

REPORT OF THE

**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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RICHMOND  
DECEMBER 2018**





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ADVISORY COUNCIL**

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

Senator Richard H. Stuart, Chair  
Delegate Luke E. Torian, Vice-Chair  
Senator Mamie E. Locke  
Delegate Glenn R. Davis, Jr.  
Shawri King-Casey  
Sandra G. Treadway  
Mark Vucci  
Lee Bujakowski  
William "Billy" Coleburn  
Kathleen Dooley  
Stephanie Hamlett  
Marisa Porto  
Cullen Seltzer  
Michael Stern

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*Division of Legislative Services*

Alan Gernhardt, *Executive Director and Senior Attorney*  
Chad Ayers, *Attorney*  
Darlene Jordan, *Sr. Operations Staff Assistant*



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# **REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

**To: The Honorable Ralph S. Northam, Governor of Virginia  
and The General Assembly of Virginia**

**Richmond, Virginia  
December 2018**

## **INTRODUCTION**

"No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."

- Lyndon B. Johnson, *Statement by the President Upon Signing S. 1160* [the federal Freedom of Information Act] (1966)

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 14 members, including two members of the House of Delegates, two members of the Senate of Virginia, the Attorney General or his designee, the Librarian of Virginia, the director of the Division of Legislative Services, one representative of local government, two representatives of the news media, and four citizens.<sup>3</sup>

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<sup>1</sup> Chapters 917 and 987 of the Acts of Assembly of 2000.

<sup>2</sup> Chapter 21 (§ 30-178 et seq.) of Title 30 of the *Code of Virginia*.

<sup>3</sup> Until 2017 the Council was composed of 12 members; one additional member from the House of Delegates and one additional member from the Senate of Virginia were added effective July 1, 2017, pursuant to House Bill 2144 (LeMunyon) (2017 Acts of Assembly, c. 644).

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 nineteenth year, 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 FOIA and public access generally. In its 18-year history, the Council has provided more than 27,800 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 1,050 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, 2017, through November 30, 2018—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. This year the General Assembly referred 13 bills to the Council for further study. 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. The Council established three subcommittees to hear bills in their respective subject areas: nine bills were referred to the Records Subcommittee, two bills were referred to the Meetings Subcommittee, and two bills were referred to the Remedies Subcommittee. Six of the nine bills referred to the Records Subcommittee dealt with issues concerning the custody and transfer of records that stemmed from concern over access to certain court records.<sup>4</sup> However, the Subcommittee and the Council took no action on these bills at the request of the bills' patrons. The patrons requested that no action be taken because other legislation was passed this year that addressed their concerns regarding access to court records through legislation outside of FOIA.<sup>5</sup> Following the recommendations of the Records Subcommittee, the Council recommended amended versions of the other three bills referred to the subcommittee as follows:

- HB 904 (Robinson); the original bill would have established a general exemption for trade secrets, as recommended by the Council last year. Due to concerns over possible

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<sup>4</sup> House Bills 504 (Mullin), 664 (Kilgore), 957 (Yancey), 958 (Yancey), 959 (Yancey), and Senate Bill 876 (Mason).

<sup>5</sup> House Bill 780 (Habeeb) and Senate Bill 564 (Obenshain).

unintended consequences, especially regarding the chemical mixtures used in hydraulic fracturing, the amended version as recommended instead only clarifies the definition of "trade secrets" to mean the same as that term is used in the Uniform Trade Secrets Act (§ 58.1-336 et seq.).

- HB 1329 (Tran); the original bill would prohibit any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity. The amended version as recommended adds language to account for state and federal laws that specifically require the collection or dissemination of such information (for example, student financial aid applications).
- SB 730 (DeSteph); the original bill would amend the definition of "public records," exempt certain social media records from mandatory disclosure, and provide that the public body is a necessary party to any enforcement proceeding. The amended version as recommended would instead provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member.

Two bills were referred to the Meetings Subcommittee, House Bill 1101 (Robinson) and Senate Bill 336 (Peake), both of which would have required public comment periods at public meetings. Bills concerning this topic area had been referred to the Council previously in 2016 and 2017 but did not result in any recommendation.<sup>6</sup> This year the Council decided to address the issue through guidance rather than through legislation. To that end, the Council has adopted and published the following policy statement:

As a matter of best practices, the FOIA Council encourages all public bodies to include public comment periods during public meetings. Additionally, the FOIA Council specifically recommends that all public institutions of higher education should afford an opportunity for public comment during any open meeting where a vote to recommend or change any fee or tuition amount occurs.

Two bills were also referred to the Remedies Subcommittee, and the subcommittee recommended amended versions of each bill to the Council. However, the Council only recommended one of the amended bills, and decided to take no action regarding the other:

- HB 213 (Mullin); the original bill would provide that formal advisory opinions be approved by the FOIA Council and provide protection from liability for civil penalties under certain circumstances. The Council recommended an amended version that would provide that any officer, employee, or member of a public body alleged to have willfully and knowingly violated FOIA who acted in good faith reliance upon an advisory opinion issued by the Council may introduce such advisory opinion as evidence that the alleged violation was not made willfully and knowingly.
- SB 630 (Surovell); the original bill would add civil penalties for improper destruction or alteration of public records and improper certification of a closed meeting. The amended

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<sup>6</sup> House Bills 2223 (Kory, 2017), 698 (Kory, 2016), and 757 (Bell, R.B., 2016).

version recommended by the subcommittee would have provided for a monetary penalty range rather than a fixed amount, and would have clarified that the penalties would not apply retroactively. After further discussion and debate, however, the Council voted to recommend no action on this bill.

A full list of all of the bills referred and the actions taken on each bill appears as Appendix E to the 2018 Annual Report of the FOIA Council.

The Council also recommended a draft to clarify that certain requirements of current law regarding participation in public meetings through electronic communication means do not apply to meetings held to address a state of emergency declared by the Governor, specifically the requirements that public bodies (i) adopt a written policy regarding participation by electronic communication, (ii) have a quorum of a public body physically assembled at a primary or central location, and (iii) make arrangements for the voice of any member participating from a remote location to be heard by all persons at the primary or central location. These requirements apply to certain types of electronic participation under former § 2.2-3708.1 that unintentionally became applicable to electronic meetings held to address states of emergency declared by the Governor when §§ 2.2-3708 and 2.2-3708.1 were consolidated through legislation effective July 1, 2018.<sup>7</sup>

The Council continued to monitor Virginia court decisions relating to FOIA. In 2017, the Accomack County General District Court issued an opinion in *Turner v. Office of the Executive Secretary*.<sup>8</sup> 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." In a related case, the Circuit Court for the City of Richmond issued a final order dated October 15, 2018, which found that FOIA "does not apply to the judiciary, including the Executive Secretary."<sup>9</sup> Staff also informed the Council that since the Council considered the issue of declaratory judgment last year, two more circuit cases had been decided, both of which held that declaratory judgment against a public body is unavailable under FOIA.<sup>10</sup> Staff noted that a prior circuit court case did allow a declaratory judgment action to be brought, but the posture was different because in that case it was the public body that brought the action.<sup>11</sup>

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 2018, Council staff conducted 48 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

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<sup>7</sup> 2018 Acts of Assembly, c. 55.

<sup>8</sup> *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).

<sup>9</sup> *Virginia Information Technologies Agency v. Turner and Office of the Executive Secretary* (Case No. CL17-5280) (Circuit Court for the City of Richmond, Final Order dated October 15, 2017).

<sup>10</sup> *Transparent GMU v. George Mason University* (Case No. CL 2017-07484) (Circuit Court of Fairfax County, decided November 29, 2017); *Hurst v. City of Norfolk* (Civil Docket No. CL17-11119) (Circuit Court of the City of Norfolk, decided November 20, 2017).

<sup>11</sup> *Town of Saltville v. Surber* (Case No. CL11-100) (Circuit Court of Smyth County, decided July 11, 2011).

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. In 2017, 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 and to generate records of who has completed training, and provides for the 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 it has also created a searchable list of FOIA officers, both available on the Council's website (<http://foiacouncil.dls.virginia.gov/>).

For this reporting period, the Council responded to 1,889 inquiries. Of these inquiries, nine resulted in formal, written opinions, all of which were requested by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1,168 were made by government officials, 596 by citizens, and 116 by media representatives. Starting in 2006, the Council has seen an increase in the number of informal opinion requests as compared with requests for formal written opinions. For more than a 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. Last 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, which has continued through 2018.

FOIA was again the subject of significant legislative activity in the 2018 Session. The General Assembly passed a total of nine bills amending FOIA during the 2017 Session. Five bills passed the General Assembly that were recommended by the FOIA Council: HB 905 that addresses what information shall be designated as trade secrets or proprietary information and therefore excluded from being open to public inspection under the Virginia Public Procurement Act (§ 2.2-4300 et seq.), HB 906 that clarifies the definition of electronic communication, HB 907 that consolidates existing provisions concerning public meetings conducted by electronic means, HB 908 that removes 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 and requires instead that members of the public be provided with an electronic communication means substantially equivalent to that provided to members of the public body, and HB 909 that clarifies that the discretionary exemptions contained in FOIA pertaining to law-enforcement and criminal records may be used by any public body. A more detailed report of the bills discussed above and other public access bills passed during the 2018 Session appears on the Council's website and is attached as Appendix D to this report.

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. New developments in technology such as documents that may be edited in real time by multiple remote users have raised further questions on both the records and meetings sides of FOIA. At its final meeting this year, the Council directed staff to update and consolidate its existing guides regarding email to provide further guidance regarding social media and other emerging technologies.

This year the Council welcomed new legislative member Delegate Glenn R. Davis, Jr., and citizen member Lee Bujakowski, both appointed by the Speaker of the House. Mr. Bujakowski replaces Edward W. "Ed" Jones, who served two four-year terms in office and was ineligible for reappointment. The Council thanked Mr. Jones for his service.

## **WORK OF THE COUNCIL**

The majority of the Council's work this year involved studying the nine bills referred by the 2018 Session of the General Assembly. The Council scheduled four meetings for this year, but the final meeting was cancelled because the Council completed its work at the conclusion of the third meeting.

