



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

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



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

Clifton A. "Chip" Woodrum, *Chairman*
R. Edward Houck, *Vice-Chairman*
David E. Anderson
John Stewart Bryan, III
John B. Edwards
Frank S. Ferguson
David Hallock
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Martika A. Parson
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Maria J.K. Everett, *Executive Director*
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**REPORT OF THE
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**To: The Honorable James S. Gilmore, III, Governor of Virginia
and
The General Assembly of Virginia**

**Richmond, Virginia
December 2000**

Introduction

“Finding that the creation of a small, independent office that emphasized the importance of training, the quick resolution of FOIA disputes, and the issuance of nonbinding, advisory opinions were both feasible and desirable, the joint subcommittee recommended to the 2000 Session of the General Assembly the creation of the Virginia Freedom of Information Advisory Council (i) to assist the citizens of the Commonwealth in gaining ready access to records in the custody of public officials and free entry to meetings of public bodies wherein public business is being conducted and (ii) to assist state and local government officials in meeting their statutory obligations through training, publication of educational materials, and quick response to questions.”¹

The Freedom of Information Advisory Council (the “Council”), established by the 2000 Session of the General Assembly², officially began operation on July 21, 2000. The Council was created as an advisory council in the legislative branch to encourage and facilitate compliance with the Freedom of Information Act. As directed by statute, the Council is tasked with furnishing, upon request, advisory opinions regarding the Freedom of Information Act (FOIA) to 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.³ 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.

¹ Report of the Joint Subcommittee Studying Virginia’s Freedom of Information Act, House Document No. 106 (2000).

² Chapters 917 and 987 of the 2000 Acts of Assembly.

³ Article 2 (§ 2.1-346.2 et seq.) of Chapter 21 of Title 2.1 of the *Code of Virginia*.

The Council is composed of 12 members: Delegate Clifton A. "Chip" Woodrum of Roanoke; Senator R. Edward Houck of Spotsylvania; Frank S. Ferguson, designee of the Attorney General; Nolan T. Yelich, Librarian of Virginia; E.M. Miller, Jr., director of the Division of Legislative Services; David Hallock of Richmond, with the law firm of Williams, Mullen, Clark and Dobbins; J. Stewart Bryan, III, of Richmond, chairman, president and chief executive officer of Media General, Inc.; W. Wat Hopkins of Blacksburg, associate professor, Virginia Tech; John B. Edwards of Smithfield, editor of the Smithfield Times; Roger C. Wiley of Richmond, partner, Hefty and Wiley; David E. Anderson, of Richmond, partner, McGuire Woods Battle & Boothe; and Martika A. Parson, of Richmond, with the Office of the Attorney General. The Division of Legislative Services provides staff support to the Council.

By issuing 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. Although the Council has no authority to mediate disputes, it can be called upon as a resource to help fashion creative solutions in an attempt to remedy a dispute. The success of Council should be judged by the number of disputes that have been resolved, not by the number of opinions issued. The Council is a resource for the public, representatives of state and local government, and members of the media. It is the mission of the Council to give reasonable effect to the intent of the law and to give the right answer regardless of who is asking the question.

Work of the Council

The Council met three times since it began operations in July 2000. At its organizational meeting held on August 15, 2000, in Richmond, the Council agreed that the day-to-day operations of the Council would be vested in its executive director. The Council also discussed (i) conducting training seminars at least annually, (ii) the creation and maintenance of a Council website to make the work of the Council and information related to FOIA generally more accessible to anyone interested in public access issues; and (iii) the publication of educational materials to assist state and local government officials, the media, and citizens in complying with FOIA. A direct telephone line and a toll-free number were established at the Division of Legislative Services to handle FOIA inquiries.

At its second meeting on September 20, 2000, the Council began deliberations on electronic communications (e-mails, etc.) and how they should be treated under FOIA in the context of both open records and open meetings. Are e-mails like paper or are they written conversation? It was suggested that they may be both. The Council reviewed the Library of Virginia's guidelines, adopted pursuant to the Virginia Public Records Act, on electronic communications in the context of records retention.

On November 29, 2000, the Council continued its examination of electronic communications as it relates to public access issues under FOIA. C. Preston Huff, State Records Administrator at the Library of Virginia and Bob Nawrocki, Electronic Records Coordinator at the Library of Virginia, prepared a presentation for the council discussing electronic communications and the Virginia Public Records Act. It was noted that the Public Records Act and the Freedom of Information Act take similar approaches to e-mail. By itself, e-mail is not a record, but is a means of conveying various types of information much like a piece of paper or microfilm. The presentation covered retention schedules for various records, and noted that the same schedules applied to information conveyed via e-mail as paper. Essentially, e-mail should not be treated any differently than paper from a records perspective.

