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## Virginia Freedom of Information Advisory Council

July 27, 2023, at 1:00 p.m.

Senate Room A, Pocahontas Building

[foiacouncil.dls.virginia.gov](https://foiacouncil.dls.virginia.gov)

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The Virginia Freedom of Information Advisory Council (the Council) met with Senator Mamie E. Locke, vice-chair, presiding.<sup>1</sup> The meeting began with introductions, welcome of new members Delegates Mike A. Cherry and Michael P. Mullin,<sup>2</sup> and opening remarks followed by the election of chair and a recap of Virginia Freedom of Information Act (FOIA) and related access bills from the 2023 Session of the General Assembly. Materials presented at the meeting are accessible through the Council's [Meetings webpage](#).

### Election of Chair and Vice-Chair

Elections for chair and vice-chair were last held on December 14, 2022, when the Council elected Delegate Marcus B. Simon as chair and Senator Locke as vice-chair. The Council needed to elect a new chair to replace Delegate Simon, as he no longer serves on the Council. Delegate Mike A. Cherry was elected chair by unanimous vote. Senator Locke remains vice-chair.

### Presentation: Recap of FOIA and Related Access Bills from 2023 Session

*Council Staff*

Staff provided the Council with a summarized version of the 2023 FOIA Legislative Update. The 2023 Session passed a total of 17 bills amending FOIA. One legislative draft was recommended by the Council to the 2023 Session, but it was not introduced.

Of the 17 bills that amend FOIA, two bills add a new records exemption in FOIA as follows:

- HB 2394 (Cordoza) and SB 1497 (Locke) exclude from mandatory disclosure under FOIA trade secrets, proprietary information, or financial information supplied by an individual or a private or nongovernmental entity to the Fort Monroe Authority for the purpose of complying with the obligations of any lease, easement, license, permit, or other agreement, whether of a commercial or residential real-estate nature, pertaining to the use or occupancy of any portion of Fort Monroe. The bills provide that in order for such trade secrets, proprietary information, or financial information to be excluded, the applicant shall (i) invoke this exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify with specificity the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. (amending § 2.2-3705.6)

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<sup>1</sup> **Members Present:** Delegate Mike A. Cherry (chair), Senator Mamie E. Locke (vice-chair), Senator Richard H. Stuart, Delegate Michael P. Mullin, William D. Coleburn, Matthew Conrad, Ryan Ferguson, Chidi I. James (virtual), Lola Rodriguez Perkins, Bruce Potter, Cullen D. Seltzer.

**Members Absent:** Delegate William C. Wampler III, Lee Bujakowski, Sandra G. Treadway, Amigo Wade.

<sup>2</sup> Delegates Cherry and Mullin replace Delegates Marcus B. Simon and William C. Wampler III, as appointees of the Speaker of the House.

Nine bills amend existing provisions of FOIA as follows:

- HB 1569 (Walker) clarifies that personnel records excluded from disclosure under FOIA include those of persons employed by (i) a public body engaged in emergency medical services or fire protection services, (ii) a law-enforcement agency, or (iii) an emergency 911 system or any other equivalent reporting system. The bill also contains technical amendments. (amending § 2.2-3706)
- HB 1738 (Carr) provides that all state public bodies may provide public access to meetings through electronic communication means and may provide the public with the opportunity to comment at such meetings through the use of such electronic communication means when public comment is customarily received. (amending §§ 2.2-3707, 2.2-3707.2, 15.2-1416, 15.2-2308.1, and 23.1-1303)
- HB 2006 (Roem) provides that any local public body that charges for the production of public records pursuant to FOIA may provide an electronic method of payment through which all payments for the production of such records to such locality may be made. (amending § 2.2-3704)
- HB 2007 (Roem) requires a public body to make available upon request and post on its website or otherwise publish a written policy (i) explaining how the public body assesses charges for accessing or searching for requested records and (ii) noting the current fee charged, if any, by the public body for accessing and searching for the requested records. (amending § 2.2-3704.1)
- HB 2156 (Watts) and SB 1170 (Hanger) clarify the duty of agencies and political subdivisions of the Commonwealth to cooperate with and assist the Behavioral Health Commission in the performance of its duties and require such agencies and political subdivisions to provide to the Commission (i) to the fullest extent possible and except as prohibited by law, any records, including data and information, requested by the Commission and (ii) upon request and availability, access to the facilities of any such agency or political subdivision. The bills also exclude from the mandatory disclosure provisions of FOIA records of the Commission. (amending §§ 2.2-3705.3 and 30-408)
- HB 2345 (Head) and SB 1255 (Dunnavant) rename the Emergency Department Care Coordination Program as the Smartchart Network Program and expand the Program to allow participation by all health care providers, insurance carriers, and other organizations with a treatment, payment, or operations relationship with a patient in the Commonwealth to facilitate real-time communication and collaboration. Under current law, participation is limited to hospital emergency departments. The bills make several other modifications to the Program, including adding a requirement that the Program allow health care providers, health care entities, and insurance carriers to access information necessary to evaluate and monitor the care and treatment of a patient in accordance with applicable patient privacy and security requirements and adding a requirement that such entities continue to improve care coordination in hospital emergency departments in order to reduce the frequency of visits by high-volume emergency department utilizers. The bills also direct the State Health Commissioner and the Director of the Department of Health Professions to convene a work group to study and establish a plan to develop and implement a system to share information regarding a patient's prescription history and medication reconciliation. The bills require the Commissioner and the Director to report their findings and recommendations to the Chairmen of the Joint Commission on Health Care, Senate Committee on Education and



Health, and House Committee on Health, Welfare and Institutions by October 1, 2023. The provisions of the bills other than creation of the work group have a delayed effective date of January 1, 2024. (amending §§ 2.2-3705.5, 32.1-372, 54.1-2523, and 54.1-2525)

- HB 2498 (Kory) adds members of any boards governing any authority established pursuant to the Park Authorities Act to the list of persons to whom the Council or the local government attorney is required to provide training. The bill requires such members to complete such training sessions within two months after assuming the local elected office and requires the clerk of each governing body or school board to maintain records indicating the names of such members and the dates of training completion. (amending § 2.2-3704.3)

Two identical bills remove existing provisions in FOIA and amend Title 53.1 as follows:

- HB 2169 (Williams) and SB 1361 (Morrissey) remove provisions that exempted from the mandatory disclosure provisions of FOIA the records of the Parole Board. The bills require the Board to (i) adopt rules regarding parole eligibility as set forth in the bills; (ii) publish the statement of actions taken by the Board by the fifteenth day of each month; (iii) include in such statement individualized reasons for the granting or denial of parole and the vote of each member; (iv) conduct final deliberations and votes on parole decisions at public meetings; (v) publish an annual report that summarizes actions taken by the Board during the prior year; and (vi) provide a prisoner or his attorney with all information, other than the personal information of the victim, gathered by the Board during an investigation, provided that such information shall not be further disclosed, reproduced, copied, or disseminated.

The bills provide that final discharges may be issued by the Board only upon approval by a majority of Board members and require the Board to publish an annual report regarding such final discharges, with items specified in the bills. The bills also require the Board, prior to making any decision to grant discretionary parole to an inmate, to have discussed and debated such decision at a meeting at which a majority of the Board members were present. The bills require, in cases in which the Board grants discretionary parole to an inmate, each Board member to identify his reasoning for such decision at the time such member's vote is cast. The bills require that parole review hearings include a live interview of the prisoner, which may be conducted in person or by videoconference or telephone, and, absent imminent death or other extraordinary circumstances, prohibit the Board from granting parole to any prisoner who has not received a live interview within the prior calendar year. The bills also allow the victim of the crime for which the prisoner is incarcerated to present testimony to the Board by virtual means. The bills have a delayed effective date of July 1, 2024. (amending §§ 2.2-3703, 53.1-136, 53.1-154, and 53.1-155)

