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## Virginia Freedom of Information Advisory Council

### Criminal Incident Information Subcommittee

November 17, 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: Draft Bill for Consideration**

##### *Staff*

Staff gave a brief summary of the bill that was drafted for consideration by the Subcommittee. Staff noted that the draft bill was largely modeled after federal Freedom of Information Act provisions but also contains portions of the original HB 5090 (Hurst, 2020) and contains a conflict of interest provision that serves to protect victims, witnesses, undercover officers, and confidential informants if there are provisions elsewhere in the Code of Virginia that offer greater protections to those individuals than are offered under the Virginia Freedom of Information Act (FOIA).

#### **Public Comment and Discussion**

During the period for live public comment, Michelle Feldman, State Campaigns Director with the Innocence Project, said that the organization supports the draft bill, but it has three suggestions for amendments regarding (i) the definition of "ongoing case," (ii) the disclosure of criminal investigative files if such disclosure would reveal law-enforcement techniques and procedures that could reasonably be expected to risk circumvention of the law, and (iii) allowing for recorded interviews between crime victims and law enforcement, or transcripts thereof, to be released. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, expressed a concern with the bill's definition of "ongoing case," language regarding an "unwarranted invasion of physical privacy," and the provision for the release of certain information to a victim's spouse or parent without safeguards to ensure those individuals are not the perpetrators. Scott Burke, Interim Chief of the Portsmouth Police Department, noted a concern with the language regarding the release of diagrams related to an alleged crime or location of a crime. He noted that it is too broad and could result in the release of diagrams or maps that jeopardize the welfare or safety of the public. Interim Chief Burke also expressed that the court standard should be a "reasonable likelihood" rather than a "preponderance of the

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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

evidence," and he questioned whether there should be tolling and court cost provisions included in the draft. Jim Hingeley, Commonwealth's Attorney for the County of Albemarle, noted concerns with the extensive process necessary to go through all files to remove or redact images of victims or anything that can readily identify victims. James Towey, Legislative and Regulatory Affairs Manager with the Department of Juvenile Justice, recommended that cross references be made to §16.1-300 of the Code of Virginia to protect the identities of juveniles who may appear in the Department's records. Herndon Chief of Police Maggie DeBoard, President of the Virginia Association of Chiefs of Police, noted concerns with the definition of "ongoing case," the "preponderance of the evidence" court standard, and the language regarding an "unwarranted invasion of personal privacy" and the lack of a defined standard. Deputy Mark Segal of the Hanover County Sheriff's Office noted concerns with who pays the court costs when files are withheld for stated reasons as well as the costs of review and redaction of files and body camera footage. Any written public comments submitted are accessible on the [Council's website](#).

After hearing extensive public comment, members of the Subcommittee went through each noted concern and discussed changes and line amendments to the draft bill. Ultimately, the Subcommittee voted unanimously to (i) make changes to the definition of "ongoing case;" (ii) add a cross reference to subdivision 14 of § 2.2-3705.2 of the Code of Virginia in the portion of the bill related to the release of diagrams of a crime scene or location of a crime; (iii) allow for the release of transcripts from interviews between crime victims and law enforcement; (iv) add that in order for a public body to withhold law-enforcement investigative techniques and procedures, a court must find by a preponderance of the evidence that the disclosure of such information could reasonably be expected to risk circumvention of the law; and (v) add protections for juveniles to the conflict provision in subsection E of the draft bill. The Subcommittee directed staff to prepare an amended draft to present at the next Council meeting.

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

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