



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

Delegate Marcus B. Simon, Chair
Senator Mamie E. Locke, Vice-Chair

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Monday, September 16, 2024 - 1:00 PM
Senate Room A, General Assembly Building
Richmond, VA

Note: This meeting will be held in person and live streamed at
http://virginia-senate.granicus.com/ViewPublisher.php?view_id=3

SUGGESTED AGENDA

ANNOTATED

- 1. Call to Order; introduction of members.**
- 2. SB 324 Workgroup Report.** *The third enactment clause of SB 324 (Roem, 2024) directed the formation of a workgroup "to examine the current FOIA provisions on charges and make recommendations on ways to amend such provisions to make the assessment of charges by public bodies for the production of public records more uniform, more transparent, easier to understand, and less costly." The workgroup has met four times to date and plans to hold two more meetings before presenting an executive summary and final report to the Council at the Council's December meeting. In examining the process of making and responding to FOIA requests with consideration of how the request process may affect the costs involved, the workgroup has recommended a guide to Best Practices for Making Requests. The guide is included with today's materials and will be published on the FOIA Council website and distributed by participating organizations such as the Virginia Municipal League, Virginia Association of Counties, Virginia School Boards Association, and the Virginia Coalition for Open Government. The workgroup plans to*

continue its discussion regarding fee caps for FOIA requests and to address broader issues affecting charges before making final recommendations.

- 3. Review of amendments to FOIA's provisions concerning criminal records.** *At its last meeting the Council considered various FOIA issues raised by Council members, including concerns regarding the treatment of criminal records and the idea that the Council may wish to review changes in the law periodically. Staff will present a brief legislative history of amendments to FOIA's provisions concerning criminal records as background for the Council's consideration.*
- 4. Discretion in the application of exemptions.** *Another issue raised has been the use of discretion in deciding whether to release exempt records. The majority of FOIA exemptions currently are preceded by the following language regarding discretion: "The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01." While this language grants to a custodian of records the discretion to release records even when an exemption applies, FOIA does not provide any further guidance or limitation on the use of that discretion.*
- 5. Other Business.**
 - **Judicial update.** *The Virginia Court of Appeals issued its decision in the case [Citizens for Fauquier County v. Town of Warrenton](#) on July 30, 2024. The case concerned the use of the working papers and correspondence exemption and whether it could be used by both the town manager and the mayor. The Court of Appeals held that it could only be used by one of them, but the Town could choose which one may use the exemption. The Court of Appeals also held that the trial court erred in allowing the Town to select a representative sample of emails for the trial court to consider without demonstrating how the sample was selected and why it was representative of the whole, and then described sampling methods that would meet scrutiny. It has been subsequently reported that the Town voted to appeal the case to the Supreme Court of Virginia, so we will continue to monitor this litigation and report as it progresses.*
 - **Judicial update.** *The Virginia Court of Appeals also issued an opinion in [Keil v. O'Sullivan](#) on August 27, 2024. A sheriff's employee sought his own personnel file and records concerning an incident that occurred at the jail in which he was involved, including internal investigation records, under the Government Data Collection and Dissemination Practices Act (GDCDPA) and FOIA.¹ The appellant alleged violations of FOIA based on a failure to respond to a "renewed request" and a failure to provide complete records when providing the appellant's personnel file. The Court of Appeals upheld the lower court's ruling that because the sheriff's office responded to the appellant's original FOIA request, a failure to respond to a later "renewal" of the same request was not a FOIA violation. The Court of Appeals also held that while certain employment evaluations were provided after the statutory*

¹ Because the Council is generally limited to FOIA matters, and because the Court of Appeals ultimately upheld the trial court's rulings that the petitioner/appellant was not entitled to relief under either act, this summary does not include the GDCDPA aspects of the decision.

response deadline, "by the time the trial court decided the case, there was no need to grant mandamus or injunctive relief under VFOIA because the evaluations had been provided."

6. Public Comment.

7. Set Future Meeting Dates.

8. Adjournment.

Council Members

Delegate Marcus B. Simon, Chair
Senator Richard H. Stuart
Dennis Clark
Ryan Ferguson
Maria J.K. Everett
Corrine Louden
Lindsay Fisher

Senator Mamie E. Locke, Vice- Chair
Delegate Elizabeth B. Bennett-Parker
Amigo Wade
Chidi James
Ken Reid
Lola Rodriguez Perkins
Jon Burkett

Staff

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The FOIA Council's website is: <http://foiacouncil.dls.virginia.gov>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by email to staff prior to meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.
E-mail: foiacouncil@dls.virginia.gov.