



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

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Senator Richard H. Stuart, Vice-Chair

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***VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL***

**Monday, October 17, 2016 - 1:30 p.m.
House Room D, General Assembly Building**

**SUGGESTED AGENDA
ANNUAL LEGISLATIVE PREVIEW, PART I
ANNOTATED**

1. Call to Order, introduction of members.
2. Bills referred to Council for study by 2016 Session of General Assembly:

To be considered by the FOIA Council at today's meeting, following presentations by the following patrons concerning their respective bills:

- i. **HB 334** Pogge--Provides that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting.
- ii. **HB336** Pogge--Protects from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For records of persons under the age of 18 years who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person under the age of 18 years who is the subject of the record may waive, in writing, the protections afforded by the bill. If the protections

are so waived, the public body shall open such records for inspection and copying.

- iii. **HB 61** (ANS) Morris--Knowing and willful FOIA violations; penalty;
- iv. **HB 432** Villanueva--Limits the application of the exemption for criminal investigative files to active criminal investigative files. As a result, closed or inactive criminal investigative files would be subject to mandatory disclosure, if requested.
- v. **SB 492** Surovell--Limits the application of the criminal investigative file exemption by providing that nothing in FOIA shall be construed to authorize the withholding of information from the records of completed unattended death investigations from immediate family members of the victim, provided that (i) such information is in a form that does not reveal the identity of persons supplying information or other individuals involved in the investigation and (ii) the immediate family members of the victim have been ruled out as suspects.
- vi. **SB 678** Garrett--Allows any county, city, or town with a population of less than 10,000 to have an additional 30 working days to respond to a FOIA request in cases where it is practically impossible to provide the requested records or to determine whether they are available within the initial five-work-day period. Currently, in such cases, a public body has seven additional working days to respond.

3. Subcommittee Reports.

- **Records Subcommittee.** *The Records Subcommittee has held eight meetings in the 2016 Interim (April 11, May 9, June 1, June 23, July 20, August 18, September 7, and September 29, 2016), to continue its study of records exemptions as directed by HJR No. 96. At its August meeting, the Records Subcommittee considered four bills referred to it by the Council. The patron of the four bills, Delegate Robert G. Marshall, participated by telephone in that meeting, as did representatives of Prince William County. After hearing the presentations and public comment, the Subcommittee decided to return the bills to the Council for further consideration, without a recommendation for action. The bills are summarized below.*
- **NOTE:** *Delegate Marshall will not be able to attend this meeting and consideration of his bills will be deferred until the November 21, 2016 meeting of the Council.*

- i. **HB 280** Marshall RG-- any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under the Virginia Freedom of Information Act.

NOTE: HB 280 would amend § 15.2-2259.

- ii. **HB 281** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body.

NOTE: HB 281 would amend § 2.2-3705.6.

- iii. **HB 282** Marshal, RG--Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of the Freedom of Information Act (FOIA) of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion.

NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.

- iv. **HB 383** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.

NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.

NOTE: There will be a public comment period at the end of the Records Subcommittee report.

- o **Meetings Subcommittee.** *The Meetings Subcommittee has held eight meetings in the 2016 Interim (April 11, May 4, June 6, July 18, and August 11 September 19, and October 17, 2016) to continue its study of meetings law under FOIA and the general provisions of FOIA. The Meetings Subcommittee held a meeting at 10:00 a.m. today.*

NOTE: There will be a public comment period at the end of the Meetings Subcommittee report.

4. Other Business.

- Comments on the Chairman's List of Issues generally.
- Council review of:
 - Consolidation draft of certain public safety FOIA exemptions (LD 17100035), referred from the Records Subcommittee without recommendation;
 - Working papers draft recommended previously by Records Subcommittee (LD 16100581); and
 - Proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Record Subcommittee has recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017 as the Proprietary Records Workgroup failed to reach consensus on creating a general exemption for trade secrets and proprietary records, despite several meetings.*
- Council review of additional legislative drafts recommended by the Records and Meetings Subcommittees:
 - Records Subcommittee drafts:
 - Definition of Public Record (LD 17100698D)
 - Procedure for requesting records and responding to requests (LD 17100765D). *Note: The Records Subcommittee recommended this draft in concept, but review of a draft is to be considered by full FOIA Council.*
 - Global language change (LD 17100766) *Last year the Records Subcommittee recommended replacing language that appears in multiple existing exemptions that states that "nothing ... shall prohibit" disclosure or release of records. Recognizing that FOIA generally does not prohibit release, the Subcommittee recommended replacing that phrasing with language stating that "nothing ... shall authorize withholding" or other language indicating an affirmative duty to disclose. However, it has come to the attention of staff that such a global change may have unintended consequences, and therefore reconsideration of this recommendation is necessary. The Subcommittee at its August meeting asked staff to again contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff has sent a second letter to the affected agencies asking for responses by September 28, 2016. Staff provided a summary of the agency responses at the September 29, 2016 meeting of the Records Subcommittee. At this meeting, the Records Subcommittee voted 4 to 1 to restore the language as it existing in FOIA prior to July, 2017 (i.e. "nothing ... shall prohibit" disclosure or release of records...").*

8. Future meetings.

Next meeting of the FOIA Council is scheduled as follows:

- Monday, November 21, 2016 at 1:30 p.m. in House Room C of the General Assembly Building, Richmond, Virginia.

9. Adjournment.

Council Members

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| Delegate James M. LeMunyon, Chair | Senator Richard H. Stuart, Vice-Chair |
| Sandra G. Treadway | Christopher Ashby |
| Ed Jones | Stephanie Hamlett |
| Kathleen Dooley | Mark Vucci |
| Shawri King-Casey | Marisa Porto |
| William "Billy" Coleburn | Michael Stern |

Staff

Maria J.K. Everett, Executive Director and Senior Attorney
 Alan Gernhardt, Senior 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 (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at 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.