REPORT OF THE
COUNCIL ON INFORMATION MANAGEMENT ON

# CURRENT STATUTES GOVERNING INFORMATION POLICY IN VIRGINIA

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA


## SENATE DOCUMENT NO. 40

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# COMMONWEALTH of VIRGINIA

## COUNCIL ON INFORMATION MANAGEMENT



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TO: The Honorable George Allen, Governor of Virginia
Members of the General Assembly

On behalf of the Council on Information Management, I am pleased to provide you with the report called for by Senate Joint Resolution 238 adopted by the General Assembly in January 1993. In carrying out its responsibilities, the Council has received the assistance of the Institute of Bill of Rights Law at The College of William and Mary, as well as policy experts representing the Virginia Citizens Consumer Council, the Virginia Press Association, the National Archives, agencies of state and local government, the Woodrow Wilson International Center for Scholars and the law firm of Fenwick and West.

This report has two distinct purposes. As directed by the General Assembly, the report provides an assessment of the impact of technology on the collection, maintenance, preservation, use and dissemination of information. Further, it examines whether, in an electronic environment, current state law ensures public access to government information, protects the rights of the individual to control information about himself, promotes the accuracy and integrity of public records and protects the taxpayer's investment in collecting, developing, storing and maintaining public records.

In submitting this report for publication, the Council believes it is important to emphasize that, with the advent of advanced information technologies, the process for managing and providing access to public records has become more complex. While the study reveals that current laws, for the most part, are adequate to address these issues, resolving the question of access versus privacy involves a unique set of challenges for the Commonwealth.

Respectfully submitted,

Hud Croasdale

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## INTRODUCTION

Information policy clearly constitutes an emerging challenge for public officials in Virginia in the 1990s. Although state and local governments have always recognized their role in managing and providing access to public records, the advent and increasing use of computers and other advanced information technologies have increased the complexity of this task and have revealed ways in which the Commonwealth's information policies can sometimes conflict.

Over the past few years, a number of issues have been raised concerning access to government information, preservation of electronic records, privacy and intellectual property which may call into question the efficacy of Virginia information laws in the electronic age. Because new technology is putting considerable pressure on the laws that were passed to regulate government information policy when government information was recorded primarily on paper, there may be a need to amend those laws in order to make certain that the policies represented in those laws are not lost as that information becomes electronic.

Senate Joint Resolution 238 was adopted by the General Assembly in January 1993. This resolution called for a study to determine whether current law ensures public access to government information, protects the rights of the individual to control information about himself, promotes the accuracy and integrity of public records and protects the taxpayer's investment in collecting, developing, storing and maintaining public records.

To ensure a thorough discussion of the issues, the Council on Information Management ("Council") formed a committee of policy experts. Serving on the committee were:

Robert D. Harris, Chair, Council on Information Management
Rodney A. Smolla, The Institute of Bill of Rights Law
John Westrick, Office of the Attorney General
Charles C. Livingston, Department of Information Technology
Marie B. Allen, National Archives
Jean Ann Fox, Virginia Citizens Consumer Council

The committee was assisted by a member from each of the Council's advisory committees, representing the technology community in state and local governments:

Dr. Franklin E. Robeson, The College of William and Mary, Education Advisory Committee
Jacqueline M. Ennis, Department of MHMR/SAS, Agency Advisory Committee
H. Bishop Dansby, GIS Law, Advisory Committee on Mapping, Surveying, and Land Information Systems
Robert Yorks, Local Government Advisory Committee

A second group of individuals was formed to provide specific policy assistance in the areas of copyright, privacy, access and public records:

J. T. Westermeier, Fenwick & West
David H. Flaherty, Woodrow Wilson Int'l. Center for Scholars
Edward Jones, *The Free Lance-Star* (Fredericksburg, Virginia)
A. W. Quillian, Department of Motor Vehicles
Louis Manarin, Library of Virginia

The committee held a series of meetings at which individuals and representatives of organizations who had expressed interest in this topic attended and were given an opportunity to express their concerns and recommendations.