### **April 4, 2018**

The Council held its first meeting of the 2018 interim on April 4, 2018.<sup>12</sup> The meeting was an organizational meeting to consider election of the chair and vice-chair, to receive an overview of the bills referred by the 2018 Regular Session of the General Assembly to the Council for further study, to establish a work plan with the appointment of necessary subcommittees, and to set future meeting dates. Senator Stuart opened the floor for nominations for chair and vice-chair. Kathleen Dooley made motions to nominate Senator Stuart as chair and Delegate Torian as vice-chair. Both motions were properly seconded, and no further motions were made. The Council voted on the motions, and Senator Stuart was elected chair and Delegate Torian was elected vice-chair, both unanimously.

### **Bills Referred to Council for Study by 2018 Regular Session of General Assembly**

Staff provided an overview of the 13 bills referred by the 2018 Regular Session of the General Assembly to the Council for study during the interim. Staff proposed dividing the bills among three subcommittees, addressing the topics of public records, meetings, and remedies. The bills and their summaries are listed below, grouped in the suggested subcommittee categories:

#### **Public Records Subcommittee:**

- HB 504 (Mullin) (Defining the term "custodian").

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<sup>12</sup> Council members Senator Stuart (Vice-Chair), Delegate Torian, Senator Locke, Coleburn, Dooley, Porto, Seltzer, Sterns, Treadway, and Vucci were present; members Hamlett, Jones, and King-Casey were absent.

- HB 664 (Kilgore)<sup>13</sup> (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).
- HB 904 (Robinson) (Establishing a general exemption for trade secrets).
- HB 957 (Yancey) (Defining the term "custodian").
- HB 958 (Yancey) (Amending the current section on redaction).
- HB 959 (Yancey) (Amending current provisions regarding the transfer of records).
- HB 1329 (Tran) (Prohibiting any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity).
- SB 730 (DeSteph) (Amending the definition of "public records," exempting certain social media records from mandatory disclosure, and providing that the public body is a necessary party to any enforcement proceeding).
- SB 876 (Mason)<sup>14</sup> (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).

#### Meetings Subcommittee:

- HB 1101 (Robinson) (Requiring that every public body, except for governing boards of public institutions of higher education, afford an opportunity for public comment during any open meeting. If a public body holds more than four meetings in a calendar year, such public body may, by recorded vote, limit the number of meetings at which an opportunity for public comment is afforded to four meetings per calendar year.).
- SB 336 (Peake) (Requiring that every elected public body afford an opportunity for public comment during any open meeting. The bill permits elected public bodies to choose the approximate point during the meeting when public comment will be received and to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner.).

#### Remedies Subcommittee:

- HB 213 (Mullin) (Providing that formal advisory opinions be approved by the FOIA Council and providing protection from liability for civil penalties under certain circumstances).

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<sup>13</sup> This bill is identical to SB 876 (Mason).

<sup>14</sup> This bill is identical to HB 664 (Kilgore).

- SB 630 (Surovell) (Adding civil penalties for improper destruction or alteration of public records and improper certification of a closed meeting).

### **Appointment of Subcommittees**

Senator Stuart followed staff recommendations in establishing three subcommittees to study the 13 bills referred as listed above and appointed members to the three subcommittees.

The Records Subcommittee will study bills HB 504 (Mullin), HB 664 (Kilgore), HB 904 (Robinson), HB 957 (Yancey), HB 958 (Yancey), HB 959 (Yancey), HB 1329 (Tran), SB 730 (DeSteph), and SB 876 (Mason). The subcommittee consists of Council members Marisa Porto as chair, Cullen Seltzer, Sandra G. Treadway, Shawri King-Casey, and Mark Vucci.

The Meetings Subcommittee will study bills HB 1101 (Robinson) and SB 336 (Peake). The subcommittee consists of Kathleen Dooley as chair, William Coleburn, Michael Stern, Shawri King-Casey, and Mark Vucci.

The Remedies Subcommittee will study bills HB 213 (Mullin) and SB 630 (Surovell). The subcommittee consists of Stephanie Hamlett as chair, Ed Jones, Sandra G. Treadway, Shawri King-Casey, and Mark Vucci.

Senator Stuart invited discussion from the members of the Council regarding the appointments. Ms. Porto advised that she may have a conflict of interest as chair of the Records Subcommittee due to her position as publisher and editor-in-chief for the Daily Press Media Group. Similarly, Mr. Seltzer expressed a similar problem due to his representation of the Office of the Executive Secretary of the Virginia Supreme Court in ongoing litigation. Staff explained that the particular litigation that led to the introduction of some of the bills in the Records Subcommittee has been completed and that the bills before the subcommittee make broader changes to FOIA that are not specific to the *Daily Press* and would impact more than one type of public body.<sup>15</sup> Staff advised that no conflict exists because of the finality of the legislation and the nature of the bills before the subcommittee. Senator Stuart also explained that the members were placed on each particular subcommittee in an attempt to provide a balance between competing interests and based on the particular positions and experiences of the members in order to provide for the inclusion of as many perspectives as possible.

Ms. Porto noted that there was a list developed by former chairman Delegate James LeMunyon of issues that were also included in the Council's previous work plans that had not been assigned to any of the subcommittees. Senator Stuart noted that the subcommittees are empowered to take on additional issues and topics that are within their assigned subject matter areas.

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<sup>15</sup> HB 504 (Mullin), HB 664 (Kilgore), HB 957 (Yancey), HB 958 (Yancey), HB 959 (Yancey), and SB 876 (Mason) were introduced in the 2018 Regular Session of the General Assembly to address issues discussed in the Virginia Supreme Court case *Daily Press, LLC. v. Office of the Exec. Sec'y*, 293 Va. 551 (2017). The case was decided on June 29, 2017. The bills that will be studied address general changes to FOIA, including (i) the definition of "custodian," (ii) the transfer of public records between public bodies, and (iii) the obligations of public bodies to respond to FOIA requests for public records even if another public body has already provided the public records.

## **Public Comment**

David Ress of the *Daily Press* spoke to the Council of his desire for the Council to reexamine the mission of the Council, review the nature of advisory opinions, and study topics such as texting during meetings throughout the interim. Senator Stuart agreed that the issue of texting during meetings should be reviewed and advised staff to include the topic in the Meetings Subcommittee.

Staff updated the Council that no relevant public comment forms had been received since the Council's last meeting on November 20, 2017. Staff also informed the Council that three formal advisory opinions had been released by the Executive Director since the last Council meeting.

## **Setting Future Meetings**

Staff suggested three meeting dates: August 22, 2018, at 1:00 p.m.; October 17, 2018, at 1:00 p.m.; and December 5, 2018, at 1:00 p.m. if a third meeting is needed. Senator Stuart invited comments from the members of the Council regarding the dates; there were none. The Council adopted these dates as the future meeting dates of the Council. There being no further business, the meeting was adjourned at 2:05 p.m.

## **August 22, 2018**

The Council held its second meeting of the 2018 interim on August 22, 2018.<sup>16</sup> The meeting was held to welcome new members, to receive reports from the Council's three subcommittees, to take action on the subcommittees' recommendations, and to hear other business of interest to the Council. Senator Richard Stuart began the meeting by welcoming Delegate Glenn R. Davis, Jr., and Mr. Lee Bujakowski to the Council, but he noted that Mr. Bujakowski was unable to attend today.

## **Subcommittee Reports**

### **Records Subcommittee:**

Staff reported that the Records Subcommittee had met three times: May 21, June 27, and August 8, 2018. At the request of the subcommittee, staff and interested parties also got together to study issues related to HB 904 (see below) on July 30, 2018. Staff reminded the Council that it had referred nine bills to the Records Subcommittee for study, as follows:

- HB 504 (Mullin) (Defining the term "custodian").
- HB 664 (Kilgore)<sup>17</sup> (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).
- HB 904 (Robinson) (Establishing a general exemption for trade secrets).
- HB 957 (Yancey) (Defining the term "custodian").

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<sup>16</sup> Council members Senator Stuart (Chair), Delegate Davis, Coleburn, Dooley, Hamlett, King-Casey, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Locke, Delegate Torian, and Bujakowski were absent.

<sup>17</sup> This bill is identical to SB 876 (Mason).

- HB 958 (Yancey) (Amending the current section on redaction).
- HB 959 (Yancey) (Amending current provisions regarding the transfer of records).
- HB 1329 (Tran) (Prohibiting any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity).
- SB 730 (DeSteph) (Amending the definition of "public records," exempting certain social media records from mandatory disclosure, and providing that the public body is a necessary party to any enforcement proceeding).
- SB 876 (Mason)<sup>18</sup> (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).

Of these nine bills, the patrons of HB 504, HB 664, HB 957, HB 958, HB 959, and SB 876 all requested that no further action be taken on these bills because the issue they sought to address concerning access to certain court records was addressed separately by House Bill 780 (Habeeb) and identical Senate Bill 564 (Obenshain), both of which were enacted this year. Therefore, the Council took no further action on these bills.

Staff provided a brief history of HB 904 concerning access to trade secrets. This issue had been studied at approximately 30 meetings since 2014 and resulted in HB 904, which would have created a general exemption for trade secrets. HB 904 was introduced as a recommendation of the Council at the 2018 Session of the General Assembly. However, concerns were raised during the session regarding what effect HB 904 would have on access to information about the chemical mixtures used in hydraulic fracturing. The General Assembly referred the bill back to the Council for further study to address these unintended consequences, and the Council referred the bill to the subcommittee. The subcommittee heard from environmental groups, the Department of Mines, Minerals and Energy, oil and natural gas representatives, and other interested parties on June 27, 2018. At the subcommittee's request, staff met with these and other interested parties again on July 30, 2018, to determine whether the parties could reach some agreement regarding access to information about the chemical mixtures used in hydraulic fracturing, such as an amended version of the bill with special provisions to address the concerns presented. Staff reported that after that discussion, it appears that those opposed to the bill would continue to oppose it even if it contained special provisions addressing access to information about the chemical mixtures used in hydraulic fracturing due to concerns there may be other unknown, unintended consequences. At the August 8, 2018, subcommittee meeting, Megan Rhyme of the Virginia Coalition for Open Government (VCOG) suggested an amended version of the bill that would include a definition of trade secrets and the provisions for designating what trade secrets are to be protected ("earmarking"). After discussing the suggestion, the subcommittee recommended a new draft that would define "trade secrets" to mean the same as

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<sup>18</sup> This bill is identical to HB 664 (Kilgore).

that term is used in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) (UTSA) and make corresponding technical changes to eliminate redundant language. The subcommittee recommended this draft to provide clarity and uniformity, as some exemptions in FOIA currently refer to the UTSA definition of "trade secrets" while others do not. Staff reported there was no opposition presented to this draft. The Council then voted unanimously to recommend this draft.

