

**Report of the
Virginia Freedom of Information Advisory Council
December 2017**

EXECUTIVE SUMMARY

In its seventeenth year, the Virginia Freedom of Information Advisory Council (the Council) continued to fulfill its role as a clearinghouse for public access issues for the Virginia General Assembly. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to the Virginia Freedom of Information Act (FOIA) and access generally. In its 17-year history, the Council has provided more than 25,900 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 1,000 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, 2016, through November 30, 2017—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. This year the General Assembly referred three bills to the Council for further study:

- **HB 2223 (Kory) FOIA; right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.
- **HB 2316 (Marshall, D.W.) Tobacco Region Revitalization Commission; meetings by teleconference.** Provides that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.
- **SB 972 (DeSteph) Requests for information by members of the General Assembly; responses not subject to redaction.** Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

Each of these bills referred was scheduled for review, and all of the patrons were invited to Council meetings to provide the background for their respective bills. Delegate Kory was unable to present HB 2223 to the Council this year, so the Council took no action on HB 2223. Senator DeSteph presented SB 972 to the Council, but after considering the bill the Council decided to take no action on it. Representatives of the Tobacco Region Revitalization Commission appeared on behalf of Delegate Marshall to present HB 2316 to the Council. The Council considered the bill and formed an Electronic Meetings Subcommittee which met twice to study HB 2316 and related issues. After hearing back from the subcommittee, the Council recommended three drafts regarding electronic meetings:

- (1) an amended draft based on HB 2316 that would remove the requirement that the remote locations from which members of a public body participate in meetings through electronic communication means be open to the public. Instead, the amended draft provides that members of the public must be provided an electronic communication means substantially equivalent to that provided to members of the public body through which the public may witness the meeting. The bill provides that public access to remote locations from which members of the public body participate through electronic communication means shall be encouraged, but not required; however, if three or more members are gathered at the same remote location, such remote location must be open to the public. The bill also amends the annual reporting requirements for public bodies that meet by electronic communication means;
- (2) a draft that would combine current Code §§ 2.2-3708 and 2.2-3708.1 into a single section addressing all types of meetings utilizing electronic communication means; and
- (3) a draft that would clarify the definition of "electronic communication" by amending it to mean the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

The Council also studied the subject matter of HB 1971 (Massie),¹ which excluded the records of a multidisciplinary team as they relate to individual child abuse or neglect cases or sex offenses involving a child from mandatory disclosure under FOIA, and provided an exemption from open meeting requirements to such teams and sexual assault response teams. The issue presented was whether these teams should be exempt from all provisions of FOIA, much like family assessment and planning teams established pursuant to § 2.2-5207. After considering the issue and hearing from Commonwealth's Attorney Michael Doucette and Deputy Commonwealth Attorney Nancy Oglesby about how these terms work in practice, the Council recommended a bill that provides that FOIA shall not apply to sexual assault response teams established pursuant to § 15.2-1627.4, with the exception of records relating to (i) protocols and policies of the sexual assault response team and (ii) guidelines for the community's response established by the sexual assault response team, which the bill provides shall be public records subject to the provisions of FOIA. The bill also provides that FOIA shall not apply to multidisciplinary child sexual abuse response teams established pursuant to § 15.2-1627.5.

Additionally, the Council decided to continue its study of the exemptions for trade secrets and proprietary records. The Council studied these exemptions over the course of its three-year study under House Joint Resolution No. 96 (2014). When that study was completed last year, the

¹ Note that HB 1971 was enacted into law effective July 1, 2017 (2017 Acts of Assembly, c. 587).

Council decided not to act on the issue, but to continue its study in 2017. This year the Council formed a Proprietary Records and Trade Secrets Subcommittee that met four times, and had a work group that met once. As a result of this year's work, the Council recommended three bills:

- (1) A bill that would (i) create a general record exclusion for trade secrets submitted to a public body, (ii) permit a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant, and (iii) permit the public body to request that the court add the submitting entity as an additional defendant in the action;
- (2) a bill that would (i) permit a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant, (ii) permit the public body to request that the court add the submitting entity as an additional defendant in the action, and (iii) provide that if, as a result of the action, the court requires the public body to produce the requested information because it was unreasonably withheld as a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), any award of reasonable costs and attorney fees to the requester shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court; and
- (3) a bill based on current procurement policy language that would amend the Virginia Public Procurement Act (§ 2.2-4300 et seq.) to provide that a bidder, offeror, or contractor shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices.