The Council has concluded that the tension between the Commonwealth's current policies cannot be completely eliminated but rather calls for a balancing of objectives. The Council believes that many of these tensions can be addressed administratively or with relatively minor statutory changes. The Council recommends that compliance with minimum requirements as well as full attainment of the Commonwealth's policies regarding access, privacy, and records preservation can best be addressed in a programmatic fashion through ongoing development of guidance that relates compliance with these laws to the evolving technology and overall management of information technology planning and acquisition. Protecting the taxpayer's investment in collecting and maintaining government databases and protecting the citizen's ability to control information about himself cannot be fully accomplished within the current statutory framework and will present significant policy issues that the General Assembly may wish to address.

## OPPORTUNITIES AND CONCERNS IN THE ELECTRONIC RECORDS ERA

### Preserving and Protecting Government Records

The electronic records era presents opportunities for more effective archiving and retrieval of government records. Imaging and other digital technologies represent new preservation techniques that can be used in place of, or in conjunction with, analog processes such as photocopy or microfilm, thereby providing an alternative of comparable quality and lower cost.

Converting electronic records from operational media into durable form for permanent storage presents a challenge because most electronically-stored information is very short-lived, and the media used in operations typically are nondurable. Tapes, diskettes and hard drive space can become unreliable relatively quickly or may need to be reused in ordinary course, and computer memory is subject to loss whenever computers are turned off. This is especially a concern with respect to government actions and transactions occurring entirely in electronic form and which no longer generate a traditional paper record. Archiving of electronic records also requires selection of appropriate "snapshots" of data, as the electronic environment often consists of evolving sets of data rather than series of separate documents.

An additional challenge for electronic preservation arises from the fact that many information management systems employ custom-designed data structures or require customized or proprietary software to retrieve or display data. As information management systems are replaced by more efficient systems (and older software ceases to be supported, understood or even licensed), it can become difficult to maintain the access to non-current records which the agency chooses not to translate for continued use.

An important issue created by the electronic environment is the question of how much information to capture. The electronic environment offers the potential to capture far more information as public records than was previously the case. Without judging the desirability of doing so, vast amounts of information from informal messages, phone conversations, preliminary drafts of documents, workplace surveillance devices and other electronic sources, as a technical matter, can be captured and preserved. Whether this is advisable from the viewpoint of cost, efficiency, privacy and other factors is another matter.

### Ensuring Access To Current Government Information

Some of the same factors discussed above with regard to the archiving of electronic records apply also to citizen access to current government information. The increased quantity of preservable data enhances the completeness of the information which may be obtained by citizens, and the electronic format can facilitate research and retrieval

of information previously obtainable, if at all, only by manual search. The electronic format, however, also presents potential barriers to access if unique data structures are used or if customized or proprietary software is needed to locate or retrieve data.

An issue which is intensified by the electronic environment is the question of how much time and money a public body ought to spend to assist citizens who wish to access government information in forms or ways that would require special efforts by the public body. The "snapshot" issue also presents difficulties, because a search of an electronic database ordinarily cannot be performed instantly upon receipt of a request but ought to be available in some form that does not unduly burden the ongoing operations of public bodies.

## Enhancing the Efficiency Of Government

Great opportunities to improve the efficiency of government have been and continue to be available through e-mail, voice mail, electronic bulletin boards, word processing, information management systems, automation of agency functions, electronic monitoring of the work place and other technologies. However, the efficiency gains offered by these technologies may be limited to the extent a public body's use of the technologies triggers time-consuming and expensive requirements to retain and index electronic files, translate data or provide for continuing use of older software to manage non-current records, or document every deletion or non-retention of electronic data.

A further loss of efficiency may be created to the extent voice mail, e-mail or other technologies are avoided by employees in favor of more costly meetings or telephone calls that do not generate a permanent record of their every communication.

The electronic records era has also raised a further issue of efficiency in managing available staff resources and agency budgets. Responding to a Freedom Of Information Act (FOIA) request for electronic records, together with all related Privacy Protection Act measures, can involve a significant diversion of staff resources from the agency's primary mission. This diversion can take the form of programming assistance, report generation, or review of records to determine whether they are disclosable or to segregate disclosable from exempt portions. As information, particularly in electronic form, attains commercial value outside traditional FOIA purposes, the quantity and frequency of such requests, as well as the volume of material sought in any particular request, is likely to increase and make the cost issue more acute.