The Council next considered the redraft of HB 1329 (Tran), which would amend the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) (GDCDPA) to prohibit state agencies from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity unless such dissemination is specifically required by law. Delegate Tran stated that the bill would help to protect the ability to worship freely without fear of persecution, much like Virginia's original religious freedom statute and the First Amendment of the United States Constitution. She noted that in some instances it is important to collect such data, such as with student applications for scholarships and federal aid forms, and the amendment to the bill allows such collection. She also stated that the bill had support from several religious organizations representing diverse faiths, as well as the Family Foundation. The Council then discussed the amended bill in detail, noting that it is in the GDCDPA rather than FOIA and therefore outside the Council's usual subject matter, and especially focusing on how it would affect disclosure to the federal government. Delegate Davis expressed his support for the concept of the bill, but concern that the amended bill would allow the federal government to require disclosure without stating a purpose, or to get the information from sources other than state agencies, effectively circumventing the goal of the bill. Delegate Tran responded that it was a conundrum, as banning collection of such information entirely would be an option, but sometimes there are good reasons for such collection, and the state cannot prevent the federal government from using other sources. The Council then discussed the language of the amended bill and how it relates to current law, and it recommended a technical amendment (to change the word "consent" to "authorization" on line 91). After acknowledging the groups who attended today's meeting in support of the bill (representatives from the All Dulles Area Muslim Society and the Virginia Interfaith Policy Center and members of the Muslim, Jewish, and Hindu communities), the Council voted 9-2 (all in favor except Delegate Davis and Mr. Stern against) to recommend the amended draft of HB 1329.

Staff then presented two amended drafts of SB 730 (DeSteph), which would amend the definition of "public record," define and exempt social media records of General Assembly members, and require that public bodies be included as necessary parties to any petition for mandamus or injunction filed under § 2.2-3713. Staff informed the Council that the drafts were identical, except one would provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. Due to time considerations, the Council and Senator DeSteph agreed to defer further consideration on the drafts until the Council's next meeting on October 17, 2018.

Remedies Subcommittee:

Staff reported that the Remedies Subcommittee met twice, on May 21 and June 4, 2018, to consider the bills listed below. The subcommittee voted to recommend amended versions of each bill to the Council for its consideration.

- HB 213 (Mullin) (Providing that formal advisory opinions be approved by the FOIA Council and providing protection from liability for civil penalties under certain circumstances).
- SB 630 (Surovell) (Adding civil penalties for improper destruction or alteration of public records and improper certification of a closed meeting).

Addressing the amended version of HB 213 first, Mr. Vucci moved and the Council voted unanimously to add language to state that the policy adopted by the Council will address when an opinion will be issued. The Council then discussed the effects of the bill, expressing concerns that it would change the nature of the Council to one that is quasi-judicial, that there may be difficulties providing formal opinions in a timely manner depending on the volume of requests received, and that the Council is not a trier of fact and requesters do not have to sign affidavits or otherwise attest to the facts. Delegate Mullin related that the genesis of the bill for him as a practitioner is to create a body of precedent, which is what the current opinions are informally, and reduce costs by relying on opinions rather than litigation. Mr. Stern noted that the provisions that would allow staff-issued advisory opinions to be introduced as evidence in any case alleging a knowing and willful violation of § 2.2-3714 would satisfy that purpose. The Council then voted to amend the bill to keep only the provisions on lines 18-23 regarding introducing staff-issued opinions as evidence, voted to strike the changes on lines 11-17 and 46-64, and directed staff to make any necessary technical changes. The Council then voted unanimously to recommend the draft as amended.

Staff next presented the amended draft of SB 630, which would add penalties for the improper destruction of public records and for the improper certification of closed meetings. The Council discussed whether there should be a standard of intent or *mens rea* added before penalties would be incurred, particularly because as many citizens serve on public bodies as volunteers and do not have the benefit of legal counsel, they may inadvertently and unintentionally violate these new provisions. The Council considered adding language requiring violations of the closed meeting certification provisions to be willful and knowing; staff pointed out that the current provisions of § 2.2-3714 already provide a civil penalty for willful and knowing violations of FOIA, including for improper certification of a closed meeting. Ms. Dooley expressed concerns that there can be good faith disagreements about closed meeting provisions which, if found to be knowing and willful violations, could be considered misfeasance or malfeasance in office. She also stated that the penalty for improper destruction of records should be in the Virginia Public Records Act (§ 42.1-76 et seq.). Senator Stuart noted there already is a criminal penalty for the improper destruction of certain public records. Senator Surovell noted that attorneys for the Commonwealth generally do not prosecute these types of matters, as they are busy prosecuting violent crimes, drug offenses, and other criminal matters. He described several news articles depicting situations that appear to be designed to avoid FOIA, such as an attorney training local government employees to destroy records, and multiple local government bodies violating closed meeting rules. After further discussion Mr. Seltzer moved to add knowing and willful language to lines 14 and 22 of the amended draft; the motion passed by a vote of 8-3 (all in favor except

Delegate Davis, Ms. Dooley, and Ms. King-Casey against). Mr. Coleburn moved to add language on line 24 to state that if the public body certified a closed meeting on the advice of its attorney and it was later found to be in violation, then the attorney would be held liable for the monetary penalties. After further discussion, the motion was amended to apply if a knowing and willful violation was committed on the advice of the attorney; the motion failed on a vote of four in favor (Ms. Porto, Mr. Coleburn, Dr. Treadway, and Delegate Davis), two against (Mr. Seltzer, with the disclosure that he represents local public bodies in his professional practice, and Mr. Stern), and five abstentions (Senator Stuart, Ms. Dooley, Ms. Hamlett, Mr. Vucci, and Ms. King-Casey). Mr. Coleburn then moved to change the word "may" on line 24 to "shall" to make the penalty for improper certification of a closed meeting mandatory. The motion failed on a vote of four in favor (Ms. Porto, Dr. Treadway, Mr. Coleburn, and Mr. Vucci) to seven against (the remaining members present). Delegate Davis then moved to make no recommendation on SB 630; after further discussion of the motion, the motion passed by vote of six to five (all in favor except Ms. Porto, Dr. Treadway, Mr. Coleburn, Mr. Vucci, and Senator Stuart).<sup>19</sup>

#### Meetings Subcommittee:

The Meetings Subcommittee was scheduled to meet on June 5, July 18, and August 22, 2018. The subcommittee had two bills referred to it, HB 1101 (Robinson) and SB 336 (Peake), both of which would have required public comment periods at public meetings. At the June 5 meeting, a quorum was not present, but the subcommittee members who were present heard from interested parties on the issue of requiring public comment periods at public meetings. Because this issue has been studied in prior years and views are divided, the members present recommended bringing this issue before the full Council and canceling the remaining subcommittee meetings, as they felt it required a policy discussion by the full Council. The members also considered the issue of members using text messages to communicate during a public meeting, and they suggested that this issue be addressed through a guidance document, rather than in legislation. Due to time constraints, the Council decided to defer the Meetings Subcommittee report until the Council's next meeting on October 17, 2018, in order to give full consideration to all of the issues raised.

#### **Other Business**

Staff updated the Council that no relevant public comment forms had been received since the Council's last meeting on November 20, 2017. Staff also updated the Council that staff has begun offering free FOIA training here in Richmond to all who are interested. The training offered counts for 1.5 hours of continuing legal education credit for attorneys and satisfies the annual training requirement for FOIA officers. The first four sessions were limited to 50 participants each, and registration was full within two weeks, so two additional sessions allowing up to 100 participants each have been added. Staff has continued to provide individualized training on request as well but hopes to offer more programs in Richmond next year, including programs specifically addressing public meetings and law-enforcement records. Staff also informed the Council that since the Council considered the issue of declaratory judgment last year, two more circuit cases had been decided, both of which held that declaratory judgment against a public body is unavailable under FOIA. Staff noted that a prior circuit court case did allow a declaratory

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<sup>19</sup> Note that Senator Stuart had to leave after this vote was taken, and Delegate Davis acted as chair for the remainder of the meeting.

judgment action to be brought, but the posture was different because in that case it was the public body that brought the action.

### **Public Comment**

Ms. Rhyme informed the Council that two FOIA cases are currently pending, one regarding attorney billing records and the scope of redaction allowed and the other concerning whether the judiciary is subject to FOIA. She also stated that the majority of FOIA transactions and meetings run smoothly but that she does hear about a lot of "horror stories." She said the common theme of these stories is that citizens see violations and cannot do anything about them and judges do not find violations. Therefore, she encouraged the Council to keep the Remedies Subcommittee in place to consider alternatives so that citizens can be heard.

### **Future Meetings**

The next meetings of the Council are scheduled for October 17, 2018, and December 5, 2018, both at 1:00 p.m. in House Room 3 of the Capitol Building. There being no further business, the meeting was adjourned.

### **October 17, 2018**

The Council held its third meeting of the 2018 interim on October 17, 2018.<sup>20</sup> The meeting was held to receive reports from the Records and Meetings Subcommittees, to take action on the subcommittees' recommendations, and to hear other business of interest to the Council. As an introductory matter, Senator Stuart observed that Council meetings are not streamed online, although the meeting rooms have the technology to do so. The Council agreed without objection that Council meetings should be streamed online and directed staff to make inquiries of the respective Clerks' Offices about using the equipment and having the facilities made available to do so.

### **Subcommittee Reports**

#### **Records Subcommittee:**

Staff presented two amended drafts of SB 730 (DeSteph), which had been carried over for further consideration after the Council's meeting on August 22, 2018. One draft (LD #19100039D) would amend the definition of "public record," define and exempt social media records of General Assembly members, require that public bodies be included as necessary parties to any petition for mandamus or injunction filed under § 2.2-3713, and provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. The other draft (LD #19100756D) includes only the provision that would provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. Senator DeSteph indicated that the -0756D draft was the newer version that he wished to move forward. He also stated that he had met with other interested parties and believed there was no opposition to the new draft, and he confirmed that this draft does not amend any definitions or address social media as the original bill did. The floor was opened to public comment on the draft. Aimee Perron Siebert,

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<sup>20</sup> Council members Senator Stuart (Chair), Delegate Torian (Vice Chair), Senator Locke, Delegate Davis, Bujakowski, Coleburn, Dooley, Hamlett, Porto, Seltzer, Stern, Treadway, and Vucci were present; Ms. King-Casey was absent.

speaking on behalf of the Virginia Press Association (VPA), stated that the new draft uses appropriate language and VPA takes no position on it. She also stated that Megan Rhyne of the Virginia Coalition for Open Government (VCOG) agreed, but Ms. Rhyne was unable to attend today's meeting. No one spoke in opposition to the new draft. The Council then voted unanimously to recommend the new draft (LD #19100756D) to the 2019 Session of the General Assembly.