The Council also heard from Bill Wilson, Director of the Division of Legislative Service's Automated Systems, on the nature of electronic communications from a technical perspective (i.e., the distinctions between e-mail, instant messaging, off-line-mail, and chat rooms). Mr. Wilson addressed key highlights of several means of electronic communication. He covered conference calls; private networks; the Internet, which includes e-mail; news and discussion groups; instant messaging; chat rooms; and commercial hybrids. For each of these modes of communications, Mr. Wilson described how they worked and the types of communications for which each might be valuable.

The issues discussed in the presentations posed many interesting albeit difficult questions in the realm of public records and electronic communication's effect on the application of the Freedom of Information Act. The council will continue to examine these issues at future meetings.

Services Rendered by the Council

The Council offers advice and guidance orally and in writing to the public, representatives of state and local government, and members of the news media. Since July 21, 2000, with its staff of two, the Council responded to more than 100 telephone inquiries and prepared eight written advisory opinions. In addition, the executive director gave 11 presentations before government and news media organizations, on campus and in public forums. A listing of these presentations follows as Appendix B.

Statistical Summaries

At the direction of the Council, the staff has kept logs regarding telephone inquiries. In an effort to identify the uses of the Council's services, the logs have characterized callers as members of the public, state agency officials, local government officials, state legislators, and members of the news media. A similar breakdown has been developed with respect to requests for written advisory opinions.

In its four months of operation, the staff of the Council has prepared eight written advisory opinions. A listing of these opinions and a brief description of the opinions follow as Appendix C. With respect to telephone inquiries, the number was 100. Based on the number of inquiries received for the period July 21, 2000, through November 30, 2000, the Council anticipates that it will provide FOIA advice and guidance orally and in writing to approximately 500 citizens of the Commonwealth by the end of its first year.⁴ For comparison purposes, the New York Committee on Open Government, upon which this office is based, generally fields between 800 and 900 inquiries each year, after having been in operation for 25 years.

Written Advisory Opinions

Among the opinions, the total by group is as follows:

| | |
|----------------------------|---|
| Members of the Public | 3 |
| Local Government Officials | 3 |
| Members of the News Media | 1 |
| State Agency Officials | 1 |
| State Legislators | 0 |

Telephone Inquiries

The profile among those callers is as follows:

| | |
|----------------------------|----|
| Members of the Public | 43 |
| Local Government Officials | 25 |
| Members of the News Media | 21 |
| State Agency Officials | 17 |
| State Legislators | 3 |

⁴ This number also includes advice to state and local government officials and media representatives.

All Inquiries to the Council

Total number of inquiries (via phone, letter, email) 141

Number of inquiries received by:

Public: 54
 Media: 33
 Government: 54

Number of pending responses (as of 11/29): 10

Number of formal responses via written opinion: 8

Number of inquiries received concerning:

Records: 85
 Meetings: 42
 Other (privacy issues, role of FOIA Council, etc.) 12

Note: some requests posed questions regarding both records and meetings, and have been counted accordingly.

Number of inquiries received about each of the following:

| | |
|---|----|
| Mechanics of FOIA (i.e. how does one make a request, proper procedure to close a meeting, what to do if a request is denied, etc.) | 37 |
| FOIA Definitions (i.e. is a described body a public body, does a described situation constitute a meeting, what is official business, etc.) | 11 |
| Specified meetings or records of a particular public body | 21 |
| Subcommittee meetings | 1 |
| Who may request records | 3 |
| Law enforcement records | 10 |
| Personnel records | 6 |
| Investigative records of public bodies (non-law enforcement) | 5 |
| School records | 5 |
| Working papers | 2 |
| Licensing records | 2 |
| Documents related to administrative hearings | 2 |

Number of inquiries received about each of the following (continued):

| | |
|---|---|
| Court documents | 1 |
| Access to test results | 1 |
| Records prepared for litigation and attorney-client privilege | 3 |
| Social or chance meetings of public officials | 3 |
| Contract discussions | 2 |
| Personnel discussions | 2 |
| Privacy issues | 1 |
| Inmate requests for records | 1 |
| Dissemination of credit card information | 1 |
| Records retention | 1 |
| -mail | 2 |
| Role of the FOIA Advisory Council | 3 |
| Questions outside the scope of FOIA | 9 |

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. Since the launching of the Council's website on August 1, 2000, the Council has received approximately 900 "hits," averaging 26 hits per day. While still under construction, the Council's website provides (i) access to the Freedom of Information law, (ii) access to the Council's meeting schedule, including meeting summaries, (iii) access to the membership and staff of the Council, and (iv) links to other Virginia resources, including the Virginia Public Records Act, FOIA Overview with frequently asked questions, and FOIA summary and compliance tips from the Office of the Attorney General. It is expected that written advisory opinions and an index thereto will be available on the Council's website by January 2001.