The Council also recommended a draft to change certain provisions of § 2.2-3706 concerning law-enforcement and criminal records. Experience has shown that certain amendments made to this section since 2013 may have had unintended consequences, in that they have been interpreted by some to limit the provisions of subsection A (concerning mandatory disclosures, discretionary exemptions, and one prohibition regarding the identity of criminal informants) only to law-enforcement agencies, and to allow any public body to use subsection B (which allows the redaction of personal, medical, and financial information from noncriminal incident records). However, certain provisions of subsection A necessarily apply to public bodies that are not engaged in criminal law-enforcement activities, and the provisions of subsection B regarding noncriminal records were not intended to apply as general exemptions for all public bodies. The Council directed staff to prepare an amended draft to correct these unintended results by clarifying the application of these subsections and subdivisions. All of the legislative drafts recommended by the Council are available on the Council's website and are attached as Appendix E to the 2017 Annual Report of the FOIA Council.

The Council continued to monitor Virginia court decisions relating to FOIA. The Supreme Court of Virginia issued its decision in the case of *Daily Press v. Office of the Executive Secretary of the Supreme Court*, a case that the Council has been monitoring since last year.² That case concerned access to the case management system comprised of records from 118 of the 120 Virginia circuit courts and maintained by the Office of the Executive Secretary of the Supreme

² *The Daily Press, LLC v. Office of the Exec. Sec'y of the Sup. Ct. of Va.*, 293 Va. 551, 800 S.E.2d 822 (2017).

Court of Virginia. The Court held that the *Daily Press* must seek these records from each clerk of circuit court, as Code § 17.1-242 expressly designates the circuit court clerks as the custodians of such records. In other litigation, the Henrico County Circuit Court in June issued a letter opinion in the case of *Davison v. Dunnivant*,³ in which Mr. Davison, a citizen, sought access to certain posts on Senator Dunnivant's Facebook page. The circuit court held that a sitting member of the General Assembly is a public official but is not a public body subject to FOIA. The circuit court issued a second letter opinion and a final order in August after a rehearing. In the second opinion, the circuit court reversed its June holding regarding whether a member of the General Assembly is subject to FOIA, but found that no violation of FOIA had occurred. In another case, the Accomack County General District Court issued an opinion in *Turner v. Office of the Executive Secretary*,⁴ also in August. Dr. Turner, a citizen, sought access to certain records regarding annual budget allotments provided to circuit court judges. The general district court concluded that "judges are not public bodies, and they are not officers or employees of a public body" and therefore "individual judges are excluded from the requirements of FOIA." It is our understanding that this decision is being appealed to the circuit court.

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes opportunities to provide FOIA training programs. During 2017, Council staff conducted 56 live, in-person FOIA training programs throughout Virginia at the request of state and local government officials, the media, and citizens. Training programs are tailored to meet the needs of the requesting organization and are provided free of charge. In 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued in favor of providing training upon the request of any interested group. Under this approach, Council staff travels to the location of the group requesting training, provides relevant training materials, and presents training tailored to meet the needs of the particular group. All such Council training programs are preapproved by the Virginia State Bar for continuing legal education credit for licensed attorneys. The training programs are also preapproved by the Department of Criminal Justice Services for law-enforcement in-service credit. In addition, the Virginia Municipal Clerks Association, the Virginia School Board Association, and other organizations give credit for attendance at these FOIA presentations. This year the Council also implemented a free online training program available through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>). This format allows FOIA officers to be trained at a time when it is convenient for them, to generate records of who has completed training, and for issuance of a certificate of completion contemporaneously with successful course completion. Both the live, in-person presentations and the online training program satisfy the statutory requirement for FOIA officers to receive annual training. Additionally, pursuant to HB 2143 (LeMunyon, 2017), the Council has created forms for FOIA officers to report their contact information, and has also created a searchable list of FOIA officers, both available on the Council's website (<http://foiacouncil.dls.virginia.gov/>).

