



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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## **Report of the Virginia Freedom of Information Advisory Council Pursuant to HJR 96 (2014) December 2016**

### **EXECUTIVE SUMMARY**

The Virginia Freedom of Information Advisory Council (the Council) completed its third and final year of study of the Virginia Freedom of Information Act (FOIA) pursuant to House Joint Resolution No. 96 (HJR 96, 2014) on December 5, 2017. The resolution directed the Council to (i) study all exemptions contained in FOIA and determine the continued applicability or appropriateness of such exemptions, (ii) determine whether FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate, (iii) examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA, and (iv) report its findings and recommendations by December 1, 2016. The Council was required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties as part of its study.

At its first meeting on April 22, 2014, the Council approved a study plan that (i) provided for the formation of two subcommittees, one to study records exemptions and the other to study open meeting exemptions and other FOIA provisions related to meetings; (ii) set out a timetable for the exemption review by each Subcommittee; and (iii) included in the study a review of any FOIA bills that may be referred by the General Assembly over the course of the study. In reviewing exemptions, the Subcommittees were directed to give consideration to the following factors to help determine the appropriateness of any exemption:

- The public policy advanced by the exemption—protection of the public good (protection of the public purse or of the public bargaining, negotiating, or litigating position) versus the protection of private interests (privacy or proprietary interests);

- The application of the attorney/client or other recognized privilege(s);
- Whether there was a clear understanding of the nature and scope of records or meetings subject to an exemption, especially in light of the narrow construction rule found in FOIA at § 2.2-3700 of the Code of Virginia;
- Whether there was a need/desire to (a) update or clarify terminology or (b) remove obsolete or redundant exemptions;
- The impact of court decisions, and opinions of the Attorney General and the FOIA Council, on an exemption;
- Legislative history and intent, to the extent available, of an exemption and whether the exemption clearly reflects the intent of the General Assembly; and
- Whether there exist comparable provisions in other states' FOIA laws that may offer a preferred way of addressing the underlying public policy for which the exemption was granted.

In addition to having meeting notices posted on the Council website and sent to the Council's mailing list, the Council devised a process to notify each affected state or local agency of the timetable of review as well as the standard for review of exemptions. The Council also decided that rather than introduce individual legislative recommendations as separate bills while the study was ongoing, it would recommend for the 2017 Regular Session one or more omnibus bills at the conclusion of the study. Meetings of the two Subcommittees were generally informal and reflected the Subcommittees' preference for dialogue among the study participants over a more formal process. At each meeting, public comment was solicited to ensure the free exchange of ideas between all interested parties and to find consensus where possible. Consensus led to legislative proposals, which were posted on the Council's website to give wider notice of the proposals and to allow time for reflection before being acted upon formally by a Subcommittee. Frequently, such proposals were the subject of discussion at two or more meetings before action was taken by the Subcommittee. Ultimately, the Council recommended two omnibus bills—one bill incorporating the recommendations of the Records Subcommittee and the other incorporating the recommendations of the Meetings Subcommittee. At its meeting on December 5, 2016, the Council voted unanimously to recommend these two omnibus bills to the 2017 Session of the General Assembly.

The Records Subcommittee met 18 times during the course of the study. The Records Subcommittee systematically reviewed all of the records exemption sections of FOIA (§§ 2.2-3705.1 through 2.2-3706), as well as relevant FOIA definitions (§ 2.2-3701) and the procedures for making and responding to a public records request (§ 2.2-3704). A Proprietary Records Work Group, which met four times in 2015 and once in 2016, was created by the Records Subcommittee. That Work Group did not reach consensus to move forward, and, due to time constraints, the Records Subcommittee recommended that the issue of proprietary records and trade secrets continue to be studied in 2017, which recommendation was adopted by the Council. The Records Subcommittee also formed a Personnel Records Work Group in 2016,

which met three times to study the personnel records exemption (subdivision 1 of § 2.2-3705.1) and to attempt to define the term “personnel records.” This Work Group also did not reach a consensus to move forward with a definition, and the Council decided to continue studying the issues related to personnel records in 2017. The Records Subcommittee formed a DHRM Records Work Group in 2015, which met once and recommended removing a DHRM-specific exemption that exempts records already exempt as personnel records. In three years of study, the Records Subcommittee considered 33 different legislative proposals addressing concerns raised about particular exemptions, of which it recommended 17 proposals to the Council. These 17 recommendations were approved by the Council and were ultimately incorporated into the Records Omnibus draft (HB 1539).