FOIA Workshops

FOIA training workshops were conducted the week of October 23-27 at the following locations statewide: Norfolk; Richmond, Charlottesville, and Wytheville. In addition to the FOIA Council, these statewide workshops were sponsored by the Office of the Attorney General, the Virginia Administrative Law Advisory Committee, the Virginia Association of Broadcasters, the Virginia Association Chiefs of Police, the Virginia Association of Counties, the Virginia Bar Association, the Virginia Coalition for Open Government, the Virginia Community College System, the Virginia Department of Criminal Justice Services, the Virginia Local Government Attorneys Association, the Virginia Municipal League the Virginia Press Association, the Virginia Sheriff's

Association, and the Virginia School Boards' Association. The workshops reached approximately 500 persons statewide and offered continuing legal education (CLE) credit required for attorneys by the Virginia State Bar to sustain their licenses to practice law and criminal justice credits as required by the Virginia Department of Criminal Justice Services for law-enforcement officials.

Educational Materials

The Council, in cooperation with the Virginia Coalition on Open Government, produced a public service poster titled *Open Government—It's your call. 1-866-448-4100*. The poster currently is being distributed to state and local officials to publicize the existence of the Council as well as its role to encourage and facilitate compliance with FOIA.

The Council is currently working on additional educational materials, including consideration of a handbook on public access laws for law-enforcement, FOIA request and response forms, and a sample motion form for public bodies to convene in a closed meeting.

Appendix A

CHAPTER 917

An Act to amend the Code of Virginia by adding in Chapter 21 of Title 2.1 an article numbered 2, consisting of sections numbered 2.1-346.2 through 2.1-346.5, relating to the Freedom of Information Act; creation of the Virginia Freedom of Information Advisory Council.

[H 551]

Approved April 9, 2000

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 21 of Title 2.1 an article numbered 2, consisting of sections numbered 2.1-346.2 through 2.1-346.5, as follows:

Article 2.

Virginia Freedom of Information Advisory Council.

§ 2.1-346.2. Virginia Freedom of Information Advisory Council; membership; terms; quorum; compensation.

A. The Virginia Freedom of Information Advisory Council (the Council) is hereby created as an advisory council in the legislative branch to encourage and facilitate compliance with the Freedom of Information Act. The Council shall be composed of twelve members as follows: the Attorney General or his designee; the Librarian of Virginia or his designee; the Director of the Division of Legislative Services or his designee; four members appointed by the Speaker of the House of Delegates, one of whom shall be a member of the House of Delegates, and three citizen members, at least one of whom shall be or have been a representative of the news media; three

members appointed by the Senate Committee on Privileges and Elections, one of whom shall be a member of the Senate, one of whom shall be or have been an officer of local government, and one citizen member; and two citizen members appointed by the Governor, one of whom shall not be a state employee. The local government representative shall be selected from a list recommended by the Virginia Association of Counties and the Virginia Municipal League. The citizen members may be selected from a list recommended by the Virginia Press Association, the Virginia Association of Broadcasters, and the Virginia Coalition for Open Government, after due consideration of such list by the appointing authorities.

B. Initial appointments to the Council shall be for the following terms: of those nonlegislative members appointed by the Speaker of the House of Delegates, one shall serve a four-year term, one shall serve a three-year term and one shall serve a two-year term; of those nonlegislative members appointed by the Senate Committee on Privileges and Elections, one shall serve a four-year term and one shall serve a three-year term; and of those members appointed by the Governor, one shall serve a four-year term and one shall serve a three-year term. Thereafter, all such appointments shall be for terms of four years, except that appointments to fill vacancies shall be for the unexpired terms in the same manner as the original appointment. No member shall be eligible to serve for more than two successive four-year terms. However, after the expiration of a term of three years or less, or after the expiration of the remainder of a term to which appointed to fill a vacancy, two additional terms may be served by such member if appointed thereto. Legislative members and other state government officials shall serve terms coincident with their terms of office.

C. The members of the Council shall elect from among their membership a chairman and a vice-chairman for two-year terms. The chairman and vice-chairman may not succeed themselves to the same position. The Council shall hold meetings quarterly or upon the call of the chairman. A majority of the Council shall constitute a

quorum.

D. Members of the Council shall receive no compensation for their services but shall be reimbursed for all reasonable and necessary expenses incurred in the discharge of their duties as provided in §§ 2.1-20.10 and 30-19.12, as appropriate.

§ 2.1-346.3. Powers and duties of the Council.

