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## Virginia Freedom of Information Advisory Council

### Criminal Incident Information Subcommittee

October 21, 2020, at 2:00 p.m.

Electronic Meeting

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

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The Criminal Incident Information Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) met electronically.<sup>1</sup> The meeting began with introductions and opening remarks. Materials presented at the meeting are accessible through the [Council's website](#).

#### **Presentation: 2020 Special Session I, HB 5090 (Hurst)**

*Delegate Chris L. Hurst*

Delegate Hurst gave a brief summary of HB 5090, which was left in Senate Committee on General Laws and Technology and referred to the Council for further study. He noted that the purpose of the bill is to try to achieve equity in the criminal justice system by allowing for closed investigative records for crimes to be released to the public with some exceptions. Delegate Hurst mentioned how this bill would allow groups such as the Innocence Project to access the necessary records as they fight for justice on behalf of those wrongfully accused of crimes. He explained that the bill includes certain exemptions from the mandatory release of such records that protect the most vulnerable information of victims and witnesses. Delegate Hurst expressed interest in revamping the bill to more closely align with federal Freedom of Information Act (FOIA) provisions regarding criminal investigative files.

Members of the Subcommittee noted the following:

- Cullen Seltzer said a policy change in this area of law is long overdue and the public should have access to criminal investigative records. He mentioned an initial concern that the legislation may be perceived as an end run around criminal case discovery rules, but he noted that the bill provides for protections from disclosure when a case is ongoing. Mr. Seltzer asked a question about the language that places the burden of proof on the public body withholding records, and he mentioned that it may be better to not set out a separate burden of proof and standard when there is already catchall language elsewhere in Virginia's FOIA<sup>2</sup>. He also mentioned that the language allowing for the withholding of records if the public body can show that the information could reasonably be expected to interfere with an ongoing law-enforcement investigation or proceeding may be too broad in

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<sup>1</sup> **Members Present:** Delegate Marcus B. Simon (chair), Matthew Conrad, Shawri King-Casey, Marisa Porto, and Cullen Seltzer

**Members Absent:** None

<sup>2</sup> § 2.2-2713 of the Code of Virginia.

scope and may allow for conclusory allegations by a public body, and maybe such language should be narrowed.

- Marisa Porto said the level of transparency that HB 5090 would allow is essential for good functioning government.
- Matthew Conrad noted that, before making a broad policy change, he would like to hear from people on both sides of the issue, including Virginia State Police (VSP) and the Virginia Sheriffs' Association. Delegate Hurst responded that he has had conversations with VSP and numerous attorneys for the Commonwealth, and the majority of pushback has come from defense attorneys who are afraid that the release of the records could have negative implications on the jury pool for cases or the case discovery process. Delegate Hurst noted that he would like to change the definition of what is considered an "ongoing" case so that a case would not be considered ongoing if it has been finally adjudicated or if more than three years have elapsed from when a decision to take no action was made. He believes this should alleviate some of the concerns held by law enforcement.
- Mr. Conrad also expressed a desire to ensure that victims of sexual assault and related crimes are protected under this legislation. He noted that the federal statute uses the language "unwarranted invasion of privacy," and he wants to make sure that will cover victims in Virginia.

Members of the Subcommittee expressed an interest in adopting the federal approach and basic framework with a few differences. The group agreed that it is probably best to meet once more to review a bill draft and to allow a chance for live testimony from stakeholders on both sides of the issue.

Staff noted that the Subcommittee should keep in mind that there are other provisions outside of Virginia's FOIA that deal with the protections of certain types of records, such as law-enforcement records concerning juveniles, and care must be taken not to create conflicts in the language of this bill.

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

Staff read aloud the written public comments that were received prior to and during the meeting. Public comments are accessible on the [Council's website](#).

Staff will poll members of the Subcommittee regarding a future meeting date of the Subcommittee. Once a date is set, it will be posted on the [Council's website](#).

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

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