Two identical bills amend existing provisions in FOIA, add new sections in Title 23.1, and repeal a chapter in Title 23.1 as follows:

- HB 1840 (Knight) and SB 1211 (Lucas) repeal provisions establishing and relating to Eastern Virginia Medical School and designate the schools and divisions previously existing as Eastern Virginia Medical School and such other academic units of Old Dominion University related to the health sciences as may be identified by the Old Dominion University Board of Visitors as the Eastern Virginia Health Sciences Center at



Old Dominion University (the Health Sciences Center). The bills permit Old Dominion University to provide medical and health sciences education and related research through the teaching hospitals and related health care and health maintenance facilities at the Health Sciences Center and contain provisions relating to the operations of the Health Sciences Center, including provisions relating to cooperative arrangements and joint ventures. The bills have a delayed effective date of the date after July 1, 2023, on which the Governor and the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations provide written approval for Old Dominion University and Eastern Virginia Medical School to complete a merger to create the Eastern Virginia Health Sciences Center at Old Dominion University. *(Note: the bills make technical amendments to existing records and meetings exemptions within FOIA.)* (amending §§ 2.2-3106, 2.2-3705.4, 2.2-3711, 2.2-4343, 2.2-4345, 22.1-209.2, 23.1-608, 23.1-608.1, 23.1-809, 23.1-1100, 23.1-1200, 23.1-2001, 23.1-2002, 32.1-69.3, 32.1-279, 38.2-5008, and 54.1-2961; adding in Chapter 20 of Title 23.1 sections numbered 23.1-2005, 23.1-2006, and 23.1-2007; and repealing Chapter 30 (§§ 23.1-3000 through 23.1-3014) of Title 23.1)

Two identical bills amend an existing closed meeting exemption in FOIA, add a new chapter in Title 2.2, and repeal various sections in Titles 2.2, 40.1, and 60.2 as follows:

- HB 2195 (Byron) and SB 1470 (Ruff) create the Department of Workforce Development and Advancement (the Department) to administer workforce development programs. The bills consolidate statewide workforce program evaluation and data sharing under the Department and provide protections against improper disclosure of data. The bills provide for the Virginia Board of Workforce Development to conduct an independent evaluation of the operations and program objectives of the Department on a biennial basis with the first report due on December 1, 2025. The bills also (i) transfer administration of apprenticeship programs from the Department of Labor and Industry to the Department, (ii) direct the State Council of Higher Education for Virginia to collaborate with the Department to grow and expand the Innovative Internship Fund and Program, and (iii) direct the Secretary of Labor (the Secretary) to conduct a comprehensive review of the Commonwealth's workforce development programs and make recommendations to address a wide range of subjects relating to improving the effectiveness and efficiency of such programs. The Secretary is also required to convene a stakeholder work group to advise the Secretary during the transition period. As introduced, the bills were a recommendation of the Small Business Commission. *(Note: Amends an existing exemption for closed meetings of a subcommittee of the Board of the Virginia Economic Development Partnership Authority.)* (amending §§ 2.2-214.2, 2.2-214.3, 2.2-435.10, 2.2-2237.3, 2.2-2238, 2.2-2472, 2.2-3711, 2.2-3905, 40.1-100, 54.1-1101, 60.2-105, 60.2-111, and 60.2-631; adding a new chapter numbered 20.2 in Title 2.2, containing articles numbered 1 through 4, consisting of sections numbered 2.2-2035 through 2.2-2057; and repealing § 2.2-435.8, Chapter 6 (§§ 40.1-117 through 40.1-127) of Title 40.1, §§ 60.2-110, 60.2-113, 60.2-113.1, 60.2-309, and 60.2-310, and Chapter 4 (§§ 60.2-400, 60.2-400.1, and 60.2-401) of Title 60.2)

For further detail, please see the full 2023 Legislative Update posted on the [Council's website](#).



