



Virginia Freedom of Information Advisory Council

April 28, 2021, at 3:00 p.m.

Electronic Meeting

foiacouncil.dls.virginia.gov

The Virginia Freedom of Information Advisory Council (the Council) met electronically with Senator Mamie E. Locke, chair, presiding.¹ The meeting began with introductions and opening remarks followed by presentations, and assignment of subcommittees. Materials presented at the meeting are accessible through the [Council's meetings webpage](#).

Presentation: Recap of FOIA and Related Access Bills from 2021 Session²

Council Staff

Staff informed the Council that the 2021 Regular Session and Special Session I of the General Assembly enacted a total of 11 bills amending the Virginia Freedom of Information Act (FOIA).

Three bills passed the General Assembly that were recommended by the Council:

- HB 1931 (Levine) (i) authorizes a public body to conduct through electronic communication means a meeting for which, on or before the day of the meeting, a member of the public body holding the meeting notifies the chair that such member is unable to attend the meeting due to a family member's medical condition that requires the member to provide care for such family member, thereby preventing the member's physical attendance, and (ii) clarifies that participation in an electronic meeting by a member of a public body due to the inability to attend because of a personal matter is limited each calendar year to two such meetings or 25 percent of the meetings held that calendar year rounded up to the next whole number, whichever is greater.
- HB 2004³ (Hurst) (i) adds criminal investigative files relating to a criminal investigation or proceeding that is not ongoing to the types of law-enforcement and criminal records required to be released in accordance with the provisions of FOIA; (ii) provides that the mandatory release of criminal incident information relating to felony offenses and criminal investigative files shall not be required if the release of such information would likely effect certain results; and (iii) extends the amount of additional time a public body has to respond, in the case of a request for certain criminal investigative files, from an additional seven work days to an additional 60 work days as long as the public body has communicated to the requester within the initial allowable five-work-day response period

¹ **Members Present:** Senator Mamie E. Locke (chair), Delegate Marcus B. Simon (vice-chair), Delegate William Wampler, III, William Coleburn, Matthew Conrad, Chidi James, Pamela O'Berry, Bruce Potter, Cullen Seltzer, Sandra Treadway, and Amigo Wade. NOTE: All members participated by electronic means, and the meeting was livestreamed on the Senate of Virginia's website pursuant to § [4-0.01](#) (g) of the 2020-2022 State Budget. A video recording of the meeting is available on the [Council's meetings webpage](#).

Members Absent: Senator Richard H. Stuart, Lee Bujakowski

² References to the 2021 Session of the General Assembly include the 2021 Special Session I.

³ As introduced, HB 2004 was a recommendation of the Council.

that it is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period.

- HB 2025 (Gooditis) provides 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.

Seven bills clarify two existing records exemptions and add three new records exemptions in FOIA as follows:

- HB 2007 (Sickles) exempts from the mandatory disclosure provisions of FOIA information of a proprietary or confidential nature disclosed by a health carrier or pharmacy benefits manager pursuant to § 38.2-3407.15:6, a wholesale distributor pursuant to § 54.1-3436.1, or a manufacturer pursuant to § 54.1-3442.02. (adding an exemption in § 2.2-3705.6)
- HB 2025 (Gooditis) clarifies 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. (amending § 2.2-3705.1)
- HB 2263 (Mullin) and SB 1165 (Surovell) amend the current exemption for information held by the Department of Corrections to clarify that such information is exempt from the mandatory disclosure provisions of FOIA if it was made confidential by the former § 53.1-233, which will be repealed as of July 1, 2021. (amending § 2.2-3705.7)
- HB 2312 (Herring) and SB 1406 (Ebbin) add the Virginia Cannabis Control Authority to the list of public bodies in the current exemption for information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to certain public bodies. (amending § 2.2-3705.3)
- SB 1343 (Vogel) exempts from the mandatory disclosure provisions of FOIA proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a carbon sequestration agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business. (amending a current exemption in § 2.2-3705.6)

Five bills clarify three existing meetings exemptions and add one new meetings exemption in FOIA as follows:

- HB 1812 (Krzek) amends the current exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board to add that deliberations regarding the refusal to issue, suspension of, or revocation of any license or permit related to casino gaming may also be held in a closed meeting. (amending § 2.2-3711)