#### Meetings Subcommittee:

Staff reminded the Council that the Meetings Subcommittee had two bills referred to it, HB 1101 (Robinson) and SB 336 (Peake), both of which would have required public comment periods at public meetings, and provided a brief summary of each bill. Staff noted that at the June 5 meeting, a quorum was not present, but the subcommittee members who were present heard from interested parties. Because this issue has been studied in prior years and views are divided, the members present recommended bringing this issue before the full Council.

Senator Stuart asked for public comment on the bills, beginning with SB 336. Phyllis Errico of the Virginia Association of Counties (VACo) stated that she felt both bills went beyond the scope of FOIA, as FOIA addresses public access to records and meetings, but not the public's ability to speak during meetings. She also expressed concern over the use of the term "elected public body" in relation to the definition of "public body" already in FOIA and the scope of entities affected by the bill. Additionally, Ms. Errico pointed out that searching the Code of Virginia for the term "public hearing" returns almost 300 responses, over 100 of which are in Title 15.2 concerning local government, so there is already ample opportunity for the public to address substantive topics. Finally, she noted that town halls and other informational meetings are available. Michelle Gowdy of the Virginia Municipal League (VML) agreed with Ms. Errico's comments and also pointed out that requiring public comment could in some instances let someone present their case twice, for example, during proceedings before a board of zoning appeals. Jeremy Bennett of the Virginia School Boards Association (VSBA) also agreed with Ms. Errico's remarks and stated that the bill may have unintended consequences with a negative impact and is unnecessary. Mr. Coleburn stated that as mayor of a town he felt that elected officials must remember who elected them and that open government includes open participation. Mr. Seltzer indicated he was sympathetic to the idea behind the bills but unsure they were a good fit within FOIA. Mr. Stern informed the Council that at the subcommittee meeting the testimony expressed a lot of concern from localities about the practical effects of these bills, and that open government advocates had expressed similar concerns about which he would like to hear more. Delegate Davis asked whether other restrictions on public comment would be allowed; staff responded that other restrictions would be allowed within the limits imposed by the First Amendment regarding freedom of speech at public forums. Senator Stuart asked representatives of local government and school boards whether they knew if any of the public bodies in their membership currently do not allow public comment at public meetings. Ms. Gowdy stated that no governing bodies prohibit public comment but some small committees or subcommittees might not allow public comment. She also said that, practically speaking, the public does not attend the majority of such meetings and such small public bodies usually have interested citizens as members, so there is still citizen input. Senator Stuart also expressed concerns about the applicability of the bills to the General Assembly, particularly as they would appear to require public comment periods during floor sessions of the House and Senate. After further discussion, the Council decided to have staff address this issue through guidance and

training. The Council voted unanimously to direct staff to prepare a policy statement, solicit input from Council members regarding the draft policy, and then prepare a final version of the policy statement to post on the Council website.

The Council then addressed HB 1101. Stacie Gordon of Partners for College Affordability and Public Trust spoke to the exception in the bill (to requiring public comment during any open meeting) for governing boards of public institutions of higher education, describing tuition increases and their impact while noting that many boards allow very little or no input from parents, students, or the general public. She urged the Council to strike the provision that would exempt such governing boards from the provisions of HB 1101. In discussion with the Council, she further stated that some boards do seek public input and some solicit online comments, but others have raised tuition without allowing public comment even after receiving a petition from students opposing the tuition hike. Ms. Errico spoke against HB 1101, stating that the same arguments would apply as with SB 336 and that the definition of "public body" is so broad it would include all subsets. She also noted that since HB 1101 requires only four public comment periods per year, some bodies that currently allow public comment at every meeting may curtail the number of public comment periods available. Delegate Davis noted that there were bills regarding notice of tuition increases this past session but the bills did not pass. He moved to amend HB 1101 to strike lines 43 through the word "received" on line 48 and insert the following language instead: "All public institutions of higher education should afford an opportunity for public comment during any open meeting where a vote to recommend or change any fee or tuition amounts occur." After discussion of whether such a directive should appear within FOIA or in Title 23.1 regarding higher education, Mr. Seltzer suggested instead to add the suggested language to the policy statement and training described above, to pass by both SB 336 and HB 1101 at this time, and to reconsider the issue in a year. Delegate Davis agreed and withdrew his earlier motion. Senator Stuart asked Christopher Whyte, representing the University of Mary Washington, if he could help get the message regarding providing public comment periods to other governing boards. Mr. Whyte agreed, and he noted that Mary Washington's board meetings are open to the public and that legislation requires posting public notice of tuition increases 30 days in advance. The Council then voted unanimously to include the language suggested by Delegate Davis as best practices in the policy statement to be drafted and in future training for governing boards of public institutions of higher education.

The members of the Meetings Subcommittee also considered the issue of members using text messages to communicate during a public meeting, and they suggested that this issue be addressed through a guidance document, rather than in legislation. The Council took these issues up in the larger context of electronic communications and social media generally, not just text messaging. Staff described current guidance materials, how the current statutory definition of "public record" is broad enough to include social media "regardless of physical form or characteristics," prior court precedents on email, and how the use of social media could be construed to be a meeting if a sufficient number of members of a public body were communicating about public business simultaneously. The Council directed staff to update the Council's guidance materials to address additional forms of social media besides email.

## **Annual Legislative Preview**

Staff reported that no one had brought any legislative proposals for consideration in advance of today's meeting. Senator Stuart opened the floor to anyone who wished to present any such legislative proposals; there were none.

### **Other Business**

Staff informed the Council that no public comment forms had been received since the Council's last meeting. Staff also presented a revised version of the Council's electronic meetings participation policy that reflects the Code changes effective July 1, 2018, but is substantively the same as the previous policy. The Council adopted the new version without objection. Finally, staff also pointed out an apparent conflict in current law that resulted from the consolidation of former Code §§ 2.2-3708 and 2.2-3708.1 into new § 2.2-3708.2 effective July 1, 2018. Specifically, a public body is not required to assemble a quorum in one location for meetings held by electronic communication means to address a state of emergency declared by the Governor (subdivision A 3 of § 2.2-3708.2), and, under former law, no policy on participation was required for such meetings. Current subsection C of § 2.2-3708.2 imposes these requirements on such meetings, as well as the requirement that the voice of any member participating from a remote location be heard by those at the primary or central meeting location. Staff informed the Council that the simplest solution would be an amendment to current subsection C that would address the conflict by clarifying that the provisions of subsection C imposing these requirements apply only to subdivisions A 1 and 2 (regarding participation by electronic communication means due to medical conditions or personal matters) and subsection B (regarding such participation for members of regional public bodies who live 60 miles or more from the central meeting location). The Council voted unanimously to recommend that amendment to the 2019 Session of the General Assembly.

### **Public Comment**

There was no additional public comment.

### **Future Meetings**

The next meeting of the Council is scheduled to be held on December 5, 2018, at 1:00 p.m. in House Room 3 of the Capitol Building. Observing that the Council had completed its review of the bills referred to it by the 2018 Session of the General Assembly and other work planned for the 2018 interim, the Council decided not to meet as scheduled in December unless called to do so by the Chair. There being no further business, the meeting was adjourned.

### **December 5, 2018**

This meeting was cancelled because the Council completed its work at the conclusion of its meeting on October 17, 2018.

### **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 online access to many of the Council's resources. The Council offers advice and guidance over the phone, via email, 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 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 for FOIA officers to be trained at a time when it is convenient for them, for records to be generated 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, the Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. During this reporting period, the Council responded to 1,889 inquiries, conducted 48 training seminars statewide, and continued to provide free online training through the Commonwealth of Virginia Learning Center. A listing of the live 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 formal, written opinions as well as more informal opinions via the telephone or email. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of government, media, or citizens. The logs help to keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency in responding to inquiries. All opinions, whether written or verbal, are based solely on the facts and information provided to the Council by the person requesting the opinion. The Council is not a trier of fact. Thus, it is specifically noted in each opinion, whether written or verbal, that Council opinions are given based on the representations of fact made by the opinion requester.

For the period of December 1, 2017, to November 30, 2018, Council staff fielded 1,889 inquiries. Of these inquiries, eight 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, staff posts written opinions 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 to six 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 to this report. The table below profiles who requested written advisory opinions for the period December 1, 2017, through November 30, 2018:

Written Advisory Opinions: 9

State and Local Government	0
Citizens of the Commonwealth	9
Members of the News Media	0

Typically, the Council provides advice over the phone and via email. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses 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, 2017, and November 30, 2018:

Telephone and Email Responses: 1,880

Government	1,168
Citizens	596
News Media	116

Appendix F to this report sets out the number of inquiries received by the Council each month from December, 2017, through November, 2018, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other). Appendix G to this report shows the number of opinions over a 10-year timespan.

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

The website address for the Council is <http://foiacouncil.dls.virginia.gov/>. 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 (§ 42.1-76 et seq.). 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 has conducted 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, a sign that its basic training mission had been successfully accomplished, 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 oversaturating any particular area, the Council resumed presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations remain available by request, as always).

While FOIA training is the most critical mission of the Council, in 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued. The statewide workshops posed considerable administrative burdens in their planning and execution, especially in light of the small Council staff. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training upon request to interested groups throughout Virginia, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group wishing to learn more about FOIA. Council staff has travelled to the location of the group requesting training. The training has been provided free of charge and tailored to meet the needs of the particular group, and has ranged from brief overviews of FOIA taking as little as 15 minutes to longer, in-depth presentations lasting several hours. Often the training has been focus specifically on particular exemptions or portions of FOIA frequently used by that group or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible. The Council also develops and continually updates free educational materials to aid in the understanding and application of FOIA. This year, the Council began offering free records training in Richmond for anyone who was interested. The Council initially offered four dates with up to 50 registrants per date; registration was full in less than two weeks. Two additional dates were added and in total, there were approximately 350 registrants total for the six dates of free training. Due to this success, the Council plans to offer additional free training in Richmond next year and to expand the programs to offer its training on meetings and training for law enforcement as well as training on records. During this reporting period, the Council staff responded to 1,889 inquiries and conducted 48 training seminars statewide. A list of these trainings appears as Appendix A to this report.

