

# **2020 FOIA LEGISLATIVE UPDATE**

## **STATUS OF FREEDOM OF INFORMATION BILLS**

### **I. Introduction**

The General Assembly passed a total of 23 bills amending the Virginia Freedom of Information Act (FOIA) during the 2020 Session. Five bills passed the General Assembly that were recommended by the FOIA Council: SB 138, which (i) adds regional public bodies to the type of public bodies that are required to have a FOIA officer, (ii) requires FOIA training every two years instead of every year, and (iii) requires a FOIA officer's name and contact information to be reported to the FOIA Council when the officer is first trained and then only if the information changes; SB 139, which allows for live, in-person training, as well as online training for local elected officials, and clarifies that constitutional officers are subject to such training requirements; SB 140, which is identical to HB 510, amends the current exemption for donor records by clarifying that the exemption does not protect "information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor" except if "the donor has requested anonymity in connection with or as a condition of making a pledge or donation" or if "the pledge or donation does not impose terms or conditions related to academic decision-making"; and SB 153, which (i) adds that the time to respond to a FOIA request is tolled for the amount of time that elapses between notice of the cost estimate and the response from the requester; (ii) adds 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receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn; and (iii) clarifies that if a cost estimate exceeds \$200 and the public body requires an advance deposit, the public body may require the requester to pay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.

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)
- 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 pursuant to Chapter 14.1 (§ 22.1-289.02) 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 § 2.2-3705.4)
- 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 Virginia Freedom of Information Act 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)

Section II of this update presents a brief overview of amendments to FOIA section by section in order to provide context and organization to the numerous bills.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes were effective July 1, 2020.

## **II. Amendments to the Virginia Freedom of Information Act**

### **§ 2.2-3704 Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.**

**SB 153 Virginia Freedom of Information Act; cost estimates; response time.** Provides that if a requester asks for a cost estimate in advance of a Virginia Freedom of Information Act 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. This bill is a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 1142).

### **§ 2.2-3704.2 Public bodies to designate FOIA officer.**

**SB 138 Virginia Freedom of Information Act; FOIA officers; training and reporting requirements.** Adds regional public bodies to the types of public bodies that must designate a FOIA officer. The bill also changes the frequency for required FOIA officer training from annually to once during each consecutive period of two calendar years and 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. Current law requires this information to be submitted by July 1 of each year. This bill is a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 1141).

### **§ 2.2-3704.3 Training for local officials.**

**HB 1527 and SB 701 State and Local Government Conflict of Interests Act and Virginia Freedom of Information Act; training requirements; executive directors and members of**

**industrial development authorities and economic development authorities.** Requires the executive director and members of each industrial development authority and economic development authority, as created by the Industrial Development and Revenue Bond Act, to take training on the provisions of the State and Local Government Conflict of Interests Act and the Freedom of Information Act at least once every two years. The bill requires such officials in office on July 1, 2020, to complete such training no later than December 31, 2020. Training on the Virginia Freedom of Information Act may be provided online by the Virginia Freedom of Information Advisory Council or the local government attorney. Training on the State and Local Government Conflict of Interests Act shall be provided by the Virginia Conflict of Interest and Ethics Advisory Council and may be provided online. The clerk of the respective governing body is responsible for maintaining training records (2020 Acts of Assembly, cc. 76 and 80).

**SB 139 Virginia Freedom of Information Advisory Act; training requirements.** Adds the option for in-person training sessions to the current requirement of online training sessions for local elected officials provided by the Virginia Freedom of Information Advisory Council or a local government attorney. The bill also clarifies that "local elected officials" includes constitutional officers. As introduced, this bill was a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 904).

### **§ 2.2-3705.3 Exclusions to application of chapter; records relating to administrative investigations.**

**HB 548 Virginia Freedom of Information Act; exclusions; Department of Behavioral Health and Developmental Services; records of active investigations.** Exempts from mandatory disclosure under the Virginia Freedom of Information Act records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services (2020 Acts of Assembly, c. 48).

### **§ 2.2-3705.4 Exclusions to application of chapter; educational records and certain records of educational institutions.**

**HB 510 and SB 140 Virginia Freedom of Information Act; public institutions of higher education; information related to pledges and donations.** 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 (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. As introduced, this bill was a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, cc. 71 and 78).