- HB 1931 (Levine) clarifies the exemption for meetings held by electronic communication means by (i) authorizing a public body to conduct through electronic communication means a meeting for which, on or before the day of the meeting, a member of the public body holding the meeting notifies the chair that such member is unable to attend the meeting due to a family member's medical condition that requires the member to provide care for such family member, thereby preventing the member's physical attendance, and (ii) providing that participation in an electronic meeting by a member of a public body due to the inability to attend because of a personal matter is limited each calendar year to two such meetings or 25 percent of the meetings held that calendar year rounded up to the next whole number, whichever is greater. (amending § 2.2-3708.2)
- HB 2312 (Herring) and SB 1406 (Ebbin) add an exemption for discussion or consideration by the Board of Directors of the Virginia Cannabis Control Authority of information subject to the exclusion in subdivision 1 of § 2.2-3705.3 related to investigations of applicants for licenses and permits and of licensees and permittees. (amending § 2.2-3711)
- SB 1271 (McPike) amends the current provisions regarding meetings held through electronic communication means during a state of emergency to (i) allow a public body, or a joint meeting thereof, to meet by electronic communication means without a quorum of the public body physically assembled at one location when a locality in which the public body is located has declared a local state of emergency, provided that (a) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (b) the purpose of the meeting is to provide for the continuity of operations of the public body or the discharge of its lawful purposes, duties, and responsibilities, and (ii) require public bodies meeting through electronic communication means during a local or state declaration of a state of emergency to (a) make arrangements for public access to such meeting through electronic communication means, including videoconferencing if already used by the public body, and (b) provide the public with the opportunity to comment at such meetings when public comment is customarily received. (amending § 2.2-3708.2)

One bill adds a new provision to FOIA and amends existing provisions as follows:

- HB 2004 (Hurst) amends the provisions of FOIA regarding criminal incident information and certain criminal investigative files and creates a new provision of FOIA that provides that the mandatory release of criminal incident information relating to felony offenses and criminal investigative files shall not be required if the release of such information would likely effect certain results. The bill also clarifies that, in the case of a request for certain criminal investigative files, a public body has an additional 60 work days to respond to the request, so long as the public body has communicated to the requester within the initial allowable five-work-day response period that it is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period, and provides that in a proceeding commenced against any officer, employee, or member of a public body under § 2.2-3713 for a violation of § 2.2-3706.1, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, certain civil penalties. (amending §§ 2.2-3704, 2.2-3706, and 2.2-3714 and adding § 2.2-3706.1)



Presentation: HB 1997, HB 2000, and HB 2196⁴

Delegate Kathleen Murphy, Delegate Danica A. Roem, and Delegate Michael P. Mullin

Delegate Kathleen Murphy presented an overview of her HB 1997, which sought to increase from three to four the number of members of a public body meeting as an informal assemblage that constitutes a meeting under FOIA.

Delegate Danica A. Roem presented an overview of her HB 2000. She noted that the nexus of the bill was to address egregious fees charged by a public body for public records requests. HB 2000 sought to eliminate charges for the first two hours of time spent by a public body accessing, duplicating, and producing public records, and introduced a cap on the hourly rate that can be charged after that.

Delegate Michael P. Mullin presented an overview of his HB 2196, which sought to allow for the release of law-enforcement disciplinary records after there has been a founded complaint. Delegate Mullin noted that the purpose of HB 2196 was to allow the public to be more informed on the actions of the law-enforcement personnel who are charged with protecting their communities.

Assignment of Subcommittees

Senator Locke

Members of the Council were assigned to specific subcommittees to study each of the bills presented during the meeting. Senator Locke followed staff recommendations by establishing a Meetings Issues Subcommittee to study HB 1997 (Murphy), the definition of "official government website" for the purpose of posting meeting notices, and other meetings and electronic meetings issues and by establishing a Records Issues Subcommittee to study HB 2000 (Roem) and HB 2196 (Mullin).

The Meetings Issue Subcommittee consists of Council members Cullen Seltzer (chair), Lee Bujakowski, William Coleburn, Matthew Conrad, and Chidi James.

The Records Issues Subcommittee consists of Council members Matthew Conrad (chair), Pamela O'Berry, Bruce Potter, Cullen Seltzer, Sandy Treadway, and Amigo Wade.

Update on SCHEV HB 2120 Study

Council Staff

Staff reported that HB 2120 (Keam, 2021) directs the State Council of Higher Education for Virginia (SCHEV) to consult the Council in working with public institutions of higher education and technology experts to develop a minimal uniform standard to provide the public with real-time electronic access to meetings of the governing boards of public institutions of higher education. To implement this directive, Council staff members are participating in work group meetings hosted by SCHEV. Once the work group has developed a legislative recommendation, it will present that recommendation to the Council as part of the Council's annual legislative preview.

⁴ HB 1997, HB 2000, and HB 2196 were introduced during the 2021 Regular Session of the General Assembly and were referred to the Council by letter from the House Committee on General Laws.



Public Comment and Next Meeting

Staff reported receiving four public comments for the meeting that were posted to the [Council's meetings webpage](#). There were several live public comments regarding each of the three bills presented. Representatives from the Virginia Coalition for Open Government and the Virginia Press Association expressed interest in actively participating in each of the subcommittees.

Senator Locke directed staff to poll members of the Council about future meeting dates for the Council and its subcommittees.

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

Alan Gernhardt, Executive Director, Virginia Freedom of Information Advisory Council, DLS
agernhardt@dls.virginia.gov
804-698-1877

Ashley Binns, Attorney, Virginia Freedom of Information Advisory Council, DLS
abinns@dls.virginia.gov
804-698-1812

