

STATUS OF FREEDOM OF INFORMATION AND OTHER ACCESS-RELATED BILLS

2018 FOIA LEGISLATIVE UPDATE

I. Introduction

The General Assembly passed a total of nine bills amending the Virginia Freedom of Information Act (FOIA) during the 2018 Session. Five bills passed the General Assembly that were recommended by the FOIA Council: HB 905, which 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, which clarifies the definition of electronic communication; HB 907, which consolidates existing provisions concerning public meetings conducted by electronic means; HB 908, which 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, which 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 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 clarifying the exemption in § 2.2-3705.2.
- 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 permits such exemptions to be used only 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 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 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 the Virginia Freedom of Information Act 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 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. 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 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. 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 Virginia 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 permits such exemptions to be used only 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).