## Protecting the Taxpayer's Investment in Databases and Systems

Development of computer systems and associated databases can represent an enormous investment of taxpayer funds and can result in databases and systems that resemble valuable information products much more than they resemble records of public transactions. In such cases, an issue of proper stewardship of publicly-held

assets and of minimizing future tax burdens is created when information marketers seek to obtain, at no or little cost under FOIA, the fruits of the public investment. In some cases, a system may be economically feasible only if the cost of its creation can be shared with private entities that will also benefit from the technology. However, a public body's ability to partner in this fashion is undercut to the extent the public body can be required to provide the fruits of the effort to anyone for free, whether or not they contributed to the development effort.

In some cases, the public body's mission may require wide disbursement of the information in question. In such cases, making the information freely available does not present the same conflict between the taxpayer's interest and the interest of users of that information. Similarly, if the taxpayers' representatives have concluded that free disbursement of valuable information products is in the best interest of the public due to economic development or other considerations, this would reflect a public policy determination not to protect the government's proprietary interest in such products.

## Protecting the Individual's Ability to Control Personal Information

The concerns that originally prompted the passage of the Virginia Privacy Protection Act seem even greater today as electronic record-keeping continues to expand. Many citizens fear that far too much information about identifiable individuals is collected, retained and disseminated by government, and that too few controls are exercised to prevent unauthorized uses or to correct errors. All this is causing citizens to lose a measure of privacy from "practical obscurity" -- the difficulty, in the absence of computer matching, of gathering and linking the many bits of personal information that citizens are constantly required or encouraged to provide as a condition of receiving various benefits or services in the public and private sectors. This collection, retention and dissemination of personal information endangers the individual's opportunities to secure employment, insurance, credit and due process and other legal protections. Particular concern exists with respect to the continued use of social security numbers as identifiers, as this information more than any other is believed to facilitate private, unauthorized access and use of credit and other records.

While the increased usage of electronic records heightens citizen interest in assuring full compliance with the Privacy Protection Act, this alone is not viewed as sufficient. The Privacy Protection Act does not prevent dissemination of information, but instead merely requires that certain measures be taken in connection with that dissemination, such as retaining a list of recipients so that, for example, they can be notified of any corrections, and so that the data subject, if he undertakes the effort, can find out who has received information about him and what decisions about him were affected by that information. What these citizens really seek, however, is protection against dissemination of personal information by government.

## REVIEW OF CURRENT LAWS

The four statutes identified in Senate Joint Resolution 238, the Virginia Public Records Act,[1] the Virginia Freedom Of Information Act,[2] the Privacy Protection Act of 1976,[3] and the Intellectual Property Act,[4] interact to form most of the Commonwealth's current information policy. Following is a review of these laws and areas in which they could be improved to meet needs arising in the electronic records era.

### Freedom Of Information Act

The Freedom of Information Act is intended, among other goals, to ensure that the people of the Commonwealth have ready access to records in the custody of public officials.[5] The FOIA directs that all official records shall be open to inspection and copying within five work days after the request, except as may be otherwise specifically provided by law. The FOIA itself currently lists 58 exemptions from mandatory disclosure, most of which are designed specifically to exempt particular records of particular agencies. The FOIA provides for quick judicial enforcement in the event of alleged violations.

The FOIA has a conceptual problem at its core: the concept of an "official record" is no longer entirely valid as a clearly-defined unit of information in the electronic environment. The concept of the "official record" is rooted in the paper era, when paper documents could be viewed as the building blocks of government information. An official record typically was a visually-perceivable paper document, and many of the balances struck by the FOIA between the goals of access versus administrative

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1 Code of Virginia, §§ 42.1-76 through 42.1-91.