As is customary, 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. Additionally, the Council continued to offer a free, online training program for FOIA officers available through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management.

### **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 Council's 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
- Basic Meetings (PowerPoint presentation)
- Basic Records (PowerPoint presentation)
- Electronic Meetings Guide
- E-Mail: Use, Access & Retention
- EMail & Meetings
- Law-Enforcement Records
- Handling FOIA Requests for Records of 911 Calls
- Taking the Shock Out of FOIA Charges
- Legislative Issue Briefs
- FOIA Guide for Boards of Visitors
- FOIA Guide for Local Government Officials
- Access to Records - Quick Reference
- FOIA Guide for Members of Deliberative Bodies
- Guide to Geographic Information Systems Records
- List of other access laws
- Citizens' Guide to Making 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 link to a FOIA petition developed by the courts 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 a total of 1,889 inquiries and conducting 48 specialized training sessions throughout the Commonwealth over the course of the year. The Council also formed two subcommittees and one work group over the past year to examine FOIA and related access issues, and it encouraged the participation of many individuals and groups in Council studies. Through its website, the Council continues to provide increased public awareness of and

participation in its work and to publish a variety of educational materials on the application of FOIA. 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 Luke E. Torian, Vice-Chair

Senator Mamie E. Locke

Delegate Glenn R. Davis, Jr.

Shawri King-Casey

Sandra G. Treadway

Mark Vucci

Lee Bujakowski

William "Billy" Coleburn

Kathleen Dooley

Stephanie Hamlett

Edward Jones

Marisa Porto

Michael Stern

## APPENDIX A

### 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, 2017 through November 30, 2018, Council staff conducted 48 training seminars, which are listed below in chronological order identifying the group/agency requesting the training. Additionally, the Council continued online FOIA training through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>). This year the Council also began offering free courses based in Richmond open to all interested parties.

December 6, 2017	Senate Legislative Aides Richmond, VA
December 13, 2017	State Compensation Board New Officer Training Glen Allen, VA
January 3, 2018	Nottoway County and nearby localities Blackstone, VA
January 5, 2018	Virginia Municipal League Newly Elected Officials Conference Charlottesville, VA
January 17, 2018	Senate Legislative Aids Richmond, VA
January 23, 2018	2018 Joint Legislative Day Workshop Commissioners of the Revenue Association of Virginia Treasurers Association of Virginia Richmond, VA
January 26, 2018	President & Cabinet Virginia Commonwealth University Richmond, VA
February 2, 2018	Counsel to the Governor Richmond, VA
March 16, 2018	Virginia Coalition for Open Government Pop-Up Sunshine Day Richmond, VA

March 19, 2018	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
March 23, 2018	Virginia Association of Counties Supervisors Forum Richmond, VA
March 28, 2018	Virginia Legal Research class University of Richmond T.C. Williams School of Law Richmond, VA
April 3, 2018	Department of Housing and Community Development Virginia Building Code Academy Permit Technician Course Dumfries, VA
April 4, 2018	Department of Aviation Virginia Airport Operators Council 2018 Spring Workshop Staunton, VA
April 25, 2018	Rappahannock Citizens for Community Empowerment (including officials and employees from Rappahannock County, Shenandoah, and nearby localities) Washington, VA
May 1, 2018	Virginia Department of Social Services Henrico, VA
May 8, 2018	Virginia Department of Social Services Hampton, VA
May 11, 2018	Virginia Municipal League Insurance Programs 2018 Annual Meeting Henrico, VA
May 15, 2018	Constitutional Officers - Bath County, Alleghany County, and Highlands County Warm Springs, VA
May 24, 2018	Commonwealth Regional Council Farmville, VA

May 25, 2018	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
June 6, 2018	Virginia Municipal League Henrico, VA
June 20, 2018	Commissioners of the Revenue Association Tidewater District Tappahannock, VA
June 26, 2018	State Board of Elections - Electoral Boards Chesterfield, VA
June 27, 2018	Commissioners of the Revenue Association Southwest District Roanoke, VA
June 25, 2018	Access to Public Records Presentation (open to all) Richmond, VA
July 31, 2018	Hampton Roads Soil & Water District Commission Newport News, VA
August 9, 2018	Department of Conservation and Recreation Richmond, VA
August 29, 2018	Access to Public Records Presentation (open to all) Richmond, VA
September 5, 2018	Roanoke Valley-Alleghany Regional Commission Roanoke, VA
September 6, 2018	Washington County, Dickenson County, Buchanan County, Town of Abingdon, Town of Vansant Breaks, VA
September 6, 2018	Southwest Virginia Criminal Justice Training Academy Annual training for sheriffs and chiefs of police Breaks, VA
September 12, 2018	Central District Commissioners of the Revenue Association Goochland, VA
September 12, 2018	Spotsylvania County Spotsylvania, VA

September 19, 2018	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
September 26, 2018	Loudoun County Ashburn, VA
September 26, 2018	Town of Middleburg Middleburg, VA
October 3, 2018	Access to Public Records Presentation (open to all) Richmond, VA
October 4, 2018	Public Schools Records Consortium Richmond, VA
October 10, 2018	Access to Public Records Presentation (open to all) Richmond, VA
October 24, 2018	State Council of Higher Education for Virginia 2018 Board of Visitors Orientation Richmond, VA
October 25, 2018	Virginia Government Finance Officers Association 2018 Fall Conference Henrico, VA
November 2, 2018	FOIA & Public Procurement for local government Harrisonburg, VA
November 7, 2018	Access to Public Records Presentation (open to all) Richmond, VA
November 14, 2018	Access to Public Records Presentation (open to all) Richmond, VA
November 15, 2018	Board of Veterans Services Henrico, VA
November 20, 2018	Brunswick County Sheriff's Office Meherrin River Regional Jail Alberta, VA
November 28, 2018	Department of Housing and Community Development Virginia Building Code Academy Permit Technician Course

Index of Written Advisory Opinions  
December 1, 2017, through November 30, 2018

**ADVISORY OPINIONS ISSUED**

<u>Opinion No.</u>	<u>Issue(s)</u>
<b>January</b>	
AO-01-18	FOIA provides that public records must be disclosed except as otherwise specifically provided by law. Tax code provisions such as § 58.1-3 are "as otherwise specifically provided by law." The statutory authority of this office is limited to FOIA matters.
<b>February</b>	
AO-02-18	A motion to convene a closed meeting must identify the subject of the meeting, the purpose of the meeting, and the exemption(s) which allow the meeting to be closed. A motion that fails to identify the subject, or lacks any other element, is insufficient. There is no general exemption for public bodies to discuss police investigations in closed meetings. Votes are required to be taken at open meetings; decisions made in closed meetings are not effective until a vote is taken at an open meeting.
<b>March</b>	
AO-03-18	The definition of "public body" includes, among other entities, "any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body." A budget task force appointed by a school superintendent that advises the superintendent is not a "public body" under this definition.

Opinion No.

Issue(s)

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**May**

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AO-04-18

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Discusses general open meetings requirements of public bodies and their committees as well as obligations of public bodies in response to a request for public records. A public body is not required to record open meetings itself but must afford the public the opportunity to record the meetings. A committee of a public body is not required to record minutes of an open meeting if the committee membership is comprised of less than a majority of the public body membership. While a public body must post a link on its website to any routine exemption policy for records, there is no requirement as to how that policy is formed or that the policy be contained in a physical policy document. A public body must state in writing the reasons why public records are not provided in response to a request for public records.

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**August**

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AO-05-18

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A custodian may require a requester of public records to provide his legal name and address and may attempt to verify that a requester is a citizen of the Commonwealth, a representative of newspapers and magazines with circulation in the Commonwealth, or a representative of radio and television stations broadcasting in or into the Commonwealth. Requiring a specific form of identification without an alternative for those who do not have such identification, however, restricts access to information promised by the policy of FOIA. Public bodies must make a proper motion to enter into each closed meeting, even if there are multiple closed meetings within the same open meeting.

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AO-06-18

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It is possible that electronic mail message headers could include legal advice and information protected by the attorney-client privilege exempt from mandatory disclosure pursuant to subdivision 2 of § 2.2-3705.2. That exemption includes advice from legal counsel to officers of a public body as well as employees of the public body, and does not place a limit on how many officers or employees of the public body may receive the advice at one time. It is also possible that electronic mail message headers could include information describing the design, function, operation, or access control features of a security system that would be exempt from mandatory disclosure pursuant to subdivision 2 of § 2.2-3405.1.

<u>Opinion No.</u>	<u>Issue(s)</u>
AO-07-18	Application forms for medical cannabis pharmaceutical processor permits that are maintained by the Board of Pharmacy are not subject to the disclosure requirements of FOIA pursuant to § 54.1-108.
AO-08-18	Discusses the use of the contract negotiations and economic development records exemptions. FOIA allows a records custodian to disclose exempt records in his discretion. Also discuss the working papers exemption as it applies to Cabinet Secretaries.
<b>October</b>	
AO-09-18	Discusses the general requirements of a public body when replying to a request for records pursuant to FOIA as well as the exemptions from mandatory disclosure for (i) legal advice and information protected by attorney-client privilege and (ii) work product compiled for use in litigation. Additionally addresses who has the responsibility to clarify ambiguities in requests, fines for violations of FOIA, charges that may be assessed in relation to a request, and remedies citizens have under FOIA.
AO-04-16	Under FOIA, a teacher has a right of access to the teacher's own personnel records, but not necessarily to scholastic records of a student. Generally, if a teacher requests a record that is both a personnel record and a scholastic record, the response should provide those portions which are the teacher's own personnel records but may redact those portions which are exempt as scholastic records. Other laws outside FOIA may also affect access to scholastic records, but this office's statutory authority is limited to providing guidance on FOIA.
<b>January</b>	
AO-01-17	Summarizes the requirements for responding to a request. A failure to respond to a request for public records is deemed a denial and a violation of FOIA. The statutory remedy for a violation is to file a petition for mandamus or injunction in general district or circuit court.