### **§ 2.2-3705.5 Exclusions to application of chapter; health and social services records.**

**HB 1012 and SB 578 Early childhood care and education; licensing.** Requires the Board of Education to establish a statewide unified public-private system for early childhood care and

education in the Commonwealth to be administered by the Board of Education, the Superintendent of Public Instruction, and the Department of Education. The bill transfers the authority to license and regulate child day programs and other early child care agencies from the Board of Social Services and Department of Social Services to the Board of Education and Department of Education. The bill maintains current licensure, background check, and other requirements of such programs. Such provisions of the bill have a delayed effective date of July 1, 2021. The bill requires the Superintendent of Public Instruction to establish a plan for implementing the statewide unified early childhood care and education system and requires the Department of Social Services and the Department of Education to enter into a cooperative agreement to coordinate the transition. The bill also requires the Board of Education to establish, no later than July 1, 2021, a uniform quality rating and improvement system designed to provide parents and families with information about the quality and availability of certain publicly funded early childhood care and education providers and to publish the initial quality ratings under such system in the fall of 2023 (2020 Acts of Assembly, cc. 860 and 861).

**SB 482 Developmental Disabilities Mortality Review Committee; penalty.** Creates the Developmental Disabilities Mortality Review Committee to review the death of any person with a developmental disability who was receiving services from a provider licensed by the Department of Behavioral Health and Developmental Services or in a training center or other state facility at the time of his death to ensure that the deaths of such persons are reviewed and analyzed in a systematic way (2020 Acts of Assembly, c. 851).

## **§ 2.2-3705.6 Exclusions to application of chapter; proprietary records and trade secrets.**

**HB 722 and SB 269 Virginia Freedom of Information Act; exclusions; proprietary records and trade secrets; affordable housing loan applications.** Excludes from mandatory disclosure 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 (2020 Acts of Assembly, cc. 72 and 79).

**HB 1017 and SB 576 Research and development in the Commonwealth.** Creates the Commonwealth of Virginia Innovation Partnership Authority (the Authority) to oversee and support research, development, and commercialization, as well as related investment and seed-stage funding, in the Commonwealth. The Authority is governed by an 11-member Board, consisting of the Secretary of Commerce and Trade, six nonlegislative citizen members appointed by the Governor, and four nonlegislative citizen members appointed by the Joint Rules Committee. Existing grant, loan, and investment funds currently administered by the Innovation and Entrepreneurship Investment Authority and the Virginia Research Investment Committee, repealed under the bill, would be consolidated under the Authority, and the Authority would be responsible for developing an Innovation Index for the Commonwealth. The bill contains technical amendments (2020 Acts of Assembly, cc. 1164 and 1169).

**§ 2.2-3705.7 Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions.**

**HB 313 and SB 259 Virginia Freedom of Information Act; library records.** Clarifies 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 the Virginia Freedom of Information Act (2020 Acts of Assembly, cc. 70 and 587).

**HB 896 and SB 384 Sports betting; Problem Gambling Treatment and Support Fund; penalties.** Directs the Virginia Lottery (the Lottery) to regulate sports betting. The bill prohibits the Lottery from issuing any permits to conduct sports betting until it has developed and published a consumer protection bill of rights.

Before administering a sports betting operation, an entity is required to apply for a three-year permit and pay a nonrefundable application fee of \$250,000 as well as an additional \$250,000 fee if its application is approved. Permit holders must apply for renewal of a permit every three years, which includes a nonrefundable renewal fee of \$200,000. The Director of the Virginia Lottery may issue from four to 12 permits at one time and is directed to issue a number of permits that will maximize tax revenue collected pursuant to the bill. In issuing permits, the Director is required to give preferred consideration to applicants that are (i) certain major league sports franchises and (ii) certain casino operators.

The bill prohibits betting on Virginia college sports and youth sports and prohibits proposition bets on all college sports. The bill prohibits betting by Lottery employees, permit holders and certain related persons, athletes and coaches with respect to events in their league, and persons under age 21. The penalty for engaging in prohibited betting is a Class 1 misdemeanor.

The bill prohibits betting on the biometric data of an athlete without his consent and includes provisions for the Lottery to investigate prohibited conduct, such as attempting to influence an athlete or the outcome of an athletic event.

The bill directs the Lottery to establish a voluntary exclusion program, which allows individuals to request that the Lottery exclude them from engaging in various kinds of betting activity.

The bill allows the governing body of a sports league to request that the Lottery (a) limit or prohibit people from betting on events of the league that it governs and (b) restrict the information sources used to resolve bets that are placed after a sports event has begun.

The bill imposes a 15 percent tax on a permit holder's adjusted gross revenue, defined in the bill. The bill authorizes permit holders to carry over and deduct net losses for up to 12 months.