2 Code of Virginia, §§ 2.1-340 through 2.1-346.1.

3 Code of Virginia, §§ 2.1-377 through 2.1-386.

4 Code of Virginia, § 2.1-20.1:1.

5 Code of Virginia, § 2.1-340.1.

efficiency and cost, were structured around that concept.[6] As other, non-paper media evolved, the definition of "official record" has been adapted to the new media.[7] Now, with electronic record-keeping, the concept of an identifiable "record" consisting of a reasonably specific discussion or report on some government action is significantly at odds with reality. Eventually a statutory change may be necessary.

For the present, however, the Council believes the current definition is workable. The definition of "official record" contemplates some physical embodiment of the information.[8] In the case of electronic records, this may be a tape, diskette or optical disk.[9] It would appear that the minimum requirements of current law are simply to make the record reasonably accessible at reasonable cost. Ordinarily this can be a tape onto which the data in question have been dumped, preferably in a standard format such as ASCII files (if the programming effort is not unreasonable). Where feasible, the agency is authorized, but not required, to prepare summaries or reports by extracting specific information from tapes, disks or other records that is more directly responsive to the requester's research topic.[10] Programming or report generation tasks appear mandated only in connection with segregating exempt from non-exempt portions of a record where such segregation is reasonable. The five work-day turn-around time provides some guidance as to the level of effort that is reasonable for segregating specific entries from a database.[11] This does not preclude public bodies from undertaking greater efforts voluntarily within a larger time agreeable to both the public body and the requester. The Council believes that public bodies generally are

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6 A request must reasonably identify the record sought and must be made to the custodian of the record. The request must identify an existing record; the public body is not required to create new ones. Code of Virginia, § 2.1-342(A). These limitations envision compliance as simply a matter of retrieving an identified document from the agency's files. With the assumption that significant government actions tend to generate records, the limitation to existing records minimizes compliance costs while providing information that is most likely to shed light on government operations.

7 See, Code of Virginia, § 2.1-341.

8 Official records are defined as "all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business." Code of Virginia, § 2.1-341.

9 In Associated Tax Service, Inc. v. Fitzpatrick, 372 S.E.2d 625, 626 and 629 (1988), the Virginia Supreme Court stated that a "computer disk file" is an official record, but the precise description of what constituted a record was not at issue in the case.

10 See Code of Virginia, § 2.1-342(A).

11 See Code of Virginia, § 2.1-342(A).

cooperative, provided that excessive diversion of staff resources can be avoided.

The FOIA does not directly indicate what factors should be considered in determining whether electronic records are reasonably accessible, or what level of effort can reasonably be expected of the agency to enhance accessibility. While guidance in this area would be helpful, the wide variety of existing electronic information systems both within state government and as between state and local government, as well as the likelihood that technology will continue to evolve rapidly, weigh against efforts to standardize the specifics of access through legislation. This is not to say that access is as complete as all would desire. Rather, the Council's conclusion is that the statute imposes certain minimum standards, but that higher ideals of access, as a practical matter, can best be pursued only through strategic planning of information technology resources, especially at the information systems procurement or implementation stage. The Council recommends that information technology management guidelines issued under § 2.1-563.31(B)(5) should include guidance for the attainment of FOIA and other information policy requirements and goals in a manner which reasonably takes into account cost and efficiency trade-offs. This effort would be enhanced by more specific authorization, but current statutory language is probably adequate.

## Privacy Protection Act of 1976

The Privacy Protection Act establishes certain principles of information practice and makes them applicable to governmental agencies that maintain manual or automated record keeping systems containing information that describes, locates or indexes anything about an individual.[12] Among other requirements, the Privacy Protection Act requires that agencies collect, maintain, use and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated or necessary to accomplish a proper purpose of the agency; maintain information in the system with accuracy, completeness, timeliness and pertinence as necessary to assure fairness in determinations relating to a data subject; make no dissemination to another system without specifying requirements for security and usage, including limitation on access thereto, and receiving reasonable assurances that those requirements and limitations will be observed; maintain a list of all persons and organizations having regular access; and maintain a complete and accurate record including the identity and purpose of any access to personal information in the system.[13]

The Privacy Protection Act also grants certain rights to individuals, including the right to be told, when the information is collected, whether one may refuse to provide the information and what the consequences will be; the right to be notified of the possible

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[12] See Code of Virginia, §§ 2.1-378(B) and 2.1-379.

