VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

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Delegate James M. LeMunyon, Vice Chair

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Tuesday, November 18, 2014 - 1:30 p.m.
House Room C, General Assembly Building

SUGGESTED AGENDA
ANNOTATED

1. **Call to Order, and Introduction of members.**
2. **Subcommittee Reports.**
   - **Records Subcommittee (Bob Tavenner, Chair)**
   - **Meetings Subcommittee (George Whitehurst, Chair)**
3. **Discussion; Legislative Recommendations of Subcommittees:**
   - *The question has arisen whether the Council wishes to recommend separate pieces of legislation each year as the three-year HJR No. 96 study progresses, or whether the Council would prefer to introduce one omnibus bill at the end of the study in 2016.*
   - *Action on legislative recommendations.*

4. **Legislative Preview.**

- **University of Virginia -** *The University proposes to add an exemption for records of certain health care committees and entities to the extent they reveal information that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17.*

5. **Unfinished Business:**

- **Electronic Communication Meetings Policy:** *At its September meeting, the Council considered adoption of an E-meetings policy as required by § 2.2-3708.1 as enacted by the 2014 Session of the General Assembly. Specifically, subsection B 1 provides that " Participation by a member of a public body as authorized under subsection A shall be only under the following conditions: …[T]he public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting;"*
  The Council considered staff suggested policy options at the September meeting, however, given concerns raised, the Council deferred action on adoption of the policy. The policy options appear as Appendix B to this agenda.
- **Action on remaining bills referred to Council for study by 2014 Session of General Assembly:**[1]

[1] Summaries of each of the bills referenced below appear as Appendix A to this agenda.

- **HB 788 (LeMunyon) -** FOIA; out-of-state requests for records. *You will recall that at its meeting in April, the Council stated that it would consider this bill as the full Council rather than refer it to a subcommittee.*
- **HB 839 (Brink)** - FOIA; applicability to the Office of the Attorney General. *At its meeting in April, the Council stated that it would consider this bill as the full Council as well, rather than refer it to a subcommittee.*

6. **Public comment.**
7. **Other Business.**
8. **2015 Meeting Schedule:** *The next meeting of the FOIA Council will be held after the 2015 Session of the General Assembly, time and date to be determined.*
9. **Adjournment.**

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Council Members

Senator Richard H. Stuart, Chair
Sandra G. Treadway
Forrest M. "Frosty" Landon
John G. Selph
James Schliessmann
Kathleen Dooley
Delegate James M. LeMunyon, Vice Chair
Christopher Ashby
George T. Whitehurst
Ed Jones
Robert L. Tavenner
Stephanie Hamlett

Staff

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Alan Gernhardt, Staff Attorney

The FOIA Council's web site is: http://dls.state.va.us/foiacouncil.htm. 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.

APPENDIX A

BILLS REFERRED TO COUNCIL FOR STUDY BY 2014 SESSION OF GENERAL ASSEMBLY

1. **HB 788 (LeMunyon) - FOIA; out-of-state requests for records.** Sets out the process for public bodies to respond to record requests made by out-of-state requesters.

2. **HB 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Clarifies that for the purposes of FOIA applicable to access to public records, the Office of the Attorney General shall be considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill contains technical amendments.

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APPENDIX B

E-Meetings Policy Options Pursuant to § 2.2-3708.1

Policy Requirement

The 2014 Session of the General Assembly enacted two identical bills, House Bill 193[2] and Senate Bill 161[3], which require public bodies to adopt a policy regarding individual participation by electronic means before members are allowed to use these provisions. The new language specifies that the policy must include "an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting." Note that these provisions and this policy requirement apply to all public bodies subject to FOIA, and that until such a policy is adopted, members cannot use these provisions to participate from remote locations. In other words, members cannot call in under the circumstances set forth in § 2.2-3708.1 until the public body adopts a policy on such participation.

Sample Language

In order to facilitate compliance with this requirement, the FOIA Council has prepared sample language public bodies may use in crafting their own policies. This sample language is based on the language of the statute itself, and includes both the basic policy statement and the limitations set forth in § 2.2-3708.1, as follows:

> *It is the policy of [the public body] that individual [public body] members may participate in meetings of [the public body] by electronic means as permitted by Virginia Code § 2.2-3708.1. This policy shall apply to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting.*

[2] 2014 Acts of Assembly, c. 492.
[3] 2014 Acts of Assembly, c. 524.

Whenever an individual member wishes to participate from a remote location, the law requires a quorum of [the public body] to be physically assembled at the primary or central meeting location, and there must be arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

When such individual participation is due to an emergency or personal matter, such participation is limited by law to two meetings or 25 percent of the meetings of the public body per member each calendar year, whichever is fewer.

An Approval Process Must Be Chosen

In addition, each public body must adopt an approval process. Some possible mechanisms would include a vote by the public body, delegation of authority to approve participation to the Chair or another member, or to make approval automatic so long as the members' participation is allowed under the terms of FOIA (i.e., does not exceed the stated limits for personal matters or emergencies, the members' voice can be heard by those present at the main location, etc.). These are not the only possible options - so long as the process adopted does not violate the express provisions of § 2.2-3708.1, each public body may choose whatever approval process it prefers. Sample language follows:

Approval by Vote
Individual participation from a remote location under this policy shall be approved or disapproved by vote of the members present at the central or primary meeting location.[4] *If a member's participation from a remote location is disapproved because such participation would violate this policy, such disapproval shall be recorded in the minutes with specificity.*

Approval by Chair
Individual participation from a remote location under this policy shall be approved or disapproved by the Chair of [the public body]. If a member's participation from a remote location is

[4] Note that a quorum must be present at the primary or central location in order to vote.

disapproved because such participation would violate this policy, such disapproval shall be recorded in the minutes with specificity.

Automatic Approval
Individual participation from a remote location shall be approved unless such participation would violate this policy or the provisions of the Virginia Freedom of Information Act. If a member's participation from a remote location is disapproved because such participation would violate this policy, such disapproval shall be recorded in the minutes with specificity.

Additional Limitations Are Optional

Additional policy provisions may be included as each public body sees fit, so long as those limitations do not violate the express provisions of § 2.2-3708.1. It is up to each public body to decide for itself whether to adopt any such additional policy provisions.