



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

Senator Richard H. Stuart, Vice-Chair
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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
Wednesday, April 4, 2018 - 1:00 p.m.
House Room 3, Capitol Building

SUGGESTED AGENDA
ANNOTATED

- 1. Call to Order, introduction of members.**
- 2. Election of Chair and Vice Chair.** *Elections for these positions were last held on September 30, 2015. Subsection D of Code § 30-178 states as follows: "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."*
- 3. Bills referred to Council for study by 2018 Session of General Assembly.** *Bills that address related subjects have been grouped together below. Please see Appendix A for a full list of the bills, with summaries, in numerical order.*

Definition of "Public Record;" Social Media; Remedies

- 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.

Public Records Procedure

- HB 504 (Mullin); Virginia Freedom of Information Act; definition of "custodian."
- HB 664 (Kilgore); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."

- HB 957 (Yancey); Virginia Freedom of Information Act; definition of "custodian."
- HB 958 (Yancey); Virginia Freedom of Information Act (FOIA); records containing both excluded and nonexcluded information; duty to redact.
- HB 959 (Yancey); Virginia Freedom of Information Act; transfer of public records.
- SB 876 (Mason); Virginia Freedom of Information Act; transfer of public records; definition of "custodian."

Trade Secrets

- HB 904 (Robinson); Virginia Freedom of Information Act (FOIA); general exclusion for trade secrets submitted to a public body.

Public Comment at Public Meetings

- HB 1101 (Robinson); Virginia Freedom of Information Act; right to speak at open meetings.
- SB 336 (Peake); Virginia Freedom of Information Act; right to speak at open meetings.

Remedies

- HB 213 (Mullin); Virginia Freedom of Information Advisory Council; formal advisory opinions; immunity from civil penalty.
- SB 630 (Surovell); Virginia Freedom of Information Act (FOIA); civil penalty.

Data Collection Act

- HB 1329 (Tran); Government Data Collection and Dissemination Practices Act; dissemination of information concerning religious preferences and affiliations.

4. Appointment of Subcommittees. *Staff suggests the Council consider appointing three subcommittees to study the bills referred in order to facilitate grouping the bills by related subject areas:*

- *Public Records Subcommittee (SB 730, HB 504, HB 664, HB 957, HB 958, HB 959, SB 876, HB 904, HB 1329)*
- *Meetings Subcommittee (HB 1101, SB 336)*
- *Remedies Subcommittee (HB 213, SB 630)*

5. Discussion.

6. Public Comment.

7. Other Business.

- *The Council asked that staff share any public comment forms received at each meeting of the Council. One such public comment form was received since the Council's last meeting.*

8. Public Comment.

9. Discussion.

10. Set future meeting dates in 2018. *As a reminder, House Joint Resolution 11 (2018) provides as follows: "Rule 26. Interim meetings of any standing committee, joint committee, joint subcommittee, legislative commission, or any other interim study subcommittee or study commission shall be held on Monday, Tuesday, or Wednesday during the first and third full weeks of the month, unless otherwise authorized by the Speaker of the House of Delegates or the Chairman of the Senate Committee on Rules, as may be appropriate for the house in which the chairman serves."*

11. Adjournment.

Council Members

Senator Richard H. Stuart, Vice-Chair
Delegate Luke E. Torian
Sandra G. Treadway
Stephanie Hamlett
Mark Vucci
Marisa Porto
William "Billy" Coleburn

Senator Mamie E. Locke
(vacant)
Ed Jones
Kathleen Dooley
Shawri King-Casey
Michael Stern
Cullen Seltzer

Staff

Alan Gernhardt, Executive Director
Chad Ayers, Attorney

The FOIA Council's web site is: [http:// foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov). To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by email to staff prior to meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.
E-mail: foiacouncil@dls.virginia.gov.

Appendix A

2018 Session of the General Assembly Bills referred to the FOIA Council

House Bills

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).

Senate Bills

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. 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.