The bill creates the Problem Gambling Treatment and Support Fund, administered by the Department of Behavioral Health and Developmental Services. The Fund is established to provide counseling to compulsive gamblers, implement problem gambling treatment and prevention programs, and provide grants to organizations that assist problem gamblers. The Fund is funded

by 2.5 percent of the revenue generated from sports betting, with the remaining 97.5 percent accruing to the general fund (2020 Acts of Assembly, cc. 1218 and 1256).

**HB 1017 and SB 576 Research and development in the Commonwealth.** *See summary under § 2.2-3705.6, supra* (2020 Acts of Assembly, cc. 1164 and 1169).

**HB 1211 and SB 34 (incorporating SB 643) Driver privilege cards; penalty.** Authorizes the issuance of new driver privilege cards by the Department of Motor Vehicles to an applicant who (i) has reported income from Virginia sources or been claimed as a dependent on an individual tax return filed with the Commonwealth in the preceding 12 months and (ii) is not in violation of the insurance requirements for the registration of an uninsured motor vehicle. The bill provides that driver privilege cards shall confer the same privileges and shall be subject to the same provisions as driver's licenses and permits; however, driver privilege cards shall not (a) confer voting privileges, (b) permit an individual to waive any part of the driver examination, or (c) have their issuance be contingent upon the applicant's ability to produce proof of legal presence in the United States. The bill limits the release of certain information stored by the Department. The bill provides for the term "driver's license" to consistently refer to all driver's licenses, permits, driver privilege cards, and special identification cards issued by the Commonwealth or the comparable law of another jurisdiction. The bill allows the issuance of a limited-duration driver's license and special identification card to an applicant presenting valid documentary evidence that a federal court or federal agency having jurisdiction over immigration has authorized the applicant to be in the United States for a period of at least 30 days from the date of application. The bill authorizes the Tax Commissioner to provide to the Commissioner of the Department information sufficient to verify that an applicant for a driver privilege card or permit reported income from Virginia sources or was claimed as a dependent on an individual tax return filed with the Commonwealth in the preceding 12 months. The bill has a delayed effective date of January 1, 2021 (2020 Acts of Assembly, cc. 1227 and 1246).

## **§ 2.2-3711 Closed meetings authorized for certain limited purposes.**

**HB 4 (incorporating HBs 374, 428, 560, 1343, and 1661) and SB 36 (incorporating SBs 102, 374, 609, 743, and 1083) Lottery Board; regulation of casino gaming.** Authorizes casino gaming in the Commonwealth to be regulated by the Virginia Lottery Board. The bill specifies the requirements for licensure of casino gaming operators and the conduct of casino gaming and imposes criminal and civil penalties for violations of the casino gaming law. The location of casino gaming establishments shall be limited to eligible host cities that meet specified criteria: the Cities of Portsmouth, Richmond, Norfolk, Danville, and Bristol. The bill requires each eligible host city to hold a referendum on the question of whether to allow casino gaming in the city and, with the exception of the City of Richmond, to hold such referendum at the November 2020 general election. The bill imposes a tax ranging from 18 to 30 percent of the adjusted gross receipts of licensees, based upon a licensee's annual adjusted gross receipts, and provides for disbursement of the tax revenues. The bill requires the Board to establish a voluntary exclusion program allowing individuals to voluntarily list themselves as being barred from entering a casino gaming establishment or other facility under the jurisdiction of the Board. The bill establishes the Problem Gambling Treatment and Support Fund, administered by the Commissioner of Behavioral Health and Developmental Services, and the Virginia Indigenous People's Trust Fund, both of which are funded by proceeds from the casino gaming tax revenues. The bill also establishes the Regional



Improvement Commission, consisting of a representative of each jurisdiction composing the transportation district in which the City of Bristol is located, to receive disbursements of gaming tax revenues and to prioritize and fund improvements in those jurisdictions. The bill requires the Virginia Racing Commission to authorize an additional 600 historical horse racing terminals each time a local referendum held by an eligible host city is approved, provided that the total number of additional machines does not exceed 2,000 statewide, and includes other provisions relating to the placement of historical horse racing terminals in the Commonwealth (2020 Acts of Assembly, cc. 1197 and 1248).

**HB 896 and SB 384 Sports betting; Problem Gambling Treatment and Support Fund; penalties.** *See summary under § 2.2-3705.7, supra* (2020 Acts of Assembly, cc. 1218 and 1256).

**HB 1017 and SB 576.** *See summary under § 2.2-3705.6, supra* (2020 Acts of Assembly, cc. 1164 and 1169).

**SB 482 Developmental Disabilities Mortality Review Committee; penalty.** *See summary under § 2.2-3705.5, supra* (2020 Acts of Assembly, c. 851).