Opinion No.

Issue(s)

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**February**

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AO-02-17

FOIA prohibits voting at public meetings by secret or written ballot as well as voting by telephone or other electronic communication means. However, FOIA does not address the use of electronic voting systems that use computer software to cast, record, and publicly display the votes at a public meeting. Whether such a system comports with FOIA depends on whether it publicly displays the individual vote of each member of the public body, or merely the final vote tally.

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**March**

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AO-03-17

A motion to convene a closed meeting must identify the subject of the meeting, the purpose of the meeting, and the exemption(s) which allow the meeting to be closed. A motion that fails to identify the subject, or lacks any other element, is insufficient.

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**May**

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AO-04-17

An organization, corporation, or agency in the Commonwealth that receives two-thirds (66.6%) or greater support from public funds is considered to be "supported ... principally by public funds" and therefore is a "public body" subject to FOIA. In some instances, an entity receiving less than two-thirds support from public sources might be considered a "public body" depending on the exact facts of each case. In this opinion, an entity receiving 68% of its support from public funds is considered a public body subject to FOIA.

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**June**

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AO-05-17

An organization, corporation, or agency in the Commonwealth that receives two-thirds (66.6%) or greater support from public funds is considered to be "supported ... principally by public funds" and therefore is a "public body" subject to FOIA. Prior opinions advised measuring an entity's level of funding at the time a request is made, but did not specify a time period to use as a measure. FOIA itself is silent on this point. We recommend using a fiscal year as the basis for determination to provide a balance between predictability in knowing whether an entity is subject to FOIA, and flexibility in recognizing changing factual circumstances.

Opinion No.

Issue(s)

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**August**

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AO-06-17

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Meeting notices must contain the date, time, and location of the meeting. Notice of regular meetings must be posted at least three working days prior to the meeting. The day of the meeting is not counted as one of the three working days. Working days generally do not include legal holidays, weekends, or other days when the offices of the public body are closed.

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**October**

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AO-07-17

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Following the policy and procedures of FOIA, all public records, including procurement records, must be disclosed upon request unless an exemption or other specific provision of law allows the records to be withheld.

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## 2018 Meetings of the Council

**Wednesday, April 4, 2018**

**House Room 3, Capitol Building, Richmond**

Election of chair and vice-chair; recap of the 2018 legislative session; review of the bills referred to the Council by the 2018 Session of the General Assembly and appointment of subcommittees to the study the bills.

**Wednesday, August 22, 2018**

**House Room 3, Capitol Building, Richmond**

Welcome new members Delegate Glenn R. Davis, Jr., and Mr. Lee Bujakowski; progress reports and review of recommended drafts from the Council's Records and Remedies Subcommittees; Meetings Subcommittee issues deferred until the next Council meeting; update on free FOIA training being offered in Richmond; update on circuit court decisions regarding declaratory judgment.

**Wednesday, October 17, 2018**

**House Room 3, Capitol Building, Richmond**

Progress reports and review of recommended drafts from the Council's Records and Meetings Subcommittees; adoption of policy statement encouraging public comment at public meetings; annual legislative preview; discussion of conflict in current § 2.2-3708.2 regarding quorum requirement for electronic meetings held to answer a state of emergency declared by the Governor and recommendation of legislation to clarify that a quorum is not required for such meetings.

**Wednesday, December 5, 2018**

**House Room 3, Capitol Building, Richmond**

Meeting CANCELLED because the Council completed its work for the year at the conclusion of its meeting on October 17, 2018.



**2018 FOIA LEGISLATIVE UPDATE**

**I. Introduction**

The General Assembly passed a total of nine bills amending FOIA during the 2018 Session. Five bills passed the General Assembly that were recommended by the Council: HB 905 that addresses what information shall be designated as trade secrets or proprietary information and therefore excluded from being open to public inspection under the Virginia Public Procurement Act, HB 906 that clarifies the definition of electronic communication, HB 907 that consolidates existing provisions concerning public meetings conducted by electronic means, HB 908 that removes 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 and requires instead that members of the public be provided with an electronic communication means substantially equivalent to that provided to members of the public body, and HB 909 that clarifies that the discretionary exemptions contained in FOIA pertaining to law-enforcement and criminal records may be used by any public body.

Eight bills clarify two existing records exemptions and add five new records exemptions in FOIA as follows:

- Clarifies the exclusion from mandatory disclosure under FOIA of information that would disclose the security aspects of a system safety program plan adopted pursuant to Federal Transit Administration regulations governing the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency. Current law excludes information that would disclose the security aspects of such system safety program plan by providing a specific citation to the Code of Federal Regulations. HB 727 clarifying the exemption in § 2.2-3705.2.
- Clarifies that the discretionary exemptions contained in FOIA pertaining to law-enforcement and criminal records may be used by any public body. Current law only permits such exemptions to be used by public bodies engaged in criminal law-enforcement activities. The bill also restricts the application of the discretionary exemption for those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature, the release of which would jeopardize the safety or privacy of any person, to only those portions of noncriminal incident or other noncriminal investigative reports or materials that are in the possession of public bodies (i) engaged in emergency medical services, (ii) engaged in fire protection services, (iii) engaged in criminal law-enforcement activities, or (iv) engaged in processing calls for service or other communications to an emergency 911 system or any other equivalent reporting system. HB 909 clarifying the exemption in § 2.2-3706.
- Excludes from the mandatory disclosure provisions of FOIA trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), supplied to the Department of Transportation as part of an audit, a special investigation, or any study requested by the

Department of Transportation. The bill provides that in order for such trade secrets to be excluded, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary. HB 1275 adding an exemption in § 2.2-3705.6.

- Excludes from the mandatory disclosure provisions of FOIA certain information held by the board of visitors of The College of William and Mary in Virginia (the board) relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would reveal confidential analyses prepared for the board and have an adverse effect on the value of the investment to be acquired, held, or disposed of by the board. HB 1426 and SB 858 adding an exemption in § 2.2-3705.7.
- Authorizes any county or city, or any combination of counties, cities, or counties and cities, to establish a local or regional overdose fatality review team for the purpose of (i) conducting contemporaneous reviews of local overdose deaths, (ii) promoting cooperation and coordination among agencies involved in investigations of overdose deaths or in providing services to surviving family members, (iii) developing an understanding of the causes and incidence of overdose deaths in the locality, (iv) developing plans for and recommending changes within the agencies represented on the local team to prevent overdose deaths, and (v) advising the Department of Health and other relevant state agencies on changes to law, policy, or practice to prevent overdose deaths. The bill authorizes a local or regional team to review the death of any person who resides in the Commonwealth and whose death was or is suspected to be due to overdose. A violation of the confidentiality of the review process is punishable as a Class 3 misdemeanor. SB 399 adding an exemption in § 2.2-3705.5.
- Prohibits the custodian of a scholastic record from releasing the address, phone number, or email address of a student in response to a FOIA request without first obtaining the written consent of either the student or the student's parent or legal guardian. SB 512 adding an exemption in § 2.2-3705.4.
- Excludes from mandatory disclosure under FOIA information held by the Virginia Commercial Space Flight Authority that is categorized as classified or sensitive but unclassified, including national security, defense, and foreign policy information, provided that such information is exempt under the federal Freedom of Information Act (5 U.S.C. § 552). SB 657 adding an exemption in § 2.2-3705.2.

One bill adds one new meetings exemption in FOIA as follows:

- Authorizes any county or city, or any combination of counties, cities, or counties and cities, to establish a local or regional overdose fatality review team for the purpose of (i) conducting contemporaneous reviews of local overdose deaths, (ii) promoting cooperation and coordination among agencies involved in investigations of overdose deaths or in providing services to surviving family members, (iii) developing an

understanding of the causes and incidence of overdose deaths in the locality, (iv) developing plans for and recommending changes within the agencies represented on the local team to prevent overdose deaths, and (v) advising the Department of Health and other relevant state agencies on changes to law, policy, or practice to prevent overdose deaths. The bill authorizes a local or regional team to review the death of any person who resides in the Commonwealth and whose death was or is suspected to be due to overdose. A violation of the confidentiality of the review process is punishable as a Class 3 misdemeanor. SB 399 adding an exemption in § 2.2-3711.

Five bills amend existing provisions of FOIA as follows:

- Provides that a clerk of court or the Executive Secretary of the Supreme Court shall make nonconfidential court records or reports of aggregated, nonconfidential case data available to the public upon request. The bill specifies that such records or reports shall be provided no later than 30 days after the request. The bill further provides that the clerk may charge a fee for responding to such request that shall not exceed the actual cost incurred in accessing, duplicating, reviewing, supplying, or searching for the requested records. Finally, the bill requires the Executive Secretary of the Supreme Court to make available to the public an online case information system of nonconfidential information for criminal cases by July 1, 2019. HB 780 and SB 564 amending § 2.2-3703.
- Clarifies the definition of electronic communication in FOIA by amending it to mean the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information. HB 906 amending § 2.2-3701.
- Consolidates existing provisions concerning public meetings conducted by electronic communication means. HB 907 amending §§ 2.2-3701, 2.2-3707, 2.2-3707.01, 2.2-3714, and 30-179; adding § 2.2-3708.2; and repealing §§ 2.2-3708 and 2.2-3708.1.
- Removes the FOIA 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, 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. HB 908 amending §§ 2.2-3708, 2.2-3708.1, and 30-179.

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 2018 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, 2018.

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

### **§ 2.2-3701 Definitions.**

**Virginia Freedom of Information Act; definition of electronic communication.** Clarifies the definition of electronic communication in the Virginia Freedom of Information Act by amending it to mean the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information. This bill is a recommendation of the Freedom of Information Advisory Council. HB 906 (Acts of Assembly, c. 54).

**Virginia Freedom of Information Act; meetings held by electronic communication means.** Consolidates existing provisions concerning public meetings conducted by electronic communication means. The bill contains technical amendments. This bill is a recommendation of the Freedom of Information Advisory Council. HB 907 (2018 Acts of Assembly, c. 55).

