIA and related public access legislation. The Council keeps abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. Council advisory opinions have been cited in legal briefs submitted to the Supreme Court of Virginia and the United States Supreme

Court. The Council has provided more than 17,000 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted approximately 665 FOIA training programs. The Council-implemented annual legislative preview provides a forum for the discussion of proposed FOIA legislation well in advance of the General Assembly Session to facilitate compromise between opposing parties. The Council monitors 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 has recommended relaxation of the rules, thus allowing state and local governmental entities to avail themselves of technology in situations involving personal matters, emergencies, or medical necessity to facilitate public service by persons with disabilities and others on government boards and commissions. All of the Council-initiated legislative recommendations have been enacted by the General Assembly and signed by the Governor into law. As a living legacy of the foresight of Chip Woodrum and others who believed "that the creation of a small, independent office that emphasized the importance of training, the quick resolution of FOIA disputes, and the issuance of nonbinding, advisory opinions was both feasible and desirable ... to assist the citizens of the Commonwealth in gaining ready access to records in the custody of public officials and free entry to meetings of public bodies wherein public business is being conducted and to assist state and local government officials in meeting their statutory obligations through training, publication of educational materials, and quick responses to questions," the Council remains open for business. It is a resource for all.

*For my friend and mentor,*  
Maria J.K. Everett  
Executive Director and Senior Attorney  
Virginia Freedom of Information Advisory Council  
March 2013