The Meetings Subcommittee met 17 times over the course of the study. The Meetings Subcommittee systematically reviewed all of the closed meeting exemptions in FOIA (approximately 48 exemptions in total) and also studied closed meetings procedures, electronic meetings and remote participation by members of a public body, and relevant definitions contained in FOIA. The Meetings Subcommittee considered 14 different legislative proposals, of which it recommended eight proposals to the Council. These eight recommendations were approved by the Council and were ultimately incorporated into the Meetings Omnibus draft.

Summaries of the Records Subcommittee’s and Meetings Subcommittee’s work, including agendas, recommendations, and other materials, are available on the Council’s website and are incorporated into the Final FOIA Study Report of the Council.

## **Final Recommendations**

Two omnibus bills, one bill incorporating the Council-approved recommendations of the Records Subcommittee and the other incorporating the Council-approved recommendations of the Meetings Subcommittee,<sup>1</sup> were recommended by the Council. Appendix B provides a summary of each legislative recommendation.

### ***1. Substantive Changes***

As a result of the study, the Council recommended several substantive changes to FOIA. These substantive changes are as follows:

HB 1539, the Records Omnibus bill:

- Eliminates the “correspondence” exemption for the Office of the Governor; the Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of

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<sup>1</sup> House Bills 1539 (2017) and 1540 (2017), respectively.

- any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia<sup>2</sup> (§ 2.2-3705.7);
- Adds the requirement that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed “working papers” (§ 2.2-3705.7);
  - Includes school boards in the requirement for posting a FOIA Rights and Responsibilities document on their websites to assist citizens in obtaining records (§ 2.2-3704.1);
  - Protects personal information of citizens in the following instances:
    - Designated survivors and authorized individuals under the Virginia College Savings Plan (§ 2.2-3705.4);
    - Postemployment benefits, other than pensions for local government employees (§§ 2.2-3705.7 and 2.2-3711);
  - Eliminates the record exemption for certain operational and marketing strategies of the yet-to-be created Alcoholic Beverage Control Authority (§§ 2.2-3705.7 and 2.2-3711);

HB 1540, the Meetings Omnibus bill:

- Redefines “regional public body” (§ 2.2-3701);
- Adds the requirement that notices of meetings be posted on government websites (§ 2.2-3707);
- Adds the requirement that notices of continued meetings be given, regardless if the meeting is held by traditional or electronic communication means (§§ 2.2-3707 and 15.2-1416);
- Adds the requirement that a proposed agenda must be included with agenda packets available to the public (§ 2.2-3707);
- Limits discussion in closed meetings of certain museum boards to specific gifts, bequests, or grants from private sources (§ 2.2-3711);
- Allows closed meetings for discussion by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for postemployment benefits other than pensions (§ 2.2-3711);
- Limits closed meeting discussions held by the Board of Visitors of Virginia Commonwealth University (VCU) and the VCU Health System Authority (§ 2.2-3711); and
- Limits remote participation by a member of a public body due to a personal matter to two meetings per year (§ 2.2-3708.1).

## ***2. Clarifying Amendments***

The Council also recommended several clarifying amendments to FOIA. These clarifying amendments include:

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<sup>2</sup> NOTE: To the extent that any correspondence meets the definition of a "working paper" for the public officials identified above, it may be withheld from the mandatory disclosure provisions of FOIA.