### **§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.**

**Public access to nonconfidential court records.** Provides that a clerk of court or the Executive Secretary of the Supreme Court shall make nonconfidential court records or reports of aggregated, nonconfidential case data available to the public upon request. The bill specifies that such records or reports shall be provided no later than 30 days after the request. The bill further provides that the clerk may charge a fee for responding to such request that shall not exceed the actual cost incurred in accessing, duplicating, reviewing, supplying, or searching for the requested records. Finally, the bill requires the Executive Secretary of the Supreme Court to make available to the public an online case information system of nonconfidential information for criminal cases by July 1, 2019. This bill incorporates SB 519. SB 564 (2018 Acts of Assembly, c. 584) and HB 780 (2018 Acts of Assembly, c. 127).

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

**Virginia Freedom of Information Act; exclusion of records relating to public safety.** Clarifies the exclusion from mandatory disclosure under the Virginia Freedom of Information Act (FOIA) of information that would disclose the security aspects of a system safety program plan adopted pursuant to Federal Transit Administration regulations governing the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency. Current law excludes information that would disclose the security aspects of such system safety program

plan by providing a specific citation to the Code of Federal Regulations. HB 727 (2018 Acts of Assembly, c. 52).

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

**Virginia Freedom of Information Act (FOIA); scholastic records; student addresses, phone numbers, and email addresses.** Prohibits the custodian of a scholastic record from releasing the address, phone number, or email address of a student in response to a FOIA request without first obtaining the written consent of either the student or the student's parent or legal guardian. SB 512 (2018 Acts of Assembly, c. 756).

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

**Local or regional overdose fatality review teams.** Authorizes any county or city, or any combination of counties, cities, or counties and cities, to establish a local or regional overdose fatality review team for the purpose of (i) conducting contemporaneous reviews of local overdose deaths, (ii) promoting cooperation and coordination among agencies involved in investigations of overdose deaths or in providing services to surviving family members, (iii) developing an understanding of the causes and incidence of overdose deaths in the locality, (iv) developing plans for and recommending changes within the agencies represented on the local team to prevent overdose deaths, and (v) advising the Department of Health and other relevant state agencies on changes to law, policy, or practice to prevent overdose deaths. The bill authorizes a local or regional team to review the death of any person who resides in the Commonwealth and whose death was or is suspected to be due to overdose. A violation of the confidentiality of the review process is punishable as a Class 3 misdemeanor. SB 399 (2018 Acts of Assembly, c. 600).

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

**Virginia Freedom of Information Act (FOIA); record exclusion for trade secrets supplied to the Virginia Department of Transportation.** Excludes from the mandatory disclosure provisions of FOIA trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), supplied to the Department of Transportation as part of an audit, a special investigation, or any study requested by the Department of Transportation. The bill provides that in order for such trade secrets to be excluded, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary. HB 1275 (2018 Acts of Assembly, c. 470).

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

**Virginia Freedom of Information Act; exclusion; certain information held by the board of visitors of The College of William and Mary in Virginia.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain information held by the board of visitors of The College of William and Mary in Virginia (the board) relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would reveal confidential analyses prepared for the board and have an adverse effect on the value of the investment to be acquired, held, or disposed of by the board. HB 1426 (2018 Acts of Assembly, c. 58) and SB 858 (2018 Acts of Assembly, c. 141).

**§ 2.2-3705.8. Limitation on record exclusions.**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act; disclosure of law-enforcement and criminal records.** Clarifies that the discretionary exemptions contained in the Freedom of Information Act pertaining to law-enforcement and criminal records may be used by any public body. Current law only permits such exemptions to be used by public bodies engaged in criminal law-enforcement activities. The bill also restricts the application of the discretionary exemption for those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature, the release of which would jeopardize the safety or privacy of any person, to only those portions of noncriminal incident or other noncriminal investigative reports or materials that are in the possession of public bodies (i) engaged in emergency medical services, (ii) engaged in fire protection services, (iii) engaged in criminal law-enforcement activities, or (iv) engaged in processing calls for service or other communications to an emergency 911 system or any other equivalent reporting system. This bill is a recommendation of the Freedom of Information Advisory Council. HB 909 (2018 Acts of Assembly, c. 48).

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

**Virginia Freedom of Information Act; meetings held by electronic communication means.** *See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

**§ 2.2-3707.01. Meetings of the General Assembly.**

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
*See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

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

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
*See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
Removes the Freedom of Information Act 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, 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. This bill is a recommendation of the Freedom of Information Advisory Council. HB 908 (2018 Acts of Assembly, c. 56).

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

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
*See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
*See summary under § 2.2-3708, supra.* HB 908 (2018 Acts of Assembly, c. 56).

**§ 2.2-3708.2. Meetings held through electronic communication means.**

**Virginia Freedom of Information Act; meetings held by electronic communication means.**  
*See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

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

**Virginia Freedom of Information Act; disclosure of law-enforcement and criminal records.**  
*See summary under § 2.2-3706, supra.* HB 909 (2018 Acts of Assembly, c. 48).

**Local or regional overdose fatality review teams.** *See summary under § 2.2-3705.5, supra.* SB 399 (2018 Acts of Assembly, c. 600).

**§ 2.2-3714. Violations and penalties.**

**Virginia Freedom of Information Act; meetings held by electronic communication means.** *See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

**§ 30-179. Powers and duties of the Council.**

**Virginia Freedom of Information Act; meetings held by electronic communication means.** *See summary under § 2.2-3701, supra.* HB 907 (2018 Acts of Assembly, c. 55).

**Virginia Freedom of Information Act; meetings held by electronic communication means.** *See summary under § 2.2-3708, supra.* HB 908 (2018 Acts of Assembly, c. 56).

**III. Other Access-Related Legislation**

**Title 2.2 Administration of Government.**

**Virginia Public Procurement Act; designation of trade secrets and proprietary information.** Provides 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. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. HB 905 (2018 Acts of Assembly, c. 31).

**Government Data Collection and Dissemination Practices Act; sharing and dissemination of data.** Amends the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) to facilitate the sharing of data among agencies of the Commonwealth and between the Commonwealth and political subdivisions. HB 1277 (2018 Acts of Assembly, c. 597).

**Data collection and dissemination; governance.** Amends the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) to facilitate the sharing of data among agencies of the Commonwealth and between the Commonwealth and political subdivisions. The bill creates the position of Chief Data Officer of the Commonwealth (CDO), housed in the office of the Secretary of Administration, to (i) develop guidelines regarding data usage, storage, and privacy and (ii) coordinate and oversee data sharing in the Commonwealth to promote the usage of data in improving the delivery of services. The bill also creates a temporary Data Sharing and Analytics Advisory Committee (Advisory Committee) to advise the CDO in the initial establishment of guidelines and best practices and to make recommendations to the Governor and General Assembly regarding a permanent data governance structure. The bill directs the

CDO and the Advisory Committee to focus their initial efforts on developing a project for the sharing, analysis, and dissemination at a state, regional, and local level of data related to substance abuse, with a focus on opioid addiction, abuse, and overdose. This bill incorporates SB 459, SB 719, SB 804, and SB 830. SB 580 (Acts of Assembly, c. 679).

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

**Retention of case records; electronic format.** Allows the clerk of a district court to destroy the papers, records, and documents in civil and criminal cases after the case has ended if such papers, records, and documents have been microfilmed or converted to an electronic format. Under current law, such records can be destroyed after three years. Current law exceptions for records with administrative, fiscal, historical, or legal value and records for certain specified misdemeanors are retained. HB 1310 (Acts of Assembly, c. 128).

### **Title 22.1 Education.**

**Scholastic records; disclosure of directory information.** Clarifies that student directory information may be publicly disclosed by a school if the school has given notice to the parent or eligible student of (i) the types of information that the school has designated as directory information; (ii) the right of the parent or eligible student to refuse the designation of any or all of the types of information about the student as directory information; and (iii) the period of time within which a parent or eligible student must notify the school in writing that he does not want any or all of the types of information about the student designated as directory information. The bill also provides, however, that no school shall disclose the address, phone number, or email address of a student pursuant to 34 C.F.R. § 99.31(a)(11) or the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) unless the parent or eligible student has affirmatively consented in writing to such disclosure. HB 1 (Acts of Assembly, c. 806).

### **Title 36 Housing.**

**Uniform Statewide Building Code; security of certain records.** Clarifies that while information contained in engineering and construction drawings and plans for any single-family residential dwelling submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) shall not be subject to disclosure to the public under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), such information shall not be deemed confidential. HB 683 (2018 Acts of Assembly, c. 42) and SB 921 (2018 Acts of Assembly, c. 92).

### **Title 42.1 Libraries.**

**Virginia Public Records Act; records retained in electronic medium.** Provides that notwithstanding any provision of law requiring a public record to be retained in a tangible

medium, an agency may retain any public record in an electronic medium, provided that the record remains accessible for the duration of its retention schedule and meets all other requirements of the Virginia Public Records Act (§ 42.1-76 et seq.). The bill provides that this provision shall not be deemed to affect any law governing the retention of exhibits received into evidence in a criminal case in any court. HB 228 (2018 Acts of Assembly, c. 252).

## APPENDIX E

### Bills Referred to the FOIA Council by the 2018 Session of the General Assembly:

- **HB 213 (Mullin); Virginia Freedom of Information Advisory Council; formal advisory opinions; immunity from civil penalty.** Requires that formal advisory opinions issued by the Virginia Freedom of Information Advisory Council (Council) be approved by the Council and, after such approval, be published on the Council's website. The bill also provides that no officer, employee, or member of a public body shall be found to have willfully and knowingly violated certain enumerated provisions of the Freedom of Information Act if the alleged violation resulted from his good faith reliance on a formal advisory opinion of the Council made in response to his written request for such opinion and such opinion was made after a full disclosure of the facts.
- **HB 504 (Mullin); Virginia Freedom of Information Act; definition of "custodian."** Defines "custodian," for purposes of the Virginia Freedom of Information Act, as a public body or its officers, employees, or agents who (i) have prepared or (ii) own or are in possession of a public record. The bill allows for more than one custodian per record.
- **HB 664 (Kilgore); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."** Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in one public body's public record to another public body from being considered as a transfer of an entire public record. The bill also prohibits a public body from withholding a public record in its entirety on the grounds that information contained in such public record was provided by another public body. The bill defines "custodian" for purposes of the Virginia Freedom of Information Act.
- **HB 904 (Robinson); Virginia Freedom of Information Act (FOIA); general exclusion for trade secrets submitted to a public body.** Creates a general record exclusion for trade secrets submitted to a public body. The bill provides that a record is eligible for exclusion as a trade secret if the submitted information qualifies as a trade secret of the submitting entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) and requires the submitting entity to make a written request to the public body (i) invoking such exclusion upon submission of the trade secret information for which protection from disclosure is sought, (ii) identifying with specificity the trade secret information for which protection is sought, and (iii) stating the reasons why protection is necessary. The bill permits 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. The bill also permits the public body to request that the court add the

submitting entity as an additional defendant in the action. The bill provides that the general exclusion for trade secrets shall not be construed to authorize the withholding of such information that no longer meets the definition of a trade secret under the Uniform Trade Secrets Act. This bill is a recommendation of the Virginia Freedom of Information Advisory Council.