The Council shall:

1. Furnish, upon request, advisory opinions or guidelines, and other appropriate information regarding the Freedom of Information Act (§ 2.1-340 et seq.) to any person or agency of state or local government, in an expeditious manner;

2. Conduct training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of the Freedom of Information Act;

3. Publish educational materials as it deems appropriate on the provisions of the Freedom of Information Act;

4. Request from any agency of state or local government such assistance, services and information as will enable the Council to effectively carry out its responsibilities. Information provided to the Council by an agency of state or local government shall not be released to any other party unless authorized by such agency;
and

5. Report annually on or before December 1 of each year on its activities and findings regarding the Freedom of Information Act, including recommendations for changes in the law, to the Governor and the General Assembly.

§ 2.1-346.4. Staff.

Staff assistance to the Council shall be provided by the Division of Legislative Services. Staff shall perform those duties assigned to it by the Council.

§ 2.1-346.5. Cooperation of agencies of state and local government.

Every department, division, board, bureau, commission, authority or political

subdivision of the Commonwealth shall cooperate with, and provide such assistance to, the Council as the Council may request.

2. That the provisions of this act shall expire on July 1, 2002.

Appendix B

Training/Education Presentations

An important aspect of the Council's work involves efforts to educate by means of seminars, workshops, and various public presentations.

From July 21, 2000 through the end of November 2000, the staff gave approximately 11 presentations, which are identified below by interest group in chronological order.

| | |
|----------------------|--|
| August 12, 2000 | Richmond City School Board City Hall, Richmond, VA |
| October 12, 2000 | College Communicators Association James Madison University Harrisonburg, VA |
| October 23, 2000 | Virginia Municipal League Annual Conference Arlington, VA |
| October 24 -27, 2000 | FOIA Workshops Norfolk, Richmond, Wytheville, and Charlottesville, VA |
| November 3, 2000 | Virginia Coalition for Open Government Access 2000 Stratford Hall, VA |
| November 13, 2000 | Virginia Association of Counties 66 th Annual Conference Warm Springs, VA |
| November 14, 2000 | Tidewater Mediation Network Virginia Beach, VA |
| November 28, 2000 | WVTF Public Radio Roanoke, VA |

Appendix C

WRITTEN ADVISORY OPINIONS ISSUED JULY 21, 2000 THROUGH NOVEMBER 29, 2000

| <u>Opinion No.</u> | <u>Issue(s)</u> |
|--------------------|--|
| AO-1 | Inquiries as to the status of e-mail under the Freedom of Information Act, charges for electronic records, the working papers exemption, assessment of fees for producing a requested record, the meaning of "reasonable specificity." |
| AO-2 | Access to property appraisal cards containing the calculations and methodology used in arriving at the individual assessed property value. |
| AO-3 | Access to a preliminary "master list" of courses offered during the next academic year at a public high school. |
| AO-4 | Meeting of three members of a public body to tour a permit-application site. |
| AO-5 | Access to records in the possession of the treasurer related to local license taxes. |
| AO-6 | Authority and scope of the FOI Advisory Council. |
| AO-7 | Presence of a lawyer during a meeting closed pursuant to subdivision A. 7. § 2.1-344 (consultation with legal counsel). |
| AO-8 | Closed meeting to discuss publicly-held real property, and scope of discussion at closed meeting |

Appendix D

2000 Meetings of the Freedom of Information Advisory Council

Initial Meeting—2 p.m. Tuesday August 15, 2000

House Room D, General Assembly Building, Richmond

Review of initial staff briefing report: Maria J.K. Everett, *executive director*

Resolution of organizational issues, including statutory duties of Council, meetings of Council, role of staff: delegation of authority for daily operations, issuance of written and oral advisory opinions, training, website development, publications development, record keeping, and "Of note" as continuing agenda item to identify issues/trends that the Council may wish to consider.

Second Meeting—10 a.m. Wednesday, September 20, 2000

House Room D, General Assembly Building, Richmond

Receipt of Status Report: Maria J.K. Everett, *executive director*

"Of note"--handling of complaints; treatment of e-mails, including a review of current opinions and guidelines.

Third Meeting—10 a.m. Wednesday, November 29, 2000

House Room C, General Assembly Building, Richmond

Topic: Electronic Communications. Presentations by: Bill Wilson, *Director, Division of Legislative Automated Systems (DLAS)* - Nature of Electronic Communications.

C. Preston Huff, *Library of Virginia, State Records Administrator* and Bob Nawrocki, *Library of Virginia, Electronic Records Coordinator* - Electronic Communications and the Virginia Public Records Act.

Review of Draft Annual Report of Freedom of Information Advisory Council.

Appendix E

Survey of Council-Related Articles in Virginia Newspapers, July 2000 to November 30, 2000

(This appendix is available upon request)