³ *Davison v. Dunnivant*, (Circuit Court of Henrico County, letter opinions dated June 14, 2017, and August 10, 2017, final order dated August 25, 2017, case no. CL17-737).

⁴ *Turner v. Office of the Attorney General* (case no. GV17-0673) and *Turner v. Office of the Executive Secretary* (case no. GV17-0637) (Accomack County General District Court, letter opinion dated August 3, 2017, addressing both cases).

For this reporting period, the Council responded to 1,842 inquiries. Of these inquiries, eight resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: five by government officials, none by media representatives, and three by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1,134 were made by government officials, 588 by citizens, and 112 by media representatives. Starting in 2006, the Council has seen an increase in the number of informal opinion requests as compared to requests for formal written opinions. For the past decade this trend has remained consistent. This continuing trend appears to stem from the Council's reputation for fairness and reliability in its informal opinions and as a creditable source for FOIA guidance before disputes arise. This year there also was a noticeable increase in the number of inquiries concerning the requirements for FOIA officers, especially in regard to the availability of online training, the reporting requirements, and the list of FOIA officers.

FOIA was again the subject of significant legislative activity in the 2017 session. The General Assembly passed a total of 22 bills amending FOIA during the 2017 session. The Council in 2016 completed the third year of the three-year study of FOIA directed by House Joint Resolution No. 96 (2014), and as a result of that study, the Council recommended two pieces of omnibus legislation to the 2017 Session of the General Assembly incorporating all of its recommended changes. Both omnibus bills, HB 1539 (the records omnibus bill) and HB 1540 (the meetings omnibus bill), passed the General Assembly. Two additional bills passed the General Assembly that were recommended by the FOIA Council: HB 1734, which requires guidance documents of the Virginia Parole Board to be available as public records under FOIA, and HB 1876, which excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. A more detailed report of the bills discussed above and other public access bills passed during the 2017 session appears on the Council's website and is attached as Appendix D to the 2016 Annual Report of the FOIA Council.

In keeping abreast of the latest access trends, the Council has continued to encounter questions regarding the use of technology both in regard to public records and public meetings. On the records side, the Council has observed that databases are often shared among users and may be maintained by service providers that may be public bodies or independent contractors, rather than by the public body that created the records, which has raised the issue of who is the custodian of such databases. Additionally, the use of social media by public bodies and public officials has led to many questions regarding access and records retention. On the meetings side, as stated above, the Council once again formed an Electronic Meetings Subcommittee to address issues that have arisen as electronic communications technology is more readily available and widely used.

Effective July 1, 2017, the membership of the Council has been increased from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. The Council welcomed new legislative members Senator Mamie E. Locke and Delegate Luke E. Torian. The Council also welcomed Chad Ayers, Esq., who recently joined the Division of Legislative Services to work with Jessica Budd, Esq., as staff to the House General Laws Committee. Starting next year, Mr. Ayers will also help staff the Council.

The Council also said farewell to Maria J.K. Everett, who has been Executive Director of the Council since its inception in July 2000, and retired in August 2017. During her 17-year tenure

as Executive Director, the FOIA Council rendered approximately 26,000 informal and formal opinions on the application/interpretation of FOIA and conducted nearly 1,000 training sessions on FOIA. Ms. Everett was also a senior attorney with the Division of Legislative Services and staffed the House General Laws Committee since 1990. In that capacity, Ms. Everett was lead staff on the study of FOIA in 1998–1999 under House Joint Resolution 187 (1998), which led to the creation of the Council. The Council praised Ms. Everett's legal expertise, her skills at providing FOIA training that is both educational and entertaining, and her ability to provide practical advice to help citizens, the media, and government officials handle FOIA matters effectively. The Council thanked Ms. Everett for her exceptional service to the Council and the Commonwealth.