HB 1539, the Records Omnibus bill:

- Revises the definition of “public record” (§ 2.2-3701);
- Clarifies citizen rights to inspect or receive copies of public records (§ 2.2-3704);
- Creates uniform reference to government websites (“official public government website”) (§ 2.2-3704.1 et seq.);
- Merges general provisions relating to personnel records into one section (§ 2.2-3705.1);
- Clarifies that the name of a public employee is subject to mandatory disclosure in the context of requests for position and salary information (§ 2.2-3705.1);
- Creates a definition of “personal contact information” (§ 2.2-3705.1);
- Consolidates public safety exemptions (Nos. 4, 6, and 14) relating to security of buildings, people in buildings, critical infrastructure, cybersecurity, and the Statewide Agencies Radio System (STARS) (§ 2.2-3705.2);
- Updates terminology for “telecommunications provider” to “communications services provider” (§ 2.2-3705.2); and
- Consolidates the exemptions for Department of Health Professions (Nos. 8, 11, and 15).

HB 1540, the Meetings Omnibus bill:

- Removes references to the Commonwealth Calendar in favor of “a central electronic calendar” (§ 2.2-3707 et seq.);
- Separates the closed meeting exemption for legal matters and litigation into two distinct exemptions (§ 2.2-3711);
- Clarifies the purposes for which closed meetings may be held in an effort to better distinguish the “subject” of a closed meeting from its “purpose” (§ 2.2-3712); and
- Provides better context for open meeting exemptions in an effort to better inform citizens of the topic of discussions allowed and by whom such discussions may be made (§ 2.2-3711).

### ***3. Removal of Obsolete or Redundant Provisions***

Finally, the Council also recommended the removal of obsolete or redundant provisions contained in FOIA. These deletions are as follows:

HB 1539, the Records Omnibus bill:

- Deletes subdivision 8 of § 2.2-3705.3, relating to Department of Human Resource Management investigations, as redundant of the personnel record exemption;
- Deletes subdivision 7 in § 2.2-3705.5, relating to data formerly held by the Commissioner of Health, as obsolete;

- Deletes subdivision 13 in § 2.2-3705.7, relating to names and addresses of persons subscribing to *Wildlife Magazine*, as obsolete; and
- Deletes subdivision 30 in § 2.2-3705.7 as redundant of the definition of “public record.”

HB 1540, the Meetings Omnibus bill:

- Deletes the reference to informal gatherings of the General Assembly (§ 2.2-3707) as obsolete;
- Deletes the reporting requirement to the Joint Commission on Science and Technology (§ 2.2-3708) as redundant (these reports go to the FOIA Council); and
- Deletes references to local crime commissions (§ 2.2-3711) as obsolete.

### ***Continuation of Study Issues to 2017:***

Despite a very active three years of study, the Council was unable to achieve the goals set out in its original study plan. This was due in part to the time constraints imposed by HJR 96 and in part by the lack of consensus among interested parties concerning larger issues related to personnel records and proprietary/trade secret records. The Council, however, is committed to a complete review of all of the provisions of FOIA and has declared that the following issues will be considered during the 2017 interim:

- The proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Council recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017, as efforts were unsuccessful in reaching consensus to create a general exemption for trade secrets and proprietary records;*
- Review of FOIA provisions in light of the advancement in technology;
- FOIA policy statement. *At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that “Any public body procuring any computer system, equipment, or software shall ensure that the proposed system, equipment, or software is capable of producing public records in accordance with this chapter.” It is believed that inclusion of this statement in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA;*
- Definitions;
- “Vendor proprietary information software” is exempt from release under subdivision 6 of § 2.2-3705.1, vis-à-vis the exemption for software “developed by or for a state agency.....” in subdivision 7 of § 2.2-3705.1;
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1);
- Texting among members during public meetings and its impact on open meeting provisions;
- Access to law-enforcement records (§ 2.2-3706);
- Personnel records (§ 2.2-3705.1);
- Enforcement of FOIA; penalties for violations; and
- Reorganization of FOIA. *Examine the organizational structure of FOIA and make recommendations to improve its readability and clarity.*

