



Virginia Freedom of Information Advisory Council

August 4, 2020, at 1:00 p.m.

Electronic Meeting

foiacouncil.dls.virginia.gov

The Virginia Freedom of Information Advisory Council (the Council) met electronically with Senator Richard H. Stuart, chair, presiding.¹ The meeting began with introductions and opening remarks followed by the election of the chair and vice-chair, presentations, and assignment of subcommittees. Materials presented at the meeting are accessible through the [Council's website](#).

Election of Chair and Vice-Chair

Because Senator Stuart had served as chair since 2018, elections for a new chair and vice-chair were held.² Senator Mamie E. Locke was elected chair and Delegate Marcus B. Simon was elected vice-chair, both by unanimous vote.³

Presentation: Recap of FOIA and Related Access Bills from 2020 Session

Council Staff

Staff informed the Council that the 2020 Regular Session of the General Assembly enacted a total of 23 bills amending the Virginia Freedom of Information Act (FOIA).

Sixteen bills clarify four existing records exemptions and add seven new records exemptions in FOIA as follows:

- HB 313 and SB 259 clarify that information contained in library records that can be used to identify any library patron who has borrowed or accessed material or resources from a library, as well as the material or resources such patron borrowed or accessed, is exempt from disclosure under FOIA. (§ 2.2-3705.7)
- HB 510 and SB 140 clarify that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education unless (i) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (ii) the pledge or donation does not impose terms or conditions directing academic decision-making. (§ 2.2-3705.4)

¹ **Members Present:** Senator Richard H. Stuart (chair), Senator Mamie E. Locke (vice-chair), Delegate Marcus B. Simon, Delegate William Wampler, III, Lee Bujakowski, William Coleburn, Matthew Conrad, Shawri King-Casey, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, Sandra Treadway, and Amigo Wade. NOTE: All members participated by electronic means, and the meeting was live-streamed on the Senate's website pursuant to § [4-0.01](#) (g) of the 2020-2022 State Budget. A video recording of the meeting is available on the [Council's website](#).

Members Absent: None

² Subsection D of § 30-178 of the Code of Virginia provides 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 Note that Cullen Seltzer was present when the meeting began but had to disconnect due to a scheduling conflict, so he was not present when the votes for chair and vice-chair were taken.

- HB 1012 and SB 578 clarify that any correspondence and information furnished in confidence to the Department of Education in connection with an active investigation of an applicant or licensee with regard to early childhood care and education pursuant to Chapter 14.1 (§ 22.1-289.02 et seq.) of Title 22.1 is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of July 1, 2021. (§ 2.2-3705.5)
- HB 1211 and SB 34 clarify that information maintained in connection with fundraising activities by the Veteran Services Foundation that reveals the social security number or other identification number appearing on a driver's license or other document issued under Chapter 3 (§ 46.2-300 et seq.) of Title 46.2 or the comparable law of another jurisdiction is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of January 1, 2021. (§ 2.2-3705.7)
- HB 548 exempts from the mandatory disclosure provisions of FOIA pertaining to records relating to administrative investigations records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services. (adding an exemption in § 2.2-3705.3)
- HB 722 and SB 269 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. The bill also provides that such financial and proprietary records shall not be withheld after they have been made public by HUD or VHDA. (adding an exemption in § 2.2-3705.6)
- HB 896 and SB 384 exempt from the mandatory disclosure provisions of FOIA personal information provided to or obtained by the Virginia Lottery (i) in connection with the voluntary exclusion program administered pursuant to § 58.1-4015.1 and (ii) concerning the identity of any person reporting prohibited conduct pursuant to § 58.1-4043. (adding an exemption in § 2.2-3705.7)
- HB 1017 and SB 576 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets information relating to a grant, loan, or investment application or accompanying a grant, loan, or investment application submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority), an advisory committee of the Authority, or any other entity designated by the Authority to review such applications if certain conditions are met. The bills also create an exemption for information held by the Authority, an advisory committee of the Authority, or any other entity designated by the Authority relating to (i) internal deliberations of or decisions by the Authority on the pursuit of particular investment strategies prior to the execution of such investment strategies and (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the Authority, if such disclosure of records pursuant to clause (i) or (ii) would have an adverse impact on the financial interest of the Authority or a private entity. (adding exemptions in §§ 2.2-3705.6 and 2.2-3705.7)



- SB 482 exempts from the mandatory disclosure provisions of FOIA relating to health and social services records information acquired during a review of any death conducted by the Developmental Disabilities Mortality Review Committee to the extent that such information is made confidential by § 37.2-314.1. (adding an exemption in § 2.2-3705.5)

Seven bills add four new meetings exemptions in FOIA as follows:

- HB 4 and SB 36 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to § 58.1-4105 regarding the denial or revocation of a license of a casino gaming operator and any discussion, consideration, or review of matters related to investigations exempt from disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 896 and SB 384 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in an appeal conducted pursuant to § 58.1-4007 regarding the denial of, revocation of, suspension of, or refusal to renew a permit related to sports betting and any discussion, consideration, or review of matters related to investigations excluded from mandatory disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 1017 and SB 576 create an exemption from the open meeting requirements of FOIA for the discussion or consideration of grant, loan, or investment application records subject to the exclusion in subdivision 28 of § 2.2-3705.6 for a grant, loan, or investment pursuant to Article 11 (§ 2.2-2351 et seq.) of Chapter 22 of Title 2.2. (§ 2.2-3711)
- SB 482 creates an exemption from the open meeting requirements of FOIA for those portions of meetings in which individual death cases of persons with developmental disabilities are discussed by the Developmental Disabilities Mortality Review Committee. (§ 2.2-3711)