[13] Code of Virginia, § 2.1-380.

dissemination of the information to another agency or nongovernmental organization; the right to inspect the data and the list of all those who have accessed it, the right to challenge, correct, or explain information; the right to have the agency investigate and record the current status of that personal information and promptly purge or correct incomplete, inaccurate, non-pertinent, untimely or unnecessary information; the right to file a statement of up to 200 words and have a copy thereof sent to any previous recipient; and the right to have past recipients of purged or corrected data notified of such action.[14] Injunctive relief and attorneys' fees are available to remedy violations of the Act.[15]

There are two aspects to the privacy concerns expressed to the Council during its study. The first is directly addressed to the Privacy Protection Act: the feeling that its provisions provide significant protection but that there is no auditing effort to assure compliance by state agencies. The Act's requirements do seem to provide a vehicle for addressing many privacy concerns. However, the Act is very complicated, and attainment of its objectives in a cost-efficient manner presents many challenges. The Council recommends that agency compliance with the Act be audited. In addition, uniform guidance should be provided to assist agency compliance and to enhance the public's ability to comprehend the measures that are available to protect their privacy. Like access, privacy protection can be enhanced significantly if provision for compliance is made at the information systems procurement or implementation stage.

The other major privacy concern expressed to the Council during its study cannot be completely addressed within the current statute: while significant restraints may be imposed upon collecting only that data which is expressly or implicitly authorized by law, and disseminating it only with adequate assurances regarding its use, many citizens are most interested in preventing dissemination, particularly in electronic form, of personal information. The current Act prohibits dissemination except when dissemination is "permitted or required by law" or necessary to accomplish a proper purpose of the agency.[16] Since the current FOIA at least permits disclosure of virtually all public records (even those which are exempt from mandatory disclosure),[17] the Privacy Protection Act's ostensible limitation on dissemination of such information is illusory.[18]

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[14] Code of Virginia, § 2.1-382(A).

[15] Code of Virginia, § 2.1-386.

[16] Code of Virginia, § 2.1-380(1).

[17] See Code of Virginia, § 2.1-342(A) and (B).

[18] This is in contrast to federal law, which generally prohibits dissemination of personal information records if disclosure of the record would constitute a clearly unwarranted invasion of personal privacy. See 5 U.S.C. §§ 552(b)(6) and 552a(b)(2). Although the Virginia FOIA and Privacy Protection Acts are patterned after the federal statutes, the key difference is that the federal privacy protection act permits dissemination if disclosure is "required under [the FOIA]" (see 5

While dissemination is difficult to prevent under current law, it appears that the Privacy Protection Act permits the use of contracts in connection with dissemination to other systems to address some of the above privacy concerns.[19] However, if the General Assembly wants to protect against dissemination of personal information, the Council would recommend considering amendments to Virginia's FOIA and Privacy Protection Act along the lines of the federal counterparts of these statutes.

## Virginia Public Records Act

The Virginia Public Records Act provides for the management and preservation of public records throughout the Commonwealth and is intended to promote uniformity in the procedures used to manage and preserve public records.[20] In addition to serving as the custodian of all records transferred to the state archives, the State Library Board is authorized to issue regulations to "facilitate" the creation, management, preservation and destruction of records by agencies.[21] The Act prohibits agencies from destroying or discarding records without a retention and disposition schedule approved by the State Librarian.[22] A recent amendment appears to grant agencies somewhat greater autonomy in scheduling the retention and destruction of electronic records.[23]

Record management rules, particularly in the electronic environment, can present significant trade-offs between cost, access, privacy protection, preservation of records and public access. Currently, the statutes provide oversight authority in this area to the Council, the State Library Board and the various agency heads.[24] While the

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U.S.C. § 552a(b)(2)) whereas the Virginia Privacy Protection Act permits dissemination if dissemination is "permitted or required by law" (see § 2.1-380(1) of the Code). Thus, a record which is exempt from mandatory disclosure under the FOIA would not meet the above federal requirement for permissible dissemination but would meet the Virginia privacy protection standard. In addition, the federal FOIA contains a general exemption from mandatory disclosure for any record if the disclosure of the record would constitute a clearly unwarranted invasion of privacy (see 5 U.S.C. § 552(b)(6)), whereas the Virginia FOIA has no such general exemption from mandatory disclosure.

19 See Code of Virginia, § 2.1-380(5).

20 Code of Virginia, § 42.1-76.

21 Code of Virginia, § 42.1-82(1).

22 Code of Virginia, § 42.1-86.1.

23 Code of Virginia, § 42.1-87.

24 See, e.g., Code of Virginia, §§ 2.1-563.31(B)(5), 42.1-82, 42.1-85, 42.1-86.1 and 42.1-87.

statutory lines of responsibility are not as clear as they could be, the Council feels that a cooperative approach will be successful. The major goal to be accomplished should be the proper balancing of cost, access, privacy, preservation and other objectives at the earliest possible stage in the information management process -- ideally at the systems procurement or implementation stage.

It is unclear whether the Act permits the State Library Board sufficient flexibility to take advantage of evolving technology. Many provisions seem to mandate particular technologies, particularly microfilm.[25] Given the dynamic nature of innovation in electronic information storage, it would be preferable to avoid writing any particular technology into a statute.

The current definition of "public record" is not adequate. The definition of this term currently is so broad that it includes any form of data representation, no matter how transitory.[26] When this is combined with the Act's prohibition against destruction of public records (except in accordance with required retention and disposition schedules),[27] it becomes literally illegal to turn off a computer, which can result in the loss of information in computer memory. More readily apparent examples of necessary loss of such "records" include editing with a word processor, automatic or manual deletion of e-mail messages after they are sent or after one's electronic mailbox is full, periodic purging of voice mail messages after a period of time, re-use of dictation tapes, and other administratively necessary actions. While the Act apparently authorizes agencies to schedule disposition and theoretically could schedule for immediate destruction, this apparently must be in accordance with procedures that document the destruction[28] -- an approach which appears inconsistent with streamlining government.

The Council recommends that the definition of "public record" be amended to strike a balance between data for which full-blown record preservation and destruction documentation measures are appropriate and data that are too transitory to be viewed appropriately as rising to the level of a public record. One suggestion would be to define public records to exclude a recording which, at the time of its creation, is intended only to substitute for a face-to-face conversation, telephone call or other non-written communication or if it is intended by its creator to serve only as a personal

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[25] See, e.g., Code of Virginia, §§ 42.1-83 and 42.1-84. Greater flexibility seems permitted for certain purposes. See e.g., Code of Virginia, § 42.1-86.

[26] "The general types of records may be, but are not limited to ... any representation held in computer memory." Code of Virginia, § 42.1-77.

[27] Code of Virginia, §§ 42.1-86.1 and 42.1-87.

[28] See Code of Virginia, § 42.1-87, Section 5 of A Manual for Public Records Management in the Commonwealth of Virginia (1992); and The Library of Virginia Guidelines for Managing Electronic Records, at p. 11 (requiring preparation and approval of a Certificate of Records Disposal (form RM-3) before any electronic record can be destroyed).

note or draft to assist the creator in preparing his own later oral or written presentation. Similarly, with respect to dynamic databases, agencies could be required to schedule reasonably periodic snapshots of such databases, and "official record" could be defined to include the snapshots but exclude the evolving, underlying database.

Finally, the Council recommends that the definition of "public record" and "official record" should be synonymous and uniform for both the Public Records Act and the FOIA.

## Intellectual Property Act

The FOIA anticipated one instance in which there is a competing policy goal of recovering from the user not just search and copy costs, but also a portion of the cost of developing a record that is in the nature of an information product.[29]

In addition, it has long been recognized that the Commonwealth can exercise its rights under the federal Copyright Act[30] to control commercialization of works of authorship in which it owns the copyright.[31] Exercise of such rights under the copyright law is not in conflict with FOIA, because citizens retain the initial right to inspect and make their own copy of such government works of authorship (unless an exception to FOIA applies). The government's rights as a copyright owner may be exercised to control the commercial requester's subsequent duplication, adaptation and distribution of works of authorship, and if desired, to obtain royalties. The government's control over subsequent duplication and distribution is appropriately limited, however, by provisions of the Copyright Act which would permit the fair use of copyrighted works without the copyright owner's permission for purposes such as criticism, comment or news reporting regarding government operations.[32]

The Intellectual Property Act provides that patents, copyrights or materials which were potentially patentable or copyrightable developed by a state employee during working hours or within the scope of his employment or when using state-owned or state-controlled facilities shall be the property of the Commonwealth. It authorizes the

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[29] Public bodies are authorized to "charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than fifty acres." Code of Virginia, § 2.1-342(A).

[30] See 17 U.S.C. § 106.

[31] See, e.g., 1981-1982 Att'y Gen. Ann. Rep. 443, 444.

[32] See 17 U.S.C. § 107.

Governor to set policies as he deems necessary to implement this provision.[33]

Under this authority, Executive Memorandum 2-86 was issued, and subsequent governors have retained it in effect. The executive memorandum, which has come to be known as the state's "intellectual property policy," ("IPP") governs disposition of intellectual property by state executive branch agencies. Separate statutes authorize intellectual property policies for state-supported institutions of higher education.[34]

The Intellectual Property Act and the IPP issued under it, however, are not currently adequate to fully protect the taxpayer's investment in the gathering and storing of government information. The current tools are limited to the protection which is available under the copyright and patent laws. At the time of the Act's passage, the prevailing view was that copyright law provided significant protection for databases, and the IPP stated that it applied to databases. Subsequently, case law under the Copyright Act has undercut that view.[35] While other legal theories may be available to supplement copyright, it is speculative whether these will prove adequate.

In view of the uncertain protection available under copyright law and other legal theories, the chief means employed by the private sector to assure that the creator of a database is able to recover a fair return is through contract. Contract formation, however, requires the recipient's agreement and receipt of consideration. In the private sector, the recipient's agreement and the consideration derive from the fact that the holder of the data is within his rights to refuse to disclose the data to the requester. This option currently is not available to public bodies in receipt of a FOIA request for nonexempt official records. Accordingly, one questions whether a recipient will agree to a contract, and if he did, one would question whether consideration for the resulting promise would exist.

At least two approaches could be considered to fully protect the taxpayer's investment in government information by enabling the public body to require a licensing agreement comparable to the agreements typically used in the private sector. These approaches are designed to provide this flexibility while not undercutting the policy of ensuring that citizens are able to witness the operations of government.

One approach would be to work within the current FOIA provision relating to

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[33] Code of Virginia, § 2.1-20.1:1.

[34] Code of Virginia, §§ 23-4.3, 23-4.4 and 23-9.10:4.

[35] See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282 (1991) and Kern River Gas Transmission Co. v. Coastal Corporation, 899 F.2d 1458 (5th Cir.), cert. den., 498 U.S. 952, 111 S. Ct. 374 (1990), which call into question the effectiveness of copyright protection for databases.

permissible charges for topographical maps.[36] One could expand the exception for topographic maps to include any record which is in the nature of an information product, i.e., one which has uses other than as a window into the operations of government and which is in fact the subject of bona fide marketing efforts by the agency. Any usefulness of such information products as a window into the operations of government could be preserved by mandating at-cost electronic access and duplication for any requester who is willing to sign a form representing that the requester does not intend any commercial use of the information and agrees not to use it or permit others to use it commercially. If the requester is unwilling to sign such a form, the agency could be authorized to charge a price designed to recover development costs (as is the case with topographical maps) or could be authorized to charge a fair market price. In either case, the public body would need authority to require the recipient to sign an agreement not to duplicate and distribute the document without further permission.

Another approach would be to require at-cost disclosure of all public records, but provide that an agency need not provide electronic copies of records if the requested copies can be provided in printed form. As with the above approach, provision of electronic copies could nonetheless be mandated if the requester is willing to sign a form representing that the requester does not intend any commercial use of the electronic copy and agrees not to use it or permit others to use it commercially. As a practical matter, the open government goals of the FOIA can be obtained if the electronic records are readily available for inspection, and if copying is unconditionally available in some form and conditionally available in electronic form. The interest in having the information in electronic form is precisely because private parties wish not only to have access to the information, but also to appropriate for themselves the value of taxpayer-funded typing and entry of the data into electronic form. This second approach would provide a basic window into government operations while preserving a domain within which the public body would be able to charge for the added value.

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[36] Code of Virginia, § 2.1-342(A).

## CONCLUSIONS

The Council finds that current laws for the most part are adequate to address the challenges which the electronic environment presents to the Commonwealth's access, preservation and privacy policies. As the policies of the Commonwealth are in competition with one another, the issue becomes more a programmatic one -- how best to plan and coordinate the way information is collected and managed in order to maximize attainment of all the Commonwealth's goals. Due to the extraordinary pace of technical change, it is unwise to specify rigid technical standards in the law in a way that reduces flexibility to devise and adapt to current technology and available solutions. Therefore, in FOIA, the current reliance on rules based on a "reasonableness" concept is preferable at this point to any specifically-mandated requirement. While flexibility is desirable, chaos is not. The problems are difficult and dynamic enough that uniform guidance to assist agencies' compliance efforts is advisable. The Council recommends that its authority under § 2.1-563.31(B)(5) to direct the promulgation of policies, standards and guidelines for managing information technology resources in the Commonwealth be used to provide this assistance. Specific statutory direction may facilitate this function but is not essential.

Recommendations for change to current statutes include: (1) providing a uniform definition for "official records" and "public records" in FOIA and the Public Records Act; (2) revising the definition of public records (and official records) to exclude transitory recordings and include periodic snapshots of dynamic databases; and (3) expand existing auditing processes to include auditing for compliance with the Privacy Protection Act. Further consideration and study should be given to the issue of data dissemination and whether the Commonwealth wants to enable its citizens to prevent government disclosure of information that unduly invades personal privacy. Finally, further consideration should be given to amending FOIA to carve out an area within which public bodies may protect the taxpayer's investment in geographic information systems or other databases by conditioning disclosure upon the payment of fees and agreement to a licensing contract.

## Appendix

## SENATE JOINT RESOLUTION 238

*Requesting the Council on Information Management, in conjunction with The Institute of Bill of Rights Law, to study issues regarding public access to government information.*

Agreed to by the Senate, February 9, 1993
Agreed to by the House of Delegates, February 17, 1993

WHEREAS, the Virginia Freedom of Information Act, the Virginia Privacy Protection Act of 1976, the Virginia Public Records Act and the Intellectual Property Act regulate the collection, maintenance, preservation, use, and dissemination of information by state and local government agencies in the Commonwealth; and

WHEREAS, the flow of information from citizens to government and back to citizens is essential in a democratic society, providing citizens with knowledge of their public institutions, society and economy; and

WHEREAS, the privacy of an individual is directly affected by the collection, maintenance, use, preservation and dissemination of personal information by government; and

WHEREAS, information is a vital component of all government programs and decisions; and

WHEREAS, advancements in information technology have enhanced the value and potential uses of public information; and

WHEREAS, the increasing value of government information, developed at public expense is a key factor in Virginia's economic, technological and cultural development; and

WHEREAS, the increased demand for, and provision of, public information may lead to a significant economic and human resources burden on government agencies; and

WHEREAS, the increased demand for and provision of public information may entail an exposure to legal liability for government agencies; and

WHEREAS, the collection, maintenance, preservation, use and dissemination of information in electronic environments have unrealized potential for management, services and accountability but may require modification of traditional policies and procedures; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Council on Information Management, in conjunction with The Institute of Bill of Rights Law be requested to study whether current state law ensures public access to government information, protects the rights of the individual to control information about himself, promotes the accuracy and integrity of public records and protects the taxpayer's investment in collecting, developing, storing and maintaining public records.

The Council is requested to consult with the Virginia State Library and Archives, Department of Information Technology, Virginia Municipal League, Virginia Press Association, Virginia Association of Counties and agencies of state and local government in conducting its study.

The Council shall complete its work in time to submit its findings and recommendations to the 1994 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.