- **HB 957 (Yancey); Virginia Freedom of Information Act; definition of "custodian."** Defines "custodian," for the purposes of the Virginia Freedom of Information Act, as the official in charge of a public body or entity that has created, prepared, or revised a public record or that maintains or possesses a public record. The bill allows for more than one custodian per record.

- **HB 958 (Yancey); Virginia Freedom of Information Act (FOIA); records containing both excluded and nonexcluded information; duty to redact.** Provides that no provision of FOIA is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that information contained in the public record was provided by another public body.

- **HB 959 (Yancey); Virginia Freedom of Information Act; transfer of public records.** Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in a public body's public record to another public body from being considered a transfer of an entire public record.

- **HB 1101 (Robinson); Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every public body, except for governing boards of public institutions of higher education, afford an opportunity for public comment during any open meeting. The bill provides, however, that if a public body holds more than four meetings in a calendar year, such public body may, by recorded vote, limit the number of meetings at which an opportunity for public comment is afforded to four meetings per calendar year. The bill requires that the notice given by a public body prior to a meeting include information as to the approximate point during the meeting when public comment will be received. In current law, this requirement applies only to public bodies where at least one member has been appointed by the Governor. The bill permits public bodies to choose the approximate point during the meeting when public comment will be received and permits public bodies to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner, but prohibits public bodies from limiting public comment to only the submission of written comments.

- **HB 1329 (Tran); Government Data Collection and Dissemination Practices Act; dissemination of information concerning religious preferences and affiliations.** Prohibits any state agency maintaining an information system that

includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity. This prohibition applies even if consent is given to disseminate such information to public institutions of higher education, state facilities under Title 37.2 (Behavioral Health and Developmental Services), and juvenile correctional facilities established pursuant to Title 66 (Juvenile Justice) or Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 (Juvenile and Domestic Relations District Courts).

- **SB 336 (Peake); Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every elected public body afford an opportunity for public comment during any open meeting. The bill permits elected public bodies to choose the approximate point during the meeting when public comment will be received and to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. Such rules shall not limit public comment to only the submission of written comments. The bill requires that the notice given by any public body prior to a meeting include information as to the approximate point during the meeting when public comment will be received.
- **SB 630 (Surovell); Virginia Freedom of Information Act (FOIA); civil penalty.** Provides that in addition to any penalties imposed under FOIA, (i) if a court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of FOIA because such officer, employee, or member of a public body intentionally altered or destroyed the requested public records prior to the expiration of the applicable record retention period set by the retention regulations promulgated pursuant to the Virginia Public Records Act (§ 42.1-76 et seq.) by the State Library Board, the court shall impose upon such officer, employee, or member in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of up to \$100 per record altered or destroyed, which amount shall be paid into the Literary Fund, and (ii) if a court finds that a member of a public body voted to certify a closed meeting and at the time of such certification such certification was not in accordance with the requirements of FOIA, the court may impose on each such member voting to certify in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of \$500, which amount shall be paid into the Literary Fund.
- **SB 730 (DeSteph); Virginia Freedom of Information Act. Clarifies that the definition of "public record" does not include records that are not prepared for or used in the transaction of public business.** Clarifies that the definition of "public record" does not include records that are not prepared for or used in the transaction of public business. The bill defines "social media account" and creates a new discretionary exemption for social media records of General Assembly members when such records relate to the use of a social media account by a member in such

member's individual capacity. The bill requires the public body to be a necessary party in any enforcement proceeding.

- **SB 876 (Mason); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."** Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in one public body's public record to another public body from being considered as a transfer of an entire public record. The bill also prohibits a public body from withholding a public record in its entirety on the grounds that information contained in such public record was provided by another public body. The bill defines "custodian" for purposes of the Virginia Freedom of Information Act.

#### **FOIA Council Action on Each Bill:**

- **HB 213 (Mullin); Virginia Freedom of Information Advisory Council; formal advisory opinions; immunity from civil penalty.** Following the recommendation of the Remedies Subcommittee, the Council recommended an amended version of this bill to the 2019 Session of the General Assembly that would provide that any officer, employee, or member of a public body alleged to have willfully and knowingly violated FOIA who acted in good faith reliance upon an advisory opinion issued by the Council may introduce such advisory opinion as evidence that the alleged violation was not made willfully and knowingly.
- **HB 504 (Mullin); Virginia Freedom of Information Act; definition of "custodian."** No action taken at the request of the patron.
- **HB 664 (Kilgore); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."** No action taken at the request of the patron.
- **HB 904 (Robinson); Virginia Freedom of Information Act (FOIA); general exclusion for trade secrets submitted to a public body.** Following the recommendation of the Records Subcommittee, the Council recommended an amended version of this bill to the 2019 Session of the General Assembly that would define "trade secrets" to mean the same as that term is used in the Uniform Trade Secrets Act (§ 58.1-336 et seq.).
- **HB 957 (Yancey); Virginia Freedom of Information Act; definition of "custodian."** No action taken at the request of the patron.
- **HB 958 (Yancey); Virginia Freedom of Information Act (FOIA); records containing both excluded and nonexcluded information; duty to redact.** No action taken at the request of the patron.

- **HB 959 (Yancey); Virginia Freedom of Information Act; transfer of public records.** No action taken at the request of the patron.
- **HB 1101 (Robinson); Virginia Freedom of Information Act; right to speak at open meetings.** The Council recommended addressing this issue through guidance rather than legislation. To this end, the Council adopted and published a policy statement encouraging public bodies to hold public comment periods at public meetings as a matter of best practices.
- **HB 1329 (Tran); Government Data Collection and Dissemination Practices Act; dissemination of information concerning religious preferences and affiliations.** Following the recommendation of the Records Subcommittee, the Council recommended an amended version of this bill to the 2019 Session of the General Assembly that adds language to account for state and federal laws that specifically require the collection or dissemination of such information (for example, student financial aid applications).
- **SB 336 (Peake); Virginia Freedom of Information Act; right to speak at open meetings.** As with HB 1101, above, the Council recommended addressing this issue through guidance rather than legislation. To this end, the Council adopted and published a policy statement encouraging public bodies to hold public comment periods at public meetings as a matter of best practices.
- **SB 630 (Surovell); Virginia Freedom of Information Act (FOIA); civil penalty.** The bill was referred to the Remedies Subcommittee, which recommended an amended version, but after further consideration the FOIA Council voted to take no action on the bill.
- **SB 730 (DeSteph); Virginia Freedom of Information Act. Clarifies that the definition of "public record" does not include records that are not prepared for or used in the transaction of public business.** Following consideration by the Records Subcommittee, the Council recommended an amended version of this bill to the 2019 Session of the General Assembly that would provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member.
- **SB 876 (Mason); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."** No action taken at the request of the patron.



## APPENDIX F

### Breakdown of Inquiries to Council December 1, 2017, through November 30, 2018

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 email. 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, 2017, through November 30, 2018

Total number of inquiries: 1,889

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>July</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Total</b>
Government	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Citizens	0	1	1	1	0	1	0	0	4	0	1	0	<b>9</b>
News Media	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
<b>TOTAL</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>4</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>9</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>TOTAL</b>
Government	76	102	95	126	107	91	96	94	123	76	103	79	<b>1168</b>
Citizens	26	46	55	59	47	46	58	48	77	39	49	46	<b>596</b>
News Media	13	9	20	12	3	7	3	14	10	14	6	5	<b>116</b>
<b>TOTAL</b>	<b>115</b>	<b>157</b>	<b>170</b>	<b>197</b>	<b>157</b>	<b>144</b>	<b>157</b>	<b>156</b>	<b>210</b>	<b>129</b>	<b>158</b>	<b>130</b>	<b>1880</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>TOTAL</b>
Government	76	102	95	126	107	91	96	94	123	76	103	79	<b>1168</b>
Citizens	26	47	56	60	47	47	58	48	81	39	50	46	<b>605</b>
News Media	13	9	20	12	3	7	3	14	10	14	6	5	<b>116</b>
<b>TOTAL</b>	<b>115</b>	<b>158</b>	<b>171</b>	<b>198</b>	<b>157</b>	<b>145</b>	<b>157</b>	<b>156</b>	<b>214</b>	<b>129</b>	<b>159</b>	<b>130</b>	<b>1889</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	0	0	0
Citizens	7	4	2
News Media	0	0	0
<b>TOTAL</b>	<b>7</b>	<b>4</b>	<b>2</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	739	229	294
Citizens	396	47	208
News Media	73	19	35
<b>TOTAL</b>	<b>1208</b>	<b>295</b>	<b>537</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	739	229	294
Citizens	403	51	210
News Media	73	19	35
<b>TOTAL</b>	<b>1215</b>	<b>299</b>	<b>539</b>

## APPENDIX G

### OPINIONS ISSUED BY THE COUNCIL DECEMBER 2009 THROUGH NOVEMBER 2018

The purpose of this appendix is to show trends over time. In order to save space, we have chosen to present a 10-year timespan 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:

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Government</b>	3	2	3	3	2	1	3	0	5	0
<b>Citizens</b>	10	3	4	2	5	2	3	2	3	9
<b>News Media</b>	0	1	0	0	3	3	3	1	0	0

Informal Opinions:

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Government</b>	910	899	820	846	872	873	802	1,058	1,134	1,168
<b>Public</b>	618	620	560	433	452	467	467	561	588	596
<b>News Media</b>	150	165	152	124	173	148	146	108	112	116

Total Number of Opinions:

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Government</b>	913	901	823	849	874	874	805	1,058	1,139	1,168
<b>Public</b>	628	623	564	435	457	469	470	563	591	605
<b>News Media</b>	150	166	152	124	176	151	149	109	112	116
<b>GRAND TOTAL</b>	1,691	1,690	1,539	1,408	1,507	1,494	1,424	1,730	1,842	1,889