## **Presentation: Judicial Update**

### *Council Staff*

Staff provided the Council with a summary of three Supreme Court of Virginia decisions relating to FOIA that were issued since the Council last met:

- The Court issued its decision in the case of *Berry v. Bd. of Supervisors of Fairfax County* on March 23, 2023. The Court held that a zoning ordinance adopted by the County at an electronic meeting conducted during the COVID-19 pandemic was void ab initio because the meeting failed to comply with FOIA's open meetings requirements. Note that the meeting at issue was conducted under the electronic meetings language in the State Budget (2020–2022 State Budget Item 4-0.01(g)), not under the provisions in FOIA regarding electronic meetings during a declared state of emergency (§ 2.2-3708.2). A notice of rehearing, petition for rehearing, and amicus briefs have been filed in the case.
- The Court issued its decision in the case of *Suffolk City School Board v. Wahlstrom* on April 27, 2023. The Court affirmed the decision of the trial court that the School Board had violated FOIA by not allowing Wahlstrom to attend a meeting in person when there was sufficient space in the meeting room for her to do so. The Court held that FOIA "affords citizens the opportunity to attend public meetings in person by actually entering into the physical space where the meeting is being conducted" with reasonable limitations such as room capacity and social distancing rules in place during the COVID-19 pandemic (14). The Court also discussed the standards for issuing injunctive relief, awards of attorney fees and costs, and civil penalties for knowing and willful violations of FOIA.
- The Court issued its decision in the case of *Gloss v. Wheeler* on May 18, 2023. The Court ruled that five members of a county board of supervisors held an improper meeting in violation of FOIA under the facts of the case when they met with police officials and others in regard to protests that were held in the county concerning the death of George Floyd in Minnesota in 2020. The Court held that in the context of public meetings, "for a topic to constitute public business it must not just be something that conceptually could at some point come before a public body, but rather, the topic must be something that is either before the public body or is likely to come before the body in the foreseeable future" (19).

## **Presentation: HB 1880 (Bennett-Parker, 2023)**

### *Megan Rhyne, Virginia Coalition for Open Government (VCOG)*

Megan Rhyne presented an overview of HB 1880, on behalf of Delegate Elizabeth B. Bennett-Parker. HB 1880, which was left in the House Committee on Counties, Cities and Towns during the 2023 Session, sought to require localities to retain a public record of certain legal settlements and judgments and to require the record of such amount to be subject to disclosure if requested pursuant to FOIA.

## **Assignment of Subcommittees**

Committee members recommended the Council refer *Berry v. Board of Supervisors of Fairfax County* and *Gloss v. Wheeler* to the Meetings Issues Subcommittee for study. Delegate Cherry



followed staff recommendations to establish an HB 1880 Subcommittee and an Electronic Meetings Subcommittee.

The Meetings Issues Subcommittee consists of Council members Delegate Cherry, William Coleburn, Lola Rodriguez Perkins, Bruce Potter, and Cullen Seltzer.

The HB 1880 Subcommittee consists of Council members Senator Locke, Delegate Cherry, Delegate Mullin, Lola Rodriguez Perkins, and Cullen Seltzer.

The Electronic Meetings Subcommittee consists of Council Members Senator Locke, Matthew Conrad, Bruce Potter, and Cullen Seltzer.

### **Public Comment**

Staff reported that the Council received two written public comments concerning electronic meetings that were posted to the [Council's meetings webpage](#). One written comment was from Sarah Taylor, who also attended the meeting in person; speaking as the parent of a special needs child, she suggested amending the Code of Virginia to allow members of public bodies who meet the definition of a "person with a disability" to participate remotely in meetings of public bodies.

### **Future Meeting Dates**

Delegate Cherry directed staff to poll members of the Council about future meeting dates for the Council.

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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

Joseph Underwood, Senior Attorney, Virginia Freedom of Information Advisory Council, DLS  
junderwood@dls.virginia.gov  
804-698-1811

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