## APPENDIX A PROPOSED STUDY PLAN BY YEAR AND CODE SECTION

PROPOSED STUDY PLAN BY YEAR AND CODE SECTION		
<b>2014 Records</b>	2.2-3705.1.	Exclusions to application of chapter; exclusion of general application to public bodies.
	2.2-3705.6.	Exclusions to application of chapter; proprietary records and trade secrets.
	2.2-3705.7.	Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.
	2.2-3705.8.	Limitation on record exclusions.
<b>2014 Meetings</b>	2.2-3707.	Meetings to be public; notice of meetings; records; minutes.
	2.2-3707.01.	Meetings of the General Assembly.
	2.2-3707.1.	Posting of minutes for state boards and commissions.
	2.2-3708.	Electronic communication meetings; applicability; physical quorum required; notice; report.
	2.2-3708.1	Participation in meetings in event of emergency; certain disabilities; distance from meeting location for certain public bodies.
	2.2-3709.	Expired.
	2.2-3710.	Transaction of public business other than by votes at meetings prohibited.
	2.2-3711.	Closed meetings authorized for certain limited purposes.
	2.2-2712.	Closed meetings procedures; certification of proceedings.
<b>2015 Records #1</b>	2.2-3705.2.	Exclusions to application of chapter; records relating to public safety.
	2.2-3705.3.	Exclusions to application of chapter; records relating to administrative investigations.
<b>2015 Records #2</b>	2.2-3705.4.	Exclusions to application of chapter; educational records and certain records of educational institutions.
	2.2-3705.5.	Exclusions to application of chapter; health and social services records.
<b>2016 General Provisions</b>	2.2-3700	Short title; policy.
	2.2-3701.	Definitions.
	2.2-3702.	Notice of chapter.
	2.2-3703.	Public bodies and records to which chapter

<b>PROPOSED STUDY PLAN BY YEAR AND CODE SECTION</b>		
		inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.
	2.2-3704.	Public records to be open to inspection; procedure for requesting records and responding to request; charges.
	2.2-3704.1.	Posting of notice of rights and responsibilities by state public bodies; assistance by the Freedom of Information Advisory Council.
	2.2-3713.	Proceedings for enforcement of chapter.
	2.2-3714.	Violations and penalties.



## **APPENDIX B**

### **Council-recommended Legislation for the 2017 Session of the General Assembly**

#### **HB 1549**

##### **SUMMARY TEXT:**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies.** Clarifies the definition of public record. The bill also (i) defines “personal contact information” that is excluded from FOIA's mandatory disclosure provisions in certain cases; (ii) clarifies that a requester has the right to inspect records or receive copies at his option; (iii) clarifies language in certain record exclusions under FOIA that certain records may be disclosed at the discretion of the custodian; (iv) consolidates the personnel record exclusion with the limitation on the application of that exclusion, and specifically clarifies that the name, in addition to position, job classification, and salary, of a public employee is public information as per opinions of the Attorney General and the FOIA Council; (v) eliminates, effective July 1, 2018, the exclusion for the Alcoholic Beverage Control Authority relating to operating and marketing strategies; (vi) eliminates the exclusion for correspondence of local officials as unnecessary; (vii) consolidates various public safety exclusions relating to building plans and drawings and critical infrastructure into a single exclusion; (viii) eliminates the exclusion for administrative investigations of the Department of Human Resource Management, as the exclusion is already covered under the personnel records exclusion; (ix) expands the exclusion for personal information provided to the Virginia College Savings Plan to cover qualified beneficiaries, designated survivors, and authorized individuals, which terms are defined in the bill; (x) consolidates the various record exclusions for the Department of Health Professions and the Department of Health into single exclusions for each Department; (xi) clarifies certain Department of Social Services exclusions; (xii) provides an exclusion for local finance boards that provide postemployment benefits other than pensions; and (xiii) eliminates the record exclusion for Virginia Wildlife Magazine. The bill also eliminates the correspondence exclusion for certain state and local officials. The bill contains numerous technical amendments. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016).

#### **HB 1540**

##### **SUMMARY TEXT:**

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** Revises FOIA's various open meeting exemptions relating to legal matters, litigation, certain museums, and the Virginia Commonwealth University Health

System Authority. The bill also (i) clarifies where meeting notices and minutes are to be posted, (ii) requires copies of proposed agendas to be made available, (iii) eliminates reporting to the Joint Commission on Science and Technology when a state public body convenes an electronic communication meeting, and (iv) makes technical corrections to several open meeting exemptions to provide context for those meeting exemptions that currently only cross-reference corollary records exemptions. The bill also clarifies closed meeting procedures. The bill contains numerous technical corrections. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016).