Five bills amend existing provisions or add new provisions to FOIA as follows:

- HB 1527 and SB 701 require the executive director and members of each industrial development authority and economic development authority to take training on the provisions of the Virginia Freedom of Information Act at least once every two years. (amending § 2.2-3704.3)
- SB 138 (i) adds regional public bodies to the types of public bodies that must designate a FOIA officer, (ii) changes the frequency for required FOIA officer training from annually to once during each consecutive period of two calendar years, and (iii) provides that the name and contact information of a FOIA officer trained by legal counsel of a public body only needs to be submitted by July 1 of the initial year of training and updated if there are changes to that information. (amending § 2.2-3704.2)
- SB 139 (i) adds the option for in-person training sessions to the current requirement of online training sessions for local elected officials provided by the FOIA Council or a local government attorney and (ii) clarifies that "local elected officials" includes constitutional officers. (amending § 2.2-3704.3)
- SB 153 provides that if a requester asks for a cost estimate in advance of a FOIA request, the time to respond is tolled for the amount of time that elapses between notice of the cost



estimate and the response from the requester, and that if the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. The bill clarifies that if a cost estimate exceeds \$200 and the public body requires an advance deposit, the public body may require the requester to pay the advance deposit before the public body is required to process the request. (amending § 2.2-3704)

Presentation: House Bill 321 (Levine)⁴

Delegate Mark H. Levine

Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria

Delegate Mark H. Levine informed the Council that the Honorable Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria, had presented the idea for HB 321 (2020) before the COVID-19 state of emergency in order to help members of public bodies, particularly public bodies that meet many times per year, to carry out their responsibilities as members while helping family members who are ill. Delegate Levine also described limitations on electronic participation in meetings under current law and said that, while his bill would help members continue to participate in meetings electronically, it contained limits, including on the number of meetings per year that can be attended electronically, in order to prevent abuse. Delegate Levine also related that the bill was supported by the Virginia Association of Counties and the Virginia Municipal League. Vice Mayor Bennett-Parker explained that the electronic meetings restrictions currently in FOIA might cause a member of a public body to miss meetings if the member was caring for a sick family member in another state. She also expressed how such restrictions could act as a barrier to participation for many people who might otherwise run for election or volunteer to serve as appointed members of various public bodies. In conclusion, Vice Mayor Bennett-Parker explained how HB 321 could help increase participation and diversity in representation while maintaining transparency and accountability. After further discussion between the Council and Delegate Levine concerning how the bill would operate, Senator Locke stated that the Council would form a subcommittee to study the bill (see below).

Assignment of Subcommittees

Senator Mamie E. Locke

Members of the Council were assigned to specific subcommittees to study each of the bills presented during the meeting. Senator Locke followed staff recommendations by establishing an Electronic Meetings Subcommittee to study HB 321 (Levine, 2020) and other electronic meetings issues, and by continuing the Phishing Study Subcommittee that began its work in 2019.

The Electronic Meetings Subcommittee, consisting of Council members Billy Coleburn, Matthew Conrad, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, and Amigo Wade, will study HB 321. It will also study other issues related to electronic meetings as needed, including issues that have been raised due to the COVID-19 pandemic and state of emergency.

The Phishing Subcommittee, consisting of Council members Sandy Treadway (chair), Lee Bujakowski, Shawri King-Casey, Sterling Rives, and Amigo Wade, will continue its study of the

⁴ HB 321 was introduced during the 2020 Regular Session of the General Assembly and was referred to the Council by letter from the Senate Committee on General Laws and Technology.



threat of phishing attacks using information obtained through FOIA as proposed by House Joint Resolution 628 (Heretick, 2019).

Delegate Simon, noting current concerns over access to law-enforcement and public safety information, asked whether the Council should form a subcommittee to study those issues. Senator Locke agreed that such issues would likely come in the future but advised waiting until they were brought to the Council before forming a subcommittee.

Other Business and Updates; Current FOIA Training

Council Staff

Staff reported that in order to facilitate compliance with the new statutory requirement for local elected officials and members and executive directors of economic development authorities and industrial development authorities to receive FOIA training,⁵ a new online FOIA training program for local elected officials was developed and made available on July 1, 2020. According to staff, some users of the new training program have experienced technical difficulties, so staff is working with IT staff to resolve those issues. Staff also reported that due to the COVID-19 state of emergency, most in-person training sessions have been cancelled, but staff has presented several live, virtual training sessions. Additionally, the Council has purchased webinar hosting software, and staff will provide additional free, live, virtual training presentations to be scheduled after the adjournment of the 2020 Special Session I of the General Assembly.

Public Comment and Next Meeting

Staff reported receiving seven public comments for the meeting that were posted to the [*Council's website*](#), including a paper from the Virginia Coalition for Open Government and Virginia Press Association, all in support of studying electronic meetings issues. Staff also said about 20 public comments were received concerning other electronic meetings, with some reporting positive experiences, some negative, and some mixed. At the direction of Senator Locke, those public comments and any additional public comments about specific electronic meetings will be posted on the [*Council's website*](#). There were no live public comments, but one additional public comment concerning electronic meetings was received during the meeting and read aloud by staff.

Senator Locke directed staff to poll members of the Council about future meeting dates for the Council and its subcommittees after the adjournment of the 2020 Special Session I of the General Assembly.

For more information, see the [*Council's website*](#) or contact the Division of Legislative Services staff:

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⁵ Such training is required pursuant to § 2.2-3704.3 of the Code of Virginia (effective July 1, 2020).

