



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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

Alan Gernhardt, Esq., Executive Director  
Ashley Binns, Esq., Attorney  
foiacouncil@dls.virginia.gov

Pocahontas Building ~ 900 East Main Street, Pocahontas Building, 8th Floor ~ Richmond, Virginia 23219  
804-698-1810 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-698-1899 ~ <http://foiacouncil.dls.virginia.gov>



### **VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

**Wednesday, December 2, 2020 - 2:00 PM**  
**Virtual Meeting**

This meeting may be viewed on the Senate of Virginia [Live Stream web page](#).  
[CLICK HERE](#) to register to give public comment.

#### **SUGGESTED AGENDA**

**\*ANNOTATED\***

- 1. Call to Order, introduction of members.** *Welcome to new FOIA Council member Chidi I. James, partner with the law firm of Blankingship & Keith, P.C. (appointed by the Speaker of the House of Delegates to fill the seat for a citizen member, formerly held by Michael Stern, as Mr. Stern's term expired on June 30, 2020).*
- 2. Subcommittee Reports.** *At its meeting on August 4, 2020, the FOIA Council assigned one bill referred by the 2020 Session of the General Assembly, one bill referred by the First 2020 Special Session of the General Assembly, and one resolution heard by the Council in 2019 and unanimously referred for further study to three subcommittees for further study. The work of the Phishing Study, Electronic Meetings, and Criminal Incident Information Subcommittees is described below.*

#### Phishing Study Subcommittee

- HJ 628 (2019; 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.

- *The Subcommittee met on November 17, 2020. The Subcommittee heard from Delegate Heretick who described his concerns about phishing attacks and presented suggestions for legislative change for the Subcommittee's consideration. The Subcommittee also heard from representatives from the City of Portsmouth and the Virginia Coalition for Open Government, and considered written comments from Mr. Roger Wiley concerning the expansion of a current FOIA provision dealing with the discretionary release of certain personal contact information provided to a public body for the purpose of signing up for electronic mail communication. After discussion and deliberation, the Subcommittee voted to recommend two legislative changes to the full Council.*
  - *The first change is an expansion to subdivision 10 of § 2.2-3705.1 that would provide that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members is excluded from the mandatory disclosure provisions of FOIA, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. Currently, the law provides protections for personal contact information provided to a public body, not to its members; only applies to electronic mail; and requires the electronic mail recipient to request the public body not to disclose his personal contact information in order for the information to be exempt from mandatory disclosure.*
  - *The second change is a further expansion of subdivision 10 which would provide that personal contact information provided to a public body or any of its members or employees during general correspondence is excluded from the mandatory disclosure provisions of FOIA. Currently, the law provides protections for personal contact information provided to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information.*

#### Electronic Meetings Subcommittee

- **HB 321 (2020; Levine) Virginia Freedom of Information Act; electronic meetings; serious medical condition of immediate family member.** Allows a public body to conduct a meeting through electronic communication means if, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that he is unable to attend due to a serious medical condition of an immediate family member that prevents the member's physical attendance. The bill also limits such participation in an electronic meeting due to a personal matter to either two meetings per calendar year or 10 percent of the meetings held that calendar year, rounded up to the nearest whole number, whichever is greater.
- *The Subcommittee met on October 20, 2020, and November 18, 2020. The Subcommittee heard from Delegate Levine who presented suggestions for legislative change regarding the option for public bodies to meet electronically for different reasons. The Subcommittee also heard and considered a number of*

written and oral public comments. At its last meeting on November 18, the Subcommittee voted to recommend the following two legislative drafts to the full Council:

- An amended substitute version of HB 321 that would allow for members of public bodies to participate remotely when caring for a family member with a serious illness, and allow members who participate remotely due to a personal matter that prevents physical attendance to do so twice per year or 25% of the meetings held per calendar year, rounded up, whichever is greater.
- Draft legislation that would amend the current provisions allowing for electronic meetings during a state of emergency declared by the Governor by allowing for such meetings due to a local state of emergency, by removing the limitation on the purpose of such meetings (currently limited to addressing the emergency), and other changes regarding the availability of videoconferencing and public comment.

#### Criminal Incident Information Subcommittee

- HB 5090 (2020 Special Session; Hurst) **Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files.** Adds criminal investigative files, defined in the bill, to the types of law-enforcement and criminal records required to be released in accordance with the provisions of the Virginia Freedom of Information Act. Under current law, the release of criminal investigative files is discretionary. The bill also allows a law-enforcement agency or attorney for the Commonwealth to petition a court of record for permission not to release criminal incident information that would otherwise be subject to release, if the release of such information is likely to jeopardize an ongoing investigation or cause certain other harms.
- *The Subcommittee met on October 21, 2020, and November 17, 2020. The Subcommittee heard from Delegate Hurst who presented suggestions for legislative changes to FOIA regarding the release of criminal incident information and criminal investigative files. The Subcommittee also heard and considered a number of written and oral public comments. At its first meeting on October 21, the Subcommittee directed Staff to prepare draft legislation mirroring the federal FOIA provisions regarding criminal incident information. At its meeting on November 18, the Subcommittee voted to make further changes to the draft legislation after hearing extensive public comment.*

**3. Legislative Preview.** *Each year the Council makes itself available to interested parties as a forum for legislative proposals involving FOIA or other access-related issues. By acting as a forum, the FOIA Council hopes that all persons interested in proposed FOIA amendments will be informed of these proposed amendments well in advance of the next session of the General Assembly and have the opportunity to address any disagreements or other issues before the next session.*

**4. Discussion.**

**5. Other Business.**

- Clarification on types of government websites to which meeting notices must be posted.

- *Update:* FOIA Training statistics.
- *Update:* Statistics on formal and informal requests for advisory opinions this year.

**6. Public Comment.**

**7. Future Meetings.**

**8. Adjournment.**

\*\*\*\*\*

**Council Members**

**Senator Mamie E. Locke, Chair**  
**Senator Richard H. Stuart**  
**Sandra G. Treadway**  
**Bruce Potter**  
**Amigo Wade**  
**Sterling Rives**  
**William "Billy" Coleburn**

**Delegate Marcus B. Simon, Vice Chair**  
**Delegate William Wampler, III**  
**Lee Bujakowski**  
**Matthew Conrad**  
**Shawri King-Casey**  
**Chidi James**  
**Cullen Seltzer**

**Staff**

Alan Gernhardt, Executive Director  
 Ashley Binns, Attorney

The FOIA Council's web site is: [http:// foiacouncil.dls.virginia.gov](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](mailto:foiacouncil@dls.virginia.gov).