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## Virginia Freedom of Information Advisory Council

September 18, 2019, at 1:00 p.m.

Pocahontas Building, Senate Committee Room A

[foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov)

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The Virginia Freedom of Information Advisory Council (the Council) met in Richmond with Senator Richard H. Stuart, chair, presiding.<sup>1</sup> The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the [Council's website](#).

### Presentation: Subcommittee Reports

*Council Staff*

#### *Forestry Records Subcommittee*

**HB 2201 (Tyler); State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.

To recap the Council's work to date, staff reminded the Council that the Forestry Records Subcommittee had met once to consider HB 2201 (Tyler). The Department of Forestry, its Attorney General representative, and the patron had further discussions about the legislation after the first Subcommittee meeting and decided not to move forward with the study of HB 2201, as they believe existing exemptions in FOIA would cover the types of records they were seeking to protect. As a result, the second scheduled Subcommittee meeting was canceled.

#### *Donor Records Subcommittee*

**HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides 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. The bill provides that the identity of the donor shall be protected only if (a) the donor has requested anonymity in connection with or as a condition of making a

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<sup>1</sup> **Members Present:** Senator Richard H. Stuart (chair), Senator Mamie E. Locke, Lee Bujakowski, William Coleburn, Bruce Potter, Cullen Seltzer, Michael Stern, Sandra Treadway, Mark Vucci

**Members Absent:** Delegate Luke E. Torian (vice chair), Matthew A. Conrad, Delegate Glenn R. Davis, Shawri King-Casey, Sterling Rives (Note: This meeting was noticed as an electronic meeting as it was expected that Mr. Conrad would call in, but he was unable to do so; no members participated by electronic communication means.)

pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.

Continuing the recap, staff reminded the Council that the Donor Records Subcommittee met once to consider HB 2386; that the Virginia Supreme Court had recently heard argument in the case *Transparent GMU v. GMU*, a case that shares background facts with HB 2386 but presents different legal issues (whether university foundations are subject to FOIA); and that the bill seeks to address the concern that anonymous donors might have undue influence over the academic decision making process of the institution. At its last meeting, the Council voted to accept the Subcommittee's recommendation that the Council recommend the amendments to the FOIA portion of the bill (lines 74-84), but that the Council give no recommendation for or against the other portion of the bill that would amend Title 23.1 (lines 101-109) because it is outside of the purview of FOIA.

### *Phishing Study Subcommittee*

**HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

Staff reported that the Phishing Study Subcommittee has met twice to consider HJ 628, is scheduled to meet again on October 8, 2019, and wishes to continue its study through next year in order to give full consideration to the issues presented. At the first Subcommittee meeting, staff presented background information on current exemptions under FOIA that are related to the subject matter of the resolution, and the Subcommittee heard from Delegate Steve E. Heretick, along with representatives from the City of Portsmouth, including the City Attorney, Chief Information Officer, and Government Affairs Manager. They expressed concerns about the availability of information through FOIA that could be used to commit identity theft against public employees and the use of spoofed email from a high ranking staff member. They also presented suggestions for legislative changes for consideration and discussion. At its second meeting the Subcommittee heard additional information about phishing, identity theft, cyberattacks, and what state government is doing in response from representatives of the Virginia State Police and the Virginia Information Technologies Agency. The Subcommittee also received comments in opposition to the suggested legislative proposals from the Virginia Coalition for Open Government and the Virginia Press Association. Staff further noted that the Speaker of the House had directed the Council to study this issue and report back by November 1, 2019. Delegate Heretick and Sherri Neil, the Portsmouth Government Affairs Manager, further discussed the factual background for the study with the Council and expressed their support for continuing the study next year. The Council then voted unanimously to report the work to date to the Speaker of the House and express its desire to continue the study next year.

Additionally, the Council directed the Subcommittee to consider adding a tolling provision to the records production procedure to toll the time from when a public body provides an estimate of costs until the requester agrees to pay. Because there is no such provision in current law, confusion and disputes over charges have occurred at times when a public body has provided an



estimate, then sent records along with a bill for charges within the five working day response deadline without the requester having agreed to those charges. Staff reported that the Subcommittee had received two alternative drafts as possible mechanisms for such a tolling provision and directed staff to further amend one of them for consideration at the Subcommittee's meeting on October 8, 2019.

### **Annual Legislative Preview**

*Roger Wiley, Hefty, Wiley, and Gore, P.C., and Leo Rogers, Loudoun County Attorney*

Mr. Wiley, on behalf of Loudoun County, stated that the county intends to include as part of its 2020 legislative package an amendment to the existing exemption for certain library records in subdivision 3 of § 2.2-3705.7 that would expand the exemption to cover materials accessed on a library computer in addition to materials borrowed by a patron. Mr. Rogers stated that the county would also seek a new exemption to protect certain information submitted by loan applicants during the loan application process that the applicants would not want competitors to get until after the application process was complete. He explained that the loan applicants were developers and the financial process involved the county, as well as state and federal agencies, but that ultimately the records would be available to the public. Sample language for both exemptions was presented for consideration and discussed by the Council. In response to inquiry from the Council, Mr. Rogers stated that the presentation was informational and that they would appreciate comments and feedback on the proposals but were not seeking action from the Council. There were no other legislative proposals presented.

### **Presentation: FOIA Training and Reporting Requirements**

*Council Staff*

#### *Legislative Changes to § 2.2-3704.3*

At its last meeting, the Council directed staff to prepare a draft for consideration that will amend § 2.2-3704.3 to allow for live, in-person FOIA training, as well as online training, and to include constitutional officers explicitly in the training requirements. Staff presented this draft (LD 20100371D) and the Council voted 8-0-1 (Senator Stuart abstained) to recommend it to the 2020 Session of the General Assembly.

#### *Legislative Changes to § 2.2-3704.2*

At its last meeting, the Council voted unanimously to recommend a bill that changes the frequency for required FOIA officer training from annually to once every two years and changes the reporting requirement from once every year to by July 1 of the year an officer is initially trained and then only if the information changes. At that meeting the Council directed staff to amend that bill to explicitly add regional public bodies to the language in § 2.2-3704.2. Staff presented this amended draft (LD 20100195D) and the Council voted unanimously to recommend it to the 2020 Session of the General Assembly.

### **Other Business and Updates**

*Council Staff*

#### *Current FOIA Training*

Staff provided an update on the free FOIA training sessions being held in Richmond. This year to date, staff has held nine such free training sessions with 142 attendees, and 87 persons are



registered for six additional sessions to be held through November, with more expected to register as the dates approach. Staff has also held 31 presentations at other locations to date, with nine more scheduled through November. Staff further reported that a new online FOIA training program is being developed in-house that will be available by July 1, 2020. It is expected that the new program will cover both access to public records and access to public meetings. Due to technical difficulties that have been experienced with the current online training, the new training will be hosted by the Division of Legislative Automated Systems instead of on the Commonwealth of Virginia Learning Center.

### *FOIA Inquiries*

Staff reported that, to date, it has received a total of 1,453 informal inquiries by telephone and email. Of those, 393 have come from citizens, 881 from government, and 76 from media representatives, and two were of uncertain sources. Staff has also received eight requests for formal advisory opinions to be published on the FOIA Council website. Staff informed the Council that it had switched earlier this year from a paper filing system to an online system, which may change the format of reporting in this year's Annual Report.

### **Public Comment and Next Meeting**

There were no public comments. Senator Stuart announced that this would be the last meeting of the Council for 2019 unless the Phishing Study Subcommittee completes its work and needs the Council to meet to vote to recommend additional legislation to the 2020 Session of the